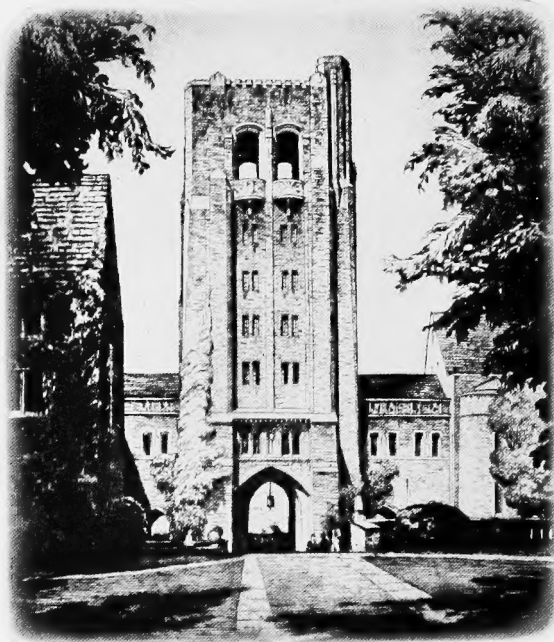


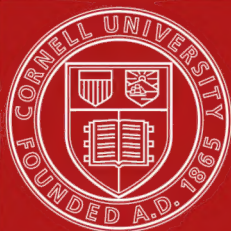
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A SUPPLEMENT  
TO THE  
COMMENTARIES  
ON THE  
LAW OF CONTRACTS

BRINGING THE LAW OF EACH SECTION OF THE ORIGINAL TEXT DOWN TO THE PRESENT TIME AND  
ADDING ALL NEW POINTS OF LAW  
SUBSEQUENTLY DECIDED

BY  
WILLIAM F. ELLIOTT

VOLUME VIII  
OF THE SET

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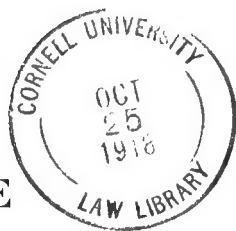


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## PREFACE

This supplement is prepared on the plan devised and worked out by Edward F. White, editor-in-chief of the publishers' staff, in the supplements to Thompson on Negligence and Thompson on Corporations, which have been widely used for several years and generally approved. It brings the original work down to date in such a manner as to offer nearly all the advantages of a complete new edition of the entire set at a very small fraction of its cost. It seems to be the ideal way to keep such a text-book up to date and enable the attorney to find most readily, with least trouble and expense, the later authorities, and the present state of the law.

The original sections are taken up one by one in their regular order as numbered, and the supporting authorities are cited and changes or modifications and new applications of the law are carefully noted. This makes it very easy to find the law and authorities upon the particular subject or phase of the subject that may be under consideration. An unusually full index, covering both text and notes, and based on the descriptive word plan as well as the ordinary method, is a further aid, especially where new sections have been added in order to present new points decided since the original work was published.

The author is gratified at the wide use of the original work by the bar of the country and by its adoption by the bench as evidenced by citations by courts of last resort, and he offers this supplement in the confident belief that it will materially add to the usefulness of the set.

W. F. ELLIOTT.

Indianapolis, September 2, 1918.





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			S. W. 201	1445
			Zinc Corp. v. Hirsch, L. R. (1916) 1	
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			Zindorf v. Tillotson, 83 Wash.	472
				1857, 1866
			Zrigenheim, In re (Mo. App.), 187 S.	
			W. 893	1829
			Zuega v. Nebraska Mtg. Co., 92 Kans.	
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60	2041, 2103	

# SUPPLEMENT

TO THE

# LAW OF CONTRACTS

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## CHAPTER I

### NATURE AND ELEMENTS

§ 1. **Definition.**—A contract is an agreement between two or more parties for a sufficient consideration, to do or not to do a particular thing.<sup>1</sup>

§ 2. **Quasi contracts.**—A quasi or constructive contract is not a true contract and does not depend on the intention or agreement of the parties, but is an obligation created by law and rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another; so that duty, and not a promise or agreement or intention of the person sought to be charged, defines it.<sup>2</sup> Although a judgment is not logically or strictly a contract, yet a few courts and text writers have taken the opposite view, and for some purposes and under some statutes a judgment is treated as a contract.<sup>3</sup>

<sup>1</sup> *Weishut v. Layton*, 28 Del. 364, 93 Atl. 1057; *People v. Dummer*, 274 Ill. 637, 113 N. E. 933, 934. For other definitions and decisions as to the meaning of the term "contract" in various connections, see *Saunders v. Busch-Everett Co.*, 138 La. 1049, 71 So. 153; *Southern Realty Co. v. Tchula Cooperative Stores* (Miss.), 75 So. 121; *Krippendorf-Dittman Co. v. Hunt & Co. Mercantile Co.* (Mo. App.), 190 S. W. 44; *Bachman v. Travelers' Ins. Co.* (N. H.), 97 Alt. 223; *Jefferson v. Cook* (Okla.), 155 Pac. 852. A "personal contract" is held to be a contract made by the person or corporation to

be bound, as distinguished from a contract imputed to such party: *Benner Line v. Pendleton*, 217 Fed. 497, 133 C. C. A. 349. A mere receipt is an admission only and not a contract: *Robertson v. Vandeventer* (Okla.), 152 Pac. 107.

<sup>2</sup> *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337, 339. See also *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 Pac. 1003; *People v. Dummer*, 274 Ill. 637, 113 N. E. 934. See and compare *Baylis v. Bishop of London*, 1 L. R. (1913) Ch. D. 127.

<sup>3</sup> *Butler v. Rockwell*, 17 Colo. 290, 29 Pac. 458, 17 L. R. A. 611, and note; *Morse v. Toppan*, 3 Gray

### § 3. Statutory obligations.<sup>4</sup>

§ 4. The agreement.—There must be a meeting of the minds of the parties in agreement, or, in other words, an intention common to both which must be communicated and assented to; and the things the minds agree upon is the contract.<sup>5</sup>

### § 5. The obligation.<sup>6</sup>

§ 6. Concurrence of agreement and obligation.—An agreement does not necessarily amount to a contract, for it is necessary, in order to constitute a contract, that the agreement should produce a legal binding result upon the relations of the parties.<sup>7</sup>

(Mass.) 411; *Sawyer v. Vilas*, 19 Vt. 43; *Childs v. Harris Mfg. Co.*, 68 Wis. 231, 32 N. W. 43. See also post § 2747.

<sup>4</sup> *Provident Gold Min. Co. v. Haynes*, 173 Cal. 44, 159 Pac. 155; *Johnson v. Morgan* (Iowa), 160 N. W. 2.

<sup>5</sup> *Springfield Fire &c. Ins. Co. v. Snowden* (Ky.), 191 S. W. 439. "An agreement is a coming together of parties in opinion or determination; the union of two or more minds in a thing done, or to be done; a mutual assent to do a thing." *Carter v. Prairie Oil & Gas Co.* (Okla.), 160 Pac. 319. A "contract" is the thing upon which two or more parties agree: *Southern R. Co. v. Huntsville Lumber Co.*, 191 Ala. 333, 67 So. 695. It is said in a Georgia case that a "contract" is an agreement between two or more parties for the doing or not doing of some specified thing, and that there is no difference between a contract and an agreement: *Douglass v. W. L. Williams Art Co.*, 143 Ga. 846, 85 S. E. 993. And in a Kentucky case it is said that an "agreement" consists in two persons being of the same mind concerning the matter agreed upon: *Tucker v. Pete Sheeran Bro. & Co.*, 155 Ky. 670, 160 S. W. 176. The minds of the contracting parties must meet at the same time, on the same subject-matter, in the same sense: *Georgia Southern & F. R. Co. v. Adeeb*, 15 Ga. App. 831, 84 S. E. 323.

<sup>6</sup> A buyer of corporate property, in notifying an unsecured creditor thereof and stating that he believes that he will be able to offer the creditor a settlement in full, does not thereby promise to pay the debt and thus create a contractual obligation: *Graham Paper Co. v. Williams* (Tex. Civ. App.), 175 S. W. 803. Where there was a contract under which plaintiff was to transfer all passengers and baggage from the station of defendant road to another station in the city, it was held that there was an implied obligation on the part of defendant to present such passengers for transportation, and that for breach of this plaintiff might recover: *Chicago, &c. R. Co. v. Martin* (Tex. Civ. App.), 163 S. W. 313. The fact that one contracting party received a portion of the profits of the business for his services does not necessarily obligate him for debts of the business: *Falk v. La Grange Cigar Co.*, 15 Ga. App. 564, 84 S. E. 93.

<sup>7</sup> *Tucker v. Pete Sheeran Bro. & Co.*, 155 Ky. 670, 160 S. W. 176. A mere promise by an employer to an employé to make a new contract with him in the future with respect to his compensation or to make him a future gift does not create a legal contractual obligation: *Berry v. Hooper's Estate*, 179 Mich. 67, 146 N. W. 275.



## CHAPTER II

### DEVELOPMENT AND CLASSIFICATION

#### § 13. How contracts may originate.<sup>1</sup>

§ 14. **Bilateral and unilateral contracts.**<sup>2</sup>—A unilateral contract, as the term is often used, is one in which only one of the parties is bound to perform, and the rights of the parties thereunder exist only at the option of the other. It is not unilateral merely because the benefits or liabilities of the respective parties are unequal, nor when either can compel the other to perform his part as stipulated; but an order which stipulates that the seller's liability for failure to deliver the article as ordered is limited to the mere repayment of such part of the purchase-price as is paid as a cash deposit is unilateral, and so lacking in mutuality as to be unenforceable.<sup>3</sup> So, where the purchaser has

<sup>1</sup> [Main section cited in *Aylesworth v. Aylesworth* (Ind. App.), 106 N. E. 907, 911.]

See also *Chudnovski v. Eckels*, 232 Ill. 312, 83 N. E. 846, and illustrations in opinion in *Gulf & C. R. Co. v. Goodman* (Tex. Civ. App.), 189 S. W. 326, 327.

<sup>2</sup> See post, §§ 180, 231, 231a, 231b, and see also *Brown v. Wilson* (Okla.), 160 Pac. 94, L. R. A. 1917B, 1184 and note, as to whether surrender clause in oil or gas lease renders it unilateral.

<sup>3</sup> *Haynes Auto Co. v. Turner*, 18 Ga. App. 22, 88 S. E. 717. See also *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. The fact that letters of the vendor evidencing a contract of sale do not bind the purchaser to pay does not make the contract unilateral, where such letters merely confirm an agreement for the sale: *Holt v. Wellons*, 163 N. Car. 124, 79 S. E. 450. A contract for the sale of onion sets to be grown "subject to crop" and providing that the seller should not be held to delivery if onion sets were damaged or destroyed from any cause not resulting from

its negligence, is not a unilateral contract, but a promise for a promise: *Texas Seed & C. Co. v. Chicago Set & C. Co.* (Tex. Civ. App.), 187 S. W. 747. But see for contract held unilateral where right to reject any or all of work was reserved: *Griffiths v. Sanitary Dist. of Chicago*, 174 Ill. App. 100. Under a contract between an electric light company and one operating a box factory, giving the former the right to use for fuel any refuse of the box factory which it did not require, it was held, that the latter was not bound to operate its factory so as to furnish such refuse for fuel: *Loyalton Electric Light Co. v. California Pine Box & C. Co.*, 22 Cal. App. 75, 133 Pac. 323. A unilateral contract to buy becomes binding when acted on by both parties: *Robson v. N. J. Weil & Co.*, 142 Ga. 429, 83 S. E. 207. See also *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763; *Watson v. Vollentine*, 183 Ill. App. 559. But compare *Rehm-Zeiber Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S. W. 777, 49 L. R. A. (N. S.) 694. Where the money consideration named in a unilateral contract remains unpaid, a promise by

established no trade in a private brand which would fix with any degree of certainty the quantity necessary to supply the demand, an agreement to sell a specified quantity of an article under such brand each year for several years, with a stipulation that if, for any unforeseen reason, the buyer can not use the entire amount he shall be released from the contract for the amount desired, the agreement is unenforceable for lack of mutuality.<sup>4</sup> And an agreement to purchase a certain number of motor cars each month during a specified term which does not obligate the manufacturer to furnish the cars, is not only unilateral and unenforceable for lack of mutuality but is also unenforceable as a binding contract, in any event, where it also contains a provision that it may be terminated by either party on fifteen days' notice, which shall act at once as a cancellation of all orders for cars not delivered prior thereto.<sup>5</sup> Agreements where the obligation is only on one side are often called unilateral contracts and held unenforceable for lack of mutuality.<sup>6</sup> But a contract to furnish a certain article or quantity or amount of it, or all that may be needed in a certain business during a specified time, or the like, may import an agreement to accept as well as to deliver, and where the business is established so that the amount or quantity is ascertainable at least approximately and with some reasonable degree of certainty, such a contract is usually upheld as not merely unilateral or lacking in mutuality.<sup>7</sup>

implication to pay arises: *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

<sup>4</sup> *Rehm-Zeiber Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S. W. 777, 49 L. R. A. (N. S.) 694.

<sup>5</sup> *Ellis v. Dodge Bros.*, 237 Fed. 860, 867. See also *White Co. v. American Motor-Car Co.*, 11 Ga. App. 285, 75 S. E. 345.

<sup>6</sup> In addition to the cases cited in preceding notes to this section, see also *Campfield v. Sauer*, 164 Fed. 833, 91 C. C. A. 304; 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837n; *Vellie Motor Car Co. v. Kopmeier Motor-Car Co.*, 194 Fed. 324, 114 C. C. A. 284; *Oakland Motor-Car Co. v. Indiana Automobile Co.*, 201 Fed. 499, 121 C. C. A. 319; *The Gleaner*, 240 Fed. 163; *Bessire & Co. v. Corn Products Mfg. Co.*, 47 Ind. App. 298, 94 N. E. 353. Where defendant agrees to furnish, but plaintiffs do

not agree to take, for a specified time the contract is unilateral and terminable at will: *Mutual Film Corp. v. Morris* (Tex. Civ. App.), 184 S. W. 1060.

<sup>7</sup> *Crane v. C. Crane & Co.*, 105 Fed. 869, 45 C. C. A. 96; *Klipstein v. Allen*, 123 Fed. 992; *Sterling Coal Co. v. Silver Spring Bleaching & C. Co.*, 162 Fed. 848, 89 C. C. A. 520; *Golden Cycle Min. Co. v. Rapson Coal Min. Co.*, 188 Fed. 179, 112 C. C. A. 95; *Stuart v. Home Tel. Co.*, 161 Mich. 123, 125 N. W. 720, and other cases cited in opinion in *Rehm-Zeiber Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S. W. 777, 49 L. R. A. (N. S.) 694; and in notes in 43 L. R. A. (N. S.) 730, and 11 L. R. A. (N. S.) 713. See also *Meier Dental Mfg. Co. v. Smith*, 237 Fed. 563, 150 C. C. A. 445, and post, §§ 180, 231. A contract for establishment of an agency and purchase of a certain number of auto-

§ 15. **Executory and executed contracts.**—An executed contract is one where nothing remains to be done by either party, while an executory contract is one where something remains to be done by one or more of the parties.<sup>8</sup> A contract may be executed as to one of the parties and executory as to the other.<sup>9</sup> Although a contract of bargain and sale is not ordinarily an executed contract until the thing sold passes from the seller to the purchaser, yet it may be otherwise stipulated, and where it is stipulated that the goods are to be shipped "to the seller's order notify purchaser," and draft made with bill of lading attached, and it is the intention of the parties that the title shall not pass until the draft is paid, the contract as to the seller becomes executed when the goods are delivered at the designated place, notice given of their arrival and the draft with bill of lading properly indorsed is tendered to the purchaser for acceptance.<sup>10</sup>

§ 16. **Specialties and simple or parol contracts.**—Parol contracts are those which are made verbally or in writing not under seal as distinguished from those made under seal.<sup>11</sup>

§ 18. **Express and implied contracts.**<sup>12</sup>

mobiles, but providing that the dealer shall not be liable for any failure of performance due to fires, etc., or any other cause whatsoever is not unilateral: *Wood v. Glens Falls Automobile Co.*, 174 App. Div. 830, 161 N. Y. S. 808.

<sup>8</sup> *McCutchen v. Klaes*, 26 Colo. App. 374, 143 Pac. 143. An executed contract is one fully performed since it was made, or at the time it was made, so that nothing remains to be done on either side: *Williams v. Philadelphia Rapid Transit Co.* (Pa.), 101 Atl. 748.

<sup>9</sup> *Southern States Co. v. Long* (Ala. App.), 73 So. 148; *Omaha Lumber Co. v. Co-operative Inv. Co.*, 55 Colo. 271, 133 Pac. 1112. Where one party grants easement in consideration of things to be performed by the other, the contract as to the former is executed, and is executory and binding as to the latter: *Galbreath Gas Co. v. Lindsey* (Okla.), 161 Pac. 826. A contract, signed by both parties and delivered, whereby one of them agrees upon the payment

of a certain sum to release the other from any claim against him is not wholly executory: *Miller v. Duntley*, 182 Ill. App. 205.

<sup>10</sup> *Southern States Co. v. Long* (Ala. App.), 73 So. 148 (citing *Loval v. Wolf*, 179 Ala. 505, 60 So. 298 on first branch of the proposition, and *Johnson v. Carden*, 187 Ala. 142, 65 So. 813, and *Cleveland v. Heidenheimer* (Tex. Civ. App.), 44 S. W. 551 in support of the decision that the contract was executed on the part of the seller).

<sup>11</sup> *Kime v. Tobyhanna Creek Ice Co.*, 240 Pa. 61, 87 Atl. 278. A special contract may rest in parol, and does not mean the same as a specialty or a contract by specialty: *Midland Roofing Mfg. Co. v. Pickens*, 96 S. Car. 286, 80 S. E. 484.

<sup>12</sup> *Mobile Light & Co. v. Cope-land* (Ala. App.), 73 So. 131; *Gulf & Co. R. Co. v. Goodman* (Tex. Civ. App.), 189 S. W. 326, 327. The courts recognize two classes of implied contracts, namely, contracts implied in fact and evidenced by the

**§ 19. Valid, void and voidable contracts—Unenforcible contracts.**<sup>13</sup>

acts of the parties, rather than by their verbal or written words, and contracts implied by the law where none in fact exist; and a contract can not be implied in fact where the facts are inconsistent with its existence, where there is an express contract covering the subject-matter, against the intention or understanding of the parties, or where an express promise would be contrary to law: *Miller v. Schloss*, 218 N. Y. 400, 113 N. E. 337. "There are two kinds of implied contracts: First, where the minds of the parties meet in an unexpressed agreement; and, second, where there is no meeting of the minds in fact": *Morse v. Kinney*, 87 Vt. 445, 89 Atl. 865; *Underhill v. Rutland R. Co. (Vt.)*, 98 Atl. 1017. "In express oral contracts, the intention of the parties is evidenced by words; while in implied contracts the agreement is inferred from the acts of the parties:" *A. J. Yawger & Co. v.*

*Joseph*, 184 Ind. 228, 108 N. E. 774. A "quasi contract" is a constructive contract which is implied by law to enforce legal duties by action *ex contractu*, where an express or implied contract does not actually exist in fact: *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 Pac. 1003. For constructive contract to pay attorney's fees, see: *Caldwell v. Stalcup* (Tex. Civ. App.), 166 S. W. 110. Contracts raised by the law on equitable grounds, usually called quasi contracts, are not true contracts in that they are not created by the parties, but are implied by law without reference to, and sometimes against, the intention of the party bound: *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

<sup>13</sup> *Owens v. Cocroft*, 14 Ga. App. 322, 80 S. E. 906; *Dolliver v. Granite State Fire Ins. Co.*, 111 Maine 275, 89 Atl. 8, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765n.

## CHAPTER III

### OFFER AND ACCEPTANCE

§ 25. **In general.**—An unaccepted offer or proposal does not constitute a contract.<sup>1</sup>

§ 26. **Aggregatio mentium — Mutuality.** — The parties must mutually assent and there must be an intention common to both, or all, who are bound.<sup>2</sup> There must be mutuality so that the contract will be binding on both parties, and it does not become binding until a proposition is made upon one side and accepted upon the other.<sup>3</sup>

§ 27. **Nature of offer—Obligation.**<sup>4</sup>

<sup>1</sup> McGowin Lumber &c. Co. v. R. J. & B. F. Camp Lumber Co., 192 Ala. 35, 68 So. 263; Hankins v. Young (Iowa), 156 N. W. 380. Where an offer requires a reciprocal promise from the party to whom the offer is made, there is no agreement, unless the latter communicates his acceptance of the offer: Kentucky Portland Cement &c. Co. v. Steckel, 164 Ky. 420, 175 S. W. 663. An offer must be accepted in order to create a contract: Tyng v. Converse, 180 Mich. 195, 146 N. W. 629. A clause in hay-cutting contract, "Also said L agrees to bale \* \* \* said hay for a further price of \$2.50 per ton," has been held a mere unaccepted offer, and not a binding contract: Lemler v. Bord, 80 Ore. 224, 156 Pac. 427, 1034.

<sup>2</sup> Springfield Fire &c. Ins. Co. v. Snowden (Ky.), 191 S. W. 439, 441. Unless there is a meeting of minds, a mutual assent, there is no valid contract: McGowin Lumber &c. Co. v. R. J. & B. F. Camp Lumber Co., 192 Ala. 35, 68 So. 263. Grogan v. Travelers' Ins. Co., 25 Colo. App. 517, 139 Pac. 1045; Ross v. Savage, 66 Fla. 106, 63 So. 148; Sears, Roebuck & Co. v. Winchester Repeating Arms Co., 178 Ill. App. 318; Tucker v. Sheeran, 155 Ky. 670, 160 S. W. 176; Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 211 N. Y. 68, 105

N. E. 88, L. R. A. 1915C, 256; Ward v. Erie R. Co., 87 Misc. 365, 149 N. Y. S. 717; Krause v. Krause, 30 N. Dak. 54, 151 N. W. 991. A written statement that the signer of a paper intended to pay a certain sum out of the proceeds of certain land is not a binding contract, there being no assent to it by the payee named therein: Narganes v. Madan's Estate, 161 App. Div. 563, 146 N. Y. S. 922. When a proposal to perform labor is definite and unconditional, and there is a like acceptance, there is no lack of mutuality: McGuire v. Old Sweet Springs Co., 73 W. Va. 321, 79 S. E. 350.

<sup>3</sup> Crosbie v. Brewer (Okla.), 158 Pac. 388. Where a contract for improvement of street was embodied in a letter addressed to two owners of property fronting thereon, it was held to lack mutuality as to the third owner whom the contractors intended to bind for the entire work: Tryon v. Clinch (Cal. App.), 162 Pac. 428. See also Stead v. Sampson (Iowa), 155 N. W. 978; Harang v. Ragan, 134 La. 201, 63 So. 875; Pocket v. Almon (Vt.), 96 Atl. 421.

<sup>4</sup> There are contracts to make a contract if one party thereafter chooses so to do: American &c. Co. v. Simon, 140 Fed. 529, 72 C. C. A. 45; 153 Fed. 1020, 82 C. C. A. 675.

§ 29. **Offer may prescribe form of acceptance.**—The manner of acceptance may be specified in an offer, and it may provide that the contract shall be binding only when the acceptance is received.<sup>5</sup>

§ 30. **Offer must not be uncertain.**<sup>6</sup>

§ 31. **Offer that may be made certain.**<sup>7</sup>

§ 32. **Offer need not be made to a particular ascertained person.**—An offer may be made to the public generally or to a particular class of persons as well as to a particular individual.<sup>8</sup>

§ 33. **Revocation of offer.**<sup>9</sup>

"But such singularity must appear in the contract made; the incompleteness must there be completely apparent; it can not be created by parol": *Bijur Motor &c. Co. v. Eclipse Mach. Co.*, 243 Fed. 600, 604.

<sup>5</sup> *Mercer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, 87 Conn. 691, 89 Atl. 909. An offer contemplating a formal written acceptance as a condition precedent, requires such formal acceptance: *E. C. Atkins & Co. v. Kirk*, 187 Ill. App. 310. (In this case a company made an offer to assume a lease on vacated premises in consideration that the offeree would lease other premises, the offer containing the words, "We hereby accept the above proposition," and a line for a signature was typewritten. The court held that the closing of the lease, and a letter to the company that the lease had been signed, were equivalent to a formal written acceptance.

<sup>6</sup> *Corley v. Ehlers* (Kans.), 163 Pac. 140. The words "with time concession can close immediately," in an alleged written offer, are not necessarily equivalent to saying that "with time concession will close immediately," and, where it is shown by the surrounding circumstances that the words were not so intended, they do not constitute such a certain and definite offer that, even when unconditionally accepted, they will constitute a binding contract between the parties, especially where the subsequent conduct of the parties shows

that they did not consider such contract as having been made: *Rankin v. Collins*, 40 App. D. C. 211. But compare *State v. Sapulpa* (Okla.), 160 Pac. 489.

<sup>7</sup> *Davis Laundry &c. Co. v. Whitmore*, 92 Ohio St. 44, 110 N. E. 518, Ann. Cas. 1917C, 988.

<sup>8</sup> *Zwolanck v. Baker Mfg. Co.*, 150 Wis. 517, 137 N. W. 769, 44 L. R. A. (N. S.) 1214n, Ann. Cas. 1914A, 793n.

<sup>9</sup> *Brown v. Farmers &c. Nat. Bank*, 76 Ore. 113, 147 Pac. 537, Ann. Cas. 1917B, 1041n (offer to convey realty until accepted is subject to withdrawal and where the alleged purchaser does not know of the offer it may be withdrawn and there is no obligation to renew it). An offer by a newspaper of prizes for the greatest number of votes, a certain number of votes being given for each subscription, is not in itself irrevocable, and may be withdrawn at any time before it has been accepted by something being done in reliance upon it: *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. "A contract between two parties, on a consideration, that an offer made by one shall remain open until a stated time is binding, but, under Civ. Code 1910, § 4230, a mere offer based on no consideration may be withdrawn before actual acceptance, though continuing in character, or stated to be subject to acceptance until a given time." *Prior v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 80 S. E. 559.

§ 34. **Time in which to accept.**<sup>10</sup>—An offer to buy requiring an acceptance must be accepted within a reasonable time and a jury is justified in finding that an attempted acceptance thirty days after the offer is not within a reasonable time.<sup>11</sup>

§ 35. **Lapse of offer and acceptance.**<sup>12</sup>

§ 36. **When the contract is complete.**—The contract is complete when a definite offer is made on one side and unconditionally accepted on the other while still open for acceptance.<sup>13</sup> Where an offer is definite and unconditionally accepted by correspondence its binding force is not affected by a subsequent letter of the party making the offer to the effect that he can not "make out" whether the contract has been concluded or not.<sup>14</sup>

§ 37. **Acceptance must be unconditional.**<sup>15</sup>—The proposal

<sup>10</sup> [Main section cited in *Farmers &c. Wagon Co. v. Newcomb* (Mich.), 159 N. W. 152, 153. Revocation is not effective until received.]

<sup>11</sup> *S. F. Bowser & Co. v. Fountain*, 128 Minn. 198, 150 N. W. 795, L. R. A. 1916B, 1036n.

<sup>12</sup> *Cook v. Story*, 89 Wash. 109, 154 Pac. 147, Ann. Cas. 1917C, 985 and note. Where an offer stipulates for an answer by return mail, the stipulation must be complied with in order to hold the offerer: *Ackerman v. Maddux*, 26 N. Dak. 50, 143 N. W. 147. Where an offer is not accepted within a reasonable time, the offerer may regard it as rejected: *McGivern v. Parkhill*, 195 Ill. App. 343. Where the party offering a compromise of liability on a judgment delayed acting on a counter proposition, it was held that the judgment creditor had the right to withdraw such offer: *Watters v. Hedgpeth*, 172 N. Car. 310, 90 S. E. 314.

<sup>13</sup> *Sturdivant v. Mt. Dixie Sanitarium &c. Co.* (Ala.), 72 So. 502. Mutual consent is necessary to the creation of a contract, but it becomes complete and binding when a proposition is made on one side and accepted on the other: *Wadin v. Czuczka*, 16 Ariz. 371, 146 Pac. 491; *Cal Hirsch &c. Co. v. Peru Steel Casting Co.*, 50 Ind. App. 59, 96 N. E. 807. "Where a continuing offer is accepted before withdrawal, a contract results": *Prior*

*v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 80 S. E. 559.

<sup>14</sup> *Ozzola v. Musolino* (Mass.), 114 N. E. 733. See also *E. C. Atkins & Co. v. Kirk*, 187 Ill. App. 310; *Chalmers Motor Co. v. Seney*, 195 Ill. App. 227. Where a promise is in effect an offer contemplating acceptance by performance of condition, the performance of condition before withdrawal of offer gives rise to a valid executory contract: *Atlantic Pebble Co. v. Lehigh Valley R. Co.* (N. J.), 98 Atl. 410. Countermanding an order after acceptance, whereby the contract was completed, will not relieve party of consequences of its breach of contract: *Bogata Mercantile Co. v. Outcault Advertising Co.* (Tex. Civ. App.), 184 S. W. 333. See for notice of acceptance of guaranty of an account held unnecessary where agreement was not a mere offer but an acceptance of a proposal made to the seller: *Staruffer v. Koch* (Mass.), 114 N. E. 750.

<sup>15</sup> "An offer must be accepted unequivocally and without variance to constitute a completed contract": *Dillin-Morris Co. v. Gillespie*, 15 Ga. App. 210, 82 S. E. 812; *Slaymaker Lock Mfg. Corp. v. Olmsted*, 197 Ill. App. 496. See also *Staaackman v. Cary*, 197 Ill. App. 601. "To make an offer and acceptance a contract, the acceptance must be unconditional, identical with the terms of the offer,

of new conditions in response to an offer operates as a refusal rather than an acceptance.<sup>16</sup>

**§ 38. Acceptance must be on terms of offer.<sup>17</sup>**

**§ 39. Variance between offer and acceptance.**—An acceptance must be on the terms of the offer, without any material modification, and it must not vary the terms.<sup>18</sup>

**§ 40. Mistake.<sup>19</sup>**

**§ 41. Condition amounts to rejection of offer.<sup>20</sup>**

and in the mode, at the place, and within the time expressly or impliedly required by the offer.” *Morrison v. Parks*, 164 N. Car. 197, 80 S. E. 85.

<sup>16</sup> *Doyle v. Hamilton Fish Co.*, 234 Fed. 47, 148 C. C. A. 63. A proposal to accept an offer if modified, or an acceptance subject to other terms and conditions than those of the offer, amounts to an absolute rejection of the offer: *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619. When an offer is accepted as made, the acceptance is not conditional merely because it is followed by inquiries as to whether the offerer will change his terms, or as to future acts, or because accompanied with expressions of hope or suggestions or requests: *Portage Rubber Co. v. Fruin Drop Forge Co.*, 186 Ill. App. 11. An acceptance may be complete, although it expresses dissatisfaction with some of the terms: *Johnson v. Federal Union Surety Co.*, 187 Mich. 454, 153 N. W. 788. A promise to pay “when I get the big church built,” only fixes the time of payment and is not conditional: *Buchholz v. Feustel*, 179 Ill. App. 396.

<sup>17</sup> *Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co.*, 87 Conn. 691, 89 Atl. 909. Acceptance of an offer must be in its terms to form a binding contract: *Hankins v. Young (Iowa)*, 156 N. W. 380; *Watters v. Hedgpeth*, 172 N. Car. 310, 90 S. E. 314; *Walker Grain Co. v. Denison Mill &c. Co. (Tex. Civ. App.)*, 178 S. W. 555. If the acceptance modifies the offer either by falling within or going beyond the terms of the offer, there is no contract: *Glenn v. S. Birch &c. Const. Co. (Mont.)*, 158

Pac. 834. It must be without material modification of the offer: *Hayes v. Posschl*, 92 Kans. 609, 141 Pac. 559. It must correspond to the offer at every point and must conclude the agreement: *United States v. P. J. Carlin Const. Co.*, 224 Fed. 859, 138 C. C. A. 449.

<sup>18</sup> A proposition to accept on terms varying from those offered amounts to a rejection of the offer: *Lewis v. Johnson*, 123 Minn. 409, 143 N. W. 1127, L. R. A. 1915D, 150n; *Rushing v. Manhattan Life Ins. Co.*, 224 Fed. 74, 139 C. C. A. 520. A letter in response to an application for a loan is not an acceptance of the loan and a completed contract, where it contains a number of essential details not covered by the application: *Kingsway Const. Co. v. Metropolitan Life Ins. Co.*, 166 App. Div. 384, 151 N. Y. S. 609. Where defendant instead of accepting an offer sent an old engine to plaintiff for credit at such price as could be agreed on, it was held that he could not demand that they credit him with the value of the engine: *Leffel v. Hall*, 168 N. Car. 407, 84 S. E. 695. See also *W. C. Sterling &c. Co. v. Watson & Bennett Co. (Mich.)*, 159 N. W. 381.

<sup>19</sup> *Winnemucca Water &c. Co. v. Model Gas &c. Works*, 179 Ind. 542, 101 N. E. 1007; *Hudson Structural Steel Co. v. Smith &c. Co.*, 110 Maine 123, 85 Atl. 384, 43 L. R. A. (N. S.) 654; *St. Nicholas Church v. Kropp (Minn.)*, 160 N. W. 500, L. R. A. 1917D, 741, and note. See also post, § 100, et seq.

<sup>20</sup> *Doyle v. Hamilton Fish Corp.*, 234 Fed. 47, 148 C. C. A. 63.



§ 42. **Counter offer.**—A counter offer usually amounts to a rejection of the original offer.<sup>21</sup> Where a tentative contract to buy goods and act as the seller's agent in certain territory is rejected by the seller and a new contract sent to the buyer, which is rejected by him, the seller can not sue on the original tentative contract for the price of such goods shipped to the buyer but not accepted by him, and the buyer is under no obligation to accept such goods although ordered on the faith of such tentative contract which was repudiated by the seller.<sup>22</sup>

§ 43. **Manner of communicating or indicating acceptance.**<sup>23</sup>

§ 44. **Communications by mail.**<sup>24</sup>

<sup>21</sup> *McRae v. Ross*, 170 Cal. 74, 148 Pac. 215. In such case the original offer is no longer pending, and can not be revived by a subsequent acceptance, unless renewed, expressly or by acquiescence, by the party making it: *Lewis v. Johnson*, 123 Minn. 409, 143 N. W. 1127, L. R. A. 1915D, 150n; *Wittwer v. Hurwitz*, 216 N. Y. 259, 110 N. E. 433.

<sup>22</sup> *Cook v. Story*, 89 Wash. 109, 154 Pac. 147, Ann. Cas. 1917C, 985, and note citing many cases to the effect that the rejection of an offer puts an end to it so that it can not afterward be accepted without the offerer's assent, and there must be a new offer and acceptance in order to constitute an express contract.

<sup>23</sup> *Swing v. Marion Pulp Co.*, 47 Ind. App. 199, 93 N. E. 1004; *High-Wheel & Co. v. Journal Co.*, 50 Ind. App. 396, 98 N. E. 442. Acceptance may be by act as well as word, and where an offer is for the other party to do something for the offered consideration instead of promising to do it, the doing of it in response thereto is an acceptance and notice of intention to do it is unnecessary: *Williams v. Emerson & Co. Implement Co.* (Mo. App.), 198 S. W. 425.

<sup>24</sup> A contract may be entered into by negotiations through the mail and by telegrams; and when parties carry on such negotiations through the mail, the contract is completed at the time a letter accepting the offer is mailed, provided it is done with due diligence after receipt of the proposal, and before any intimation that

it is withdrawn: *Porter v. Gossell*, 112 Ark. 380, 166 S. W. 533. See also *Navarre Realty Co. v. Coale*, 122 Md. 494, 89 Atl. 728 (but in this case the acceptance was held not to be unconditional); *Gordon v. Churchill*, 34 S. Dak. 411, 148 N. W. 848; *Kenedy Mercantile Co. v. Western Union Tel. Co.* (Tex. Civ. App.), 167 S. W. 1094. Mailing a letter properly addressed, whether received or not, is sufficient acceptance of an offer sent by mail, which the letter purports to accept, and this completes the contract unless a formal written contract embodying all its terms is a condition precedent: *Mercer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, 87 Conn. 691, 89 Atl. 909. See also *Emerson v. Stevens Grocer Co.*, 95 Ark. 421, 130 S. W. 541; *Farmers' Produce Co. v. McAlester Storage & Co. Co.* (Okla.), 150 Pac. 483, L. R. A. 1916A, 1297. But compare *Ferguson v. West Coast Shingle Co.*, 96 Ark. 27, 130 S. W. 527; *Stein-Gray Drug Co. v. H. Michelson Co.*, 116 N. Y. S. 789. Although an acceptance of an offer to contract is complete when a letter is deposited in the mail, a revocation or retraction of the offer can have no effect until it is communicated to the person to whom the offer is made, and this must be before its acceptance: *Owen M. Bruner Co. v. Standard Lumber Co.*, 63 Pa. Super. Ct. 283. In determining whether letters constitute a complete contract, the intent of the parties ascertained from the circumstances must govern: *McConnell v. Harrell & Nicholson*

§ 45. **Communications by telegraph.**—Contracts may be made by telegraph, and when so made in unambiguous terms the telegrams rather than a letter of confirmation thereafter constitute the contract and govern when acted on even though there may be a usage or custom to send letters of confirmation.<sup>25</sup> An acceptance made by telegraph of an offer made in the same way becomes binding on the party making the offer at the time the telegram of acceptance is delivered to the telegraph company.<sup>26</sup>

§ 46. **Communications by telephone or phonograph.**<sup>27</sup>

§ 47. **Conduct as offer or acceptance.**—In some cases conduct may operate as an acceptance and make the contract as binding as well as if the acceptance had been in words.<sup>28</sup>

§ 48. **Silence does not always give consent.**—Silence will not ordinarily amount to the acceptance of an offer unless it is expressly so agreed.<sup>29</sup>

Co., 183 Mich. 369, 149 N. W. 1042; Mackay v. Tide Water Oil Co., 94 Misc. 694, 158 N. Y. S. 667.

<sup>25</sup> Cargill Commission Co. v. Mowery, 99 Kans. 389, 161 Pac. 634, 636, 162 Pac. 313, distinguishing Strong v. Ringle, 96 Kans. 573, 152 Pac. 631. Contracts required to be written may be made by telegram: L. W. Hubbell Fertilizer Co. v. Jacobellis, 195 Ill. App. 410. See also Brooke v. Cunningham (Ga. App.), 90 S. E. 1037.

<sup>26</sup> Weld v. Victory Mfg. Co., 205 Fed. 770; Kennedy Mercantile Co. v. Western Union Tel. Co. (Tex. Civ. App.), 167 S. W. 1094.

<sup>27</sup> [Main section quoted in Tyng v. Converse, 180 Mich. 195, 146 N. W. 629, 630, offer may be accepted by telephone.]

<sup>28</sup> The assent to a modification of a contract may be expressed or implied from the conduct of the parties and a party may by conduct estop himself from denying such assent: Hertz v. Montgomery Journal Pub. Co., 9 Ala. App. 178, 62 So. 564. "Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound thereby." Citizens' Bank v. Willis, 15 Ga. App. 772, 84 S. E. 157. An agreement signed by only one of the parties is mutual and bind-

ing on both, if the other party, upon its delivery to him, assents to its terms and holds and acts upon it as a valid contract: Hoyt v. Schillo Motor Sales Co., 185 Ill. App. 628. One to whom an offer is made may accept it by conduct, so as to create a contract as binding as if the acceptance had been in words: Hankins v. Young (Iowa), 156 N. W. 380; A. B. Dick Co. v. Fuller, 213 Fed. 98. (Contract to compensate defendant for inventing a stencil sheet that did not require to be wetted held established by defendants acting on the inducement offered). And see generally as to evidence to show contract: Chalmers Motor Co. v. Seney, 195 Ill. App. 227; W. C. Sterling & Co. v. Watson & Bennett Co. (Mich.), 159 N. W. 381; Stimson v. Brinkman (Mo. App.), 190 S. W. 646; Wimpie Elec. Co. v. Columbus Circle Const. Corp., 98 Misc. 242, 162 N. Y. S. 969; Hughes v. Eastern R. & Co. (Wash.), 161 Pac. 343.

<sup>29</sup> Cincinnati Equipment Co. v. Big Muddy River Consol. Coal Co., 158 Ky. 247, 164 S. W. 794. In an action for alleged breach of contract, it was held error to instruct that, if the plaintiff suggested modification and the defendant failed to answer him, he agreed thereto, and the contract as modified was the true contract.

§ 49. Performance or acceptance of consideration as an acceptance of offer.<sup>30</sup>

§ 50. Acceptance must be by ascertained person.—As a general rule when an offer is made to a particular person it can be accepted only by such person.<sup>31</sup>

§ 51. Rewards.—An offer or promise of a reward is merely a proposal or conditional promise and not a consummated contract; but when accepted by a substantial performance of its condition before it lapses there becomes a binding contract which can not thereafter be revoked to the prejudice of the party so performing.<sup>32</sup> The weight of authority and the better reason seem to be to the effect that notice or knowledge of the offer is necessary in order to entitle one to recover the reward.<sup>33</sup> But there are authorities, almost equal in number, holding that prior knowledge is not essential, especially where the reward is offered by or under a public statute, and perhaps such an offer by statute may be distinguished in effect from the offer of a reward by a private individual.<sup>34</sup>

§ 52. Reward—Who may not accept.<sup>35</sup>

§ 53. Tickets, receipts and the like.<sup>36</sup>

This is so for the reason that one need not answer and can not be bound in the absence of actual assent: *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, 80 Ore. 124, 156 Pac. 584.

<sup>30</sup> *Citizens' Bank v. Willis*, 15 Ga. App. 772, 84 S. E. 157; *Williams v. Emerson & Co. Implement Co.* (Mo. App.), 198 S. W. 425.

<sup>31</sup> *Corley v. Ehlers* (Kans.), 163 Pac. 140.

<sup>32</sup> *Zwolaneck v. Baker Mfg. Co.*, 150 Wis. 517, 137 N. W. 769, 44 L. R. A. (N. S.) 1214n, Ann. Cas. 1914A, 793n. As to what must be done to earn reward for arrest see *Elkins v. Wyandotte County*, 86 Kans. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662 and note reviewing authorities.

<sup>33</sup> *Police Pension Fund v. Railway Ticket & Co. Bureau*, 175 Ill. App. 464; *Hoggard v. Dickerson*, 180 Mo. App. 70, 165 S. W. 1135 (but it is sufficient if an essential part of the service is performed after knowledge); *Sheldon v. George*, 132 App. Div. 470, 116

N. Y. S. 969; *Tobin v. McComb* (Tex. Civ. App.), 156 S. W. 237; note in L. R. A. 1916A, 1279.

<sup>34</sup> *Smith v. State*, 38 Nev. 477, 151 Pac. 512, L. R. A. 1916A, 1276. See also *Sullivan v. Phillips*, 178 Ind. 164, 98 N. E. 868, Ann. Cas. 1915B, 670n; *MacFarlane v. Bloch*, 59 Ore. 1, 115 Pac. 1056, Ann. Cas. 1913B, 1275n.

<sup>35</sup> *Forsyth v. Murnane*, 113 Minn. 181, 129 N. W. 134 (police officer entitled to reward when services not part of his official duties); *Burkee v. Matson*, 114 Minn. 233, 130 N. W. 1025, 34 L. R. A. (N. S.) 924n (president of village council entitled to reward for apprehending person committing crime outside village); *Rogers v. McCoach*, 66 Misc. 85, 120 N. Y. S. 686 (police officers, &c. not entitled to reward for arrest in performance of official duty); *Buck v. Nance*, 112 Va. 28, 70 S. E. 515, Ann. Cas. 1912C, 1293n (jailor not entitled to reward).

<sup>36</sup> *Marrone v. Washington Jockey Club*, 227 U. S. 633, 33 Sup. Ct. 401, 43 L. R. A. (N. S.) 961 and note;

§ 56. **American doctrine as to deeds and sealed instruments.**<sup>37</sup>

§ 57. **Sales.**<sup>38</sup>—The mere statement of the price at which property is held is not an offer to sell.<sup>39</sup> Where an offer to buy or sell has been rejected the party rejecting can not afterward make it a binding contract by attempting to accept it without renewal or consent of the other party.<sup>40</sup>

§ 58. **Auction sales.**—An offer, without notice of reservation, in an auction sale of real estate does not enable the highest bidder to complete a contract, specifically enforceable by him, by the mere announcement of his bid, where it is rejected, or the bid raised even by the owner's agent.<sup>41</sup>

§ 59. **Building and working contracts.**<sup>42</sup>

§ 60. **Miscellaneous cases of offer and acceptance held sufficient.**<sup>43</sup>

Toledo &c. R. Co. v. Milner (Ind. App.), 110 N. E. 756; Taylor v. Spartanburg &c. R. Co., 98 S. Car. 206, 82 S. E. 404, 52 L. R. A. (N. S.) 908n, Ann. Cas. 1916D, 585, and note; Melody v. Great Northern R. Co., 25 S. Dak. 606, 127 N. W. 543, 30 L. R. A. (N. S.) 568, Ann. Cas. 1912C, 727, 730; note to Louisville &c. R. Co. v. Fish (Ky.), 127 S. W. 519, in 43 L. R. A. (N. S.) 584; post, vol. 4, §§ 3155-3162; 3207-3214; 3317, et seq.

<sup>37</sup> See as to necessity for delivery and acceptance and what is sufficient, Culver v. Carroll, 175 Ala. 469, 57 So. 767, Ann. Cas. 1914D, 103 and note; Hagen v. Hagen (Minn.), 161 N. W. 380, L. R. A. 1917C, 964 and note; Pitkins' Admr. v. City of Montpelier, 85 Vt. 467, 82 Atl. 671, Ann. Cas. 1914D, 500 and note. As to whether one not a party to a sealed instrument can enforce it, see note to Case v. Case, 203 N. Y. 263, 96 N. E. 440, in Ann. Cas. 1913B, 311, 313.

<sup>38</sup> Wichita Mill &c. Co. v. Liberal Elevator Co., 243 Fed. 99.

<sup>39</sup> Nebraska Seed Co. v. Harsh, 98 Nebr. 89, 152 N. W. 310, L. R. A. 1915F, 824 and note; Harvey v. Facey, L. R. (1893) App. Cas. 552, 69 L. T. N. S. 504.

<sup>40</sup> Cook v. Story, 89 Wash. 109, 154 Pac. 147, Ann. Cas. 1917C, 985. See

also Shaw v. Ingram-Day Lumber Co., 152 Ky. 329, 153 S. W. 431, L. R. A. 1915D, 145n.

<sup>41</sup> Freeman v. Poole, 37 R. I. 489, 93 Atl. 786, L. R. A. 1917A, 63, reviewing many cases both in opinion and note. See also United States v. Meyer, 37 App. D. C. 282.

<sup>42</sup> See generally and especially as to what is necessary to constitute such a contract with a municipality, Jersey City v. Harrison, 72 N. J. L. 185, 62 Atl. 765, 65 Atl. 507. A valid statute or ordinance prescribing conditions of such work, such as what shall be done and the manner of doing enters into the contract and one who undertakes to do the work must do it according to the requirements of the law: Long v. Owen, 21 Idaho 243, 121 Pac. 99, Ann. Cas. 1913D, 465 and note. As to construction of such contracts, see notes in Ann. Cas. 1913C, 224; 1913D, 629; 1913E, 963.

<sup>43</sup> Stauffer v. Koch (Mass.), 114 N. E. 750; Weiss v. Levy, 150 N. Y. S. 489; Farmers' Produce Co. v. McAlester Storage &c. Co. (Okla.), 150 Pac. 483, L. R. A. 1916A, 1297. Where a printed statement in a contract is written over, so as to vary its terms, the one accepting the contract must be held to have understood the significance of the change, and failure

§ 61. Miscellaneous cases of offer and acceptance held insufficient.<sup>44</sup>

§ 62. Time and place of contract determined by acceptance.<sup>45</sup>

§ 63. Intention to reduce contract to writing.—Although the fact that the parties intended to reduce the contract to writing, embodying its terms therein, may raise a strong presumption that the prior negotiations were merely preliminary and although if this is expressly made a condition precedent to a complete contract there will be no complete contract until it is done, yet where the terms are all agreed on and because of the desire to hurry the work to be done the parties proceed with it thereunder, the contract is enforceable notwithstanding it was agreed

of his agent to communicate it would not constitute a defense: *American Mfg. Co. v. O. C. Frey Hardware Co.* (Tex. Civ. App.), 180 S. W. 956. Where plaintiff, a broker, requested a writing to show what his contract with the defendant was, and the defendant replied that his word was as good as his bond, it was held that he assented to conditions which the plaintiff had just prior thereto stated, and they were a part of the contract: *Bartlett v. Doyle*, 161 Wis. 624, 155 N. W. 125. Where through a series of negotiations plaintiff and defendant first agreed on territory for a sales agency contract, then on the quantity to be sold, then on general features, such as payment, return of sacks, and the like, then on the amount of monthly deliveries, and finally defendant telegraphed that plaintiff's final price quotation was acceptable, it was held that such telegram consummated a binding contract: *C. W. Hull Co. v. Marquette Cement Mfg. Co.*, 208 Fed. 260, 125 C. C. A. 460. A telegram accepting an offer for the purchase of goods before the receipt of a message withdrawing the offer makes a completed contract of sale: *Weld v. Victory Mfg. Co.*, 205 Fed. 770. Where a certain, definite offer is made by letter or telegram, and accepted, before withdrawal, without condition or change of terms, this constitutes a contract: *Rankin v. Collins*, 40 App. D. C. 211.

<sup>44</sup> *Farrell v. Greenlee County*, 15 Ariz. 106, 136 Pac. 637, 49 L. R. A. (N. S.) 380n; *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619; *Guarantee Const. Co. v. Rickert-Finlay Realty Co.*, 88 Misc. 73, 150 N. Y. S. 551 (proposal for doing of work, stating that upon acceptance a contract would be prepared "along these lines," held not a binding contract between the parties, though approved by defendant's engineer); *Babcock v. Ormsby*, 18 S. Dak. 358, 100 N. W. 759; *Queens College v. Jayne*, 10 Ont. L. Rep. 319; *Bohan v. Galbraith*, 13 Ont. L. Rep. 301. Letter from manager of insurance company to insurance man, stating that his company was agreeable to employing him as manager in the United States, does not constitute a contract: *Potomac Ins. Co. v. Kelly*, 173 App. Div. 791, 160 N. Y. S. 161. Where offer to sell share in a business is not accepted in terms, but the other party replies that when capable he would pay what he thought offerer was entitled to, no binding contract is created: *Moss v. Granville*, 156 N. Y. S. 453.

<sup>45</sup> [Main section quoted in *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629, 630, 631, holding that where defendant in Michigan wrote to plaintiff in Chicago ordering plaintiff to buy certain stock, which order was subsequently confirmed by telephone, while defendant was in Michigan and

that a writing should be prepared in the meantime embodying its terms.<sup>46</sup>

**§ 63a. Execution and delivery—Evidence.**—The manner and form of executing contracts, what is necessary to the complete execution of a contract, and the like, are subjects that are considered elsewhere in this work, in various connections, especially in treating of agents, corporations as parties, and the statute of frauds. So, in the chapter on deeds the law as to their execution and delivery is fully considered. But it may be well to refer at this place to cases of a miscellaneous nature, showing what is necessary in this regard to constitute a complete enforceable contract. An agreement binding a party to pay for services rendered by a member of his family may be either in writing or

plaintiff in Chicago, the contract was an Illinois contract. Cited in *Cuero Cotton Oil & Mfg. Co. v. Feeders' Supply Co.* (Tex. Civ. App.), 203 S. W. 79, 81.]

<sup>46</sup> *Lamoureux v. Weisman* (Minn.), 161 N. W. 504. See also *Staackman v. Cary*, 197 Ill. App. 601; *Alexandria Billiard Co. v. Miloslawsky*, 167 Iowa 395, 149 N. W. 504; *Jungdorf v. Little Rice*, 156 Wis. 466, 145 N. W. 1092. Although the parties to a verbal agreement, the terms of which are mutually understood and agreed upon, contemplate that it is to be reduced to writing and signed, yet, if this is to be done merely as a memorial of the agreement, it is binding notwithstanding it is never put in writing: *Whitted v. Fairfield Cotton Mills*, 210 Fed. 725, 128 C. C. A. 219. See also *Southern R. Co. v. Huntsville Lumber Co.*, 191 Ala. 333, 67 So. 695; *Alexander v. Hollis*, 115 Ark. 589, 171 S. W. 915; *Webber v. Smith*, 24 Cal. App. 51, 140 Pac. 37; *Conner v. Plank*, 25 Cal. App. 516, 144 Pac. 295; *Berman v. Rosenberg*, 115 Maine 19, 97 Atl. 6; *Park v. Kansas City Southern R. Co.*, 58 Pa. Super. Ct. 419; *Loewi v. Long*, 76 Wash. 480, 136 Pac. 673; *Jungdorf v. Little Rice*, 156 Wis. 466, 145 N. W. 1092. This rule has no application, where some of the material features of the contract are left for future agreement, containing all the terms of the contract: *Cincinnati Equipment Co. v. Big Muddy River*

*Consol. Coal Co.*, 158 Ky. 247, 164 S. W. 794. Where parties orally agreed upon the terms of a contract, but it was the understanding that it was to be evidenced by a writing and not become binding until then, a letter written by one of the parties embracing the terms of the contract and expressly calling for confirmation, but which was never confirmed by the other, was not sufficient: *Las Palmas Winery & Distillery v. Garrett*, 167 Cal. 397, 139 Pac. 1077. An oral agreement is not legally enforceable if the parties intend that it shall not be binding until it is put in writing: *Tucker v. Sheeran*, 155 Ky. 670, 160 S. W. 176. See also *Alexandria Billiard Co. v. Miloslawsky*, 167 Iowa 395, 149 N. W. 504; *Walker Grain Co. v. Denison Mill & Co.* (Tex. Civ. App.), 178 S. W. 555. Writings do not constitute the contract when they are intended only as preliminary negotiations to be followed by a formal contract containing other material provisions: *Goldstine v. Tolman*, 157 Wis. 141, 147 N. W. 7. A memorandum reciting that it is a correct statement of a transaction, and that for plaintiff's services in negotiating a lease to defendant's intestate the latter had promised to pay a certain part of the profits on the sale, or transfer of the lease, is not the original contract between the parties, but only evidence of a contract previously made: *Heroy v. Reilly*, 84 N. J. L. 671, 87 Atl. 112.

verbal.<sup>47</sup> Parties may adopt an existing written contract as their contract instead of reducing it to a new writing.<sup>48</sup> The contract may be in or by two or more writings instead of one.<sup>49</sup> Where, by correspondence, the parties reach and make a specific and definite agreement, to be afterward put in a formal writing, the obligatory character of the agreement can not ordinarily be defeated by either party by failure to sign such writing.<sup>50</sup> So, a valid written contract, though signed by only one of the parties, when fully recognized and acted on by both or accepted and acted on by the one not signing has often been held binding to the same extent as if signed by both parties.<sup>51</sup> But a contract signed

<sup>47</sup> *Merrick v. Ditzler*, 91 Ohio St. 256, 110 N. E. 493.

<sup>48</sup> *Valdes Hotel Co. v. Ferrell*, 17 Ga. App. 93, 86 S. E. 333. *Bowen v. Chenoa-Hignite Coal Co.*, 168 Ky. 588, 182 S. W. 635.

<sup>49</sup> Two instruments may be executed as a part of the same transaction and agreement, and in such they should be read and construed as one instrument: *Baseleon v. Baker*, 182 Ill. App. 611. Where there are two writings each supposed to conform to and embody the terms of the contract the fact that the copy retained by the party who prepared the writings does not conform to the agreement, and that the one given to the other party conforms to it only by reason of an almost illegible addition made before its execution, will not render the contract unenforceable against the party who prepared the writings: *Draper v. Miller*, 92 Kans. 275, 140 Pac. 890. A memorandum either following the signature or on the back or margin of the instrument, made by agreement of the parties or with their acquiescence, at the time of its execution, is considered as forming part of the contract: *Croft v. Beecher*, 185 Ill. App. 622. To be final an agreement must comprise all the terms which the parties intended to introduce: *Mackay v. Tide Water Oil Co.*, 94 Misc. 694, 158 N. Y. S. 667. See also *Illinois Life Ins. Co. v. Beifeld*, 184 Ill. App. 582. A written offer by plaintiff to lay floors, where there was no specification of the amount of work, and no agreement by defendant to pay the price named was

held not to bind defendant to allow plaintiff to lay all the floors in the building, although good as to the floors laid at defendant's instance: *Acme Wood Carpet Flooring Co. v. Broadway & C. St. Co.*, 142 N. Y. S. 490. But a proposal to furnish structural steel and acceptance thereof has been held to constitute a completed contract, although the drawings referred to in the proposal were never furnished: *American-Pacific Const. Co. v. Modern Steel Structural Co.*, 211 Fed. 849, 128 C. C. A. 375. So, where the specifications forming a part of a contract were identified therein by being initialed by one of the parties, it was held that this was equivalent to attaching them to the contract and rendered the contract definite and certain: *American-Pacific Const. Co. v. Modern Steel Structural Co.*, 211 Fed. 849, 128 C. C. A. 375.

<sup>50</sup> *United States v. P. J. Carlin Const. Co.*, 224 Fed. 859, 138 C. C. A. 449. But it has been held, that where a contract contemplates its execution by signing, either party has the right to insist upon the condition, and mere acts of performance on the part of one who has not signed it will not validate it: *Sparks v. Mauk*, 170 Cal. 122, 148 Pac. 926.

<sup>51</sup> *Hudson v. State* (Ga. App.), 81 S. E. 362; *McKeage v. Scully-Kostner Coal Co.*, 185 Ill. App. 122; *Sentney v. Hutchinson Interurban R. Co.*, 90 Kans. 610, 135 Pac. 678; *Leonard v. Howard*, 67 Ore. 203, 135 Pac. 549. Receipt and acceptance by one party of a paper though signed by the other only, where it purports to

by one not named in the body of the instrument has been held invalid.<sup>52</sup> A written instrument has no valid existence as a binding contract until delivered.<sup>53</sup> Delivery is composed of both a manual transfer, actual or constructive, and an intention or operation of minds intending to make the contract.<sup>54</sup> As to what is sufficient evidence of execution, delivery and acceptance, see below.<sup>55</sup>

embody all the terms of a contract between them, binds the acceptor, as well as the signer, to the terms of the paper: *Frankfort Marine Accident &c. Ins. Co. v. California Artistic Metal &c. Co.*, 28 Cal. App. 74, 151 Pac. 176. A party is presumed to be familiar with all of the terms of a written contract, and it is usually immaterial where his signature appears: *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978. Where one party, after signing a contract and discovering that the other party has failed to do so, states that he intended to proceed under it, he waives the failure to sign: *Serhant v. Gooch Milling &c. Co.*, 96 Nebr. 754, 148 N. W. 911. *Benson v. Ashford* (Tex. Civ. App.), 189 S. W. 1093; *Hunter v. Byron*, 92 Wash. 469, 159 Pac. 703. Where one signing a contract by mark directs another to write his name, the fact that the name as written is not the correct name of the party will not vitiate the contract: *Bachinsky v. Federal Coal &c. Co.* (W. Va.), 90 S. E. 227.

<sup>52</sup> *Alcazar Amusement Co. v. Pereira*, 194 Ill. App. 507. See also § 3890. Where a contract purported to be under the hands and seals of the parties, and there was no seal except one opposite the signature of plaintiff, it was held that the contract was a sealed contract: *Hiett v. Turner-Hudnut Co.*, 182 Ill. App. 524. A party who signs a contract after full opportunity to read it is bound thereby in the absence of fraud, and this rule applies to a contract containing, when delivered by a party signing it, blanks to be filled by the other party; but the authority to fill such blanks extends only to filling them so as to make the contract complete as agreed by the parties: *J. W. Jenkins Sons Music Co. v. Johnson*, 175 Mo. App. 355, 162 S. W. 308.

<sup>53</sup> *Narganes v. Madan's Estate*, 161 App. Div. 563, 146 N. Y. S. 922; *Guild v. More*, 32 N. Dak. 432, 155 N. W. 44; *Fitzgerald v. Metropolitan Life Ins. Co.* (Vt.), 98 Atl. 498. But compare *Rothbaum v. Levy*, 195 Ill. App. 246; *Leviton Lumber Co. v. Levy*, 195 Ill. App. 248.

<sup>54</sup> *Storey v. Storey*, 214 Fed. 973, 131 C. C. A. 269, also holding that, "want of intent to make a contract in præsenti deprives the physical possession of the paper of its prima facie force as evidence of a legal delivery, and if there is a secondary condition on the performance of which the writing is to become a contract, that fact is immaterial, except as it may obviate the effect of the primary condition." The instrument should be understood by the parties to be ready for delivery, in order to make placing it in the hands of the grantee a delivery: *Fitzkee v. Hoeflin*, 187 Ill. App. 514. "Acceptance of a written contract with intent to assume its benefits and burdens is essential to a legal delivery of it:" *New York Life Ins. Co. v. Manning*, 156 App. Div. 818, 142 N. Y. S. 1132.

<sup>55</sup> When the signature to a written instrument is proved, it will be presumed that it was executed by the party whose signature is attached thereto: *In re Chismore's Estate*, 166 Iowa 217, 147 N. W. 297. Although a duplicate written contract is not signed by one of the plaintiffs, such fact does not prove an agreement that the contract was not to take effect until signed by both parties: *Wilkes v. Holmes*, 128 Minn. 349, 150 N. W. 1098. The presumption of delivery arising from possession of an instrument is not so strong when applied to an executory contract as it is when applied to a deed: *Brown Bros. Lumber Co. v. Preston Mill Co.*, 83 Wash. 648, 145 Pac. 964.



§ 64. Alteration and filling blanks by consent.<sup>56</sup>

The possession by an executor of an instrument two years after he became executor, signed by testator and acknowledging an indebtedness to the executor in a certain sum, is not sufficient evidence that testator had ever delivered the instrument to the executor, and can not be made the basis of a contract between testator and the executor supporting a claim against the estate: *Narganes v. Madan's Estate*, 161 App. Div. 563, 146 N. Y. S. 922. See as to burden where duplicates are signed and claimed to be sent to another by mail and latter claims to have signed and returned one in person: *O'Neal v. Moore* (W. Va.), 88 S. E. 1044. Where the defendant claimed that the contract was in a letter written to plaintiff and another, while plaintiff averred that the contract was oral, the question was held to be one of fact for the jury: *Barbour v. Can-*

*trell*, 193 Ala. 154, 69 So. 67. So where the pleadings and evidence presented an issue of fact whether the contract sued on was delivered on a condition precedent to its effectiveness, it was held that such issue should be left to the jury: *Rutherford v. Holbert*, 42 Okla. 735, 142 Pac. 1099, L. R. A. 1915B, 221n. See also *State v. Regent Laundry Co.* (Mo. App.), 190 S. W. 951.

<sup>56</sup> See generally as to authority to fill blanks note to *Hartington Nat. Bank v. Breslin*, 88 Nebr. 47, 128 N. W. 659, 31 L. R. A. (N. S.) 130, Ann. Cas. 1912B, 1008n; and *Holman v. Higgins*, 134 Tenn. 387, 183 S. W. 1008, L. R. A. 1916F, 1263, and note. And see as to what are material alteration notes in Ann. Cas. 1917C, 1177; Ann. Cas. 1913C, 183; Ann. Cas. 1913D, 725; Ann. Cas. 1912A, 1045.

## CHAPTER IV

### FRAUD AND MISREPRESENTATION

#### § 70. Apparent consent may not be real.<sup>1</sup>

§ 71. **Fraud or misrepresentation as to inducement or collateral matter.**<sup>2</sup>—False statements as to what property had cost or as to what similar property had sold for, or as to the amount of business that had been done and the profits cleared, and the like, constitute fraud that will usually vitiate a contract and justify rescission, and it is generally actionable, at least when relied and acted upon and made the basis of the selling price or amount agreed to be paid.<sup>3</sup>

§ 72. **Fraud or misrepresentation as to essential elements of contracts.**—A false representation by the vendor in the sale of land that it is in good condition for cropping, or fertile and especially adapted to certain crops, or the like, is a represen-

<sup>1</sup> One who seeks to avoid a written contract for fraud or mistake of fact, must show that he was wrongfully or fraudulently induced to execute something different from what he thought: *Smith v. Mosbarger* (Ariz.), 156 Pac. 79. Fraud is available as a defense against an interstate commerce contract as well as any other contract: *Hamley v. Till*, 162 Wis. 533, 156 N. W. 968.

<sup>2</sup> "The rule that one, who, when sued on a written contract, may not defend for fraud unconnected with its execution, was based on the common law that a party to a sealed instrument was bound by its recitals, at law, unless its execution was induced by such fraud as to render it not the party's deed." *Maine Northwestern Development Co. v. Northern Commercial Co.*, 213 Fed. 103. Where a written contract is induced by fraudulent representations, the contract is impressed with the fraud and may be rescinded in a proper case: *Paxton-Eckman Chemical Co. v. Mundell* (Ind. App.), 112 N. E. 546; *Sams v. Barnes*, 74 W. Va. 420, 82 S. E. 124. Contracts in-

duced by fraud are not void but voidable, and the defrauded party may elect with knowledge of the facts to treat a contract as valid: *Wingate v. Render* (Okla.), 160 Pac. 614.

<sup>3</sup> *Kempf v. Ranger*, 132 Minn. 64, 155 N. W. 1059; *Brody v. Foster* (Minn.), 158 N. W. 824, L. R. A. 1916F, 780 and note. See also *Bry Block Mercantile Co. v. Columbia Portrait Co.*, 219 Fed. 710, 135 C. C. A. 382; *Jarratt v. Langston*, 99 Ark. 438, 138 S. W. 1003; *Allen v. Barhoff*, 90 Conn. 183, 96 Atl. 928; *Beck v. Goar*, 180 Ind. 81, 100 N. E. 1; *Voorhies v. Cragan* (Ind. App.), 112 N. E. 826; *Uplam v. Mickleson* (Iowa), 157 N. W. 264; *Lane v. Harmony*, 112 Maine 25, 90 Atl. 546, Ann. Cas. 1915C, 874; *Miller v. Du Val* (Mich.), 158 N. W. 140; *Stewart v. Salisbury Realty & Co.*, 159 N. Car. 230, 74 S. E. 736; *Garrison v. Bowman* (Tex. Civ. App.), 183 S. W. 70; *Kohl v. Taylor*, 62 Wash. 678, 114 Pac. 874, 35 L. R. A. (N. S.) 174 and note; *Hull v. Doheny*, 161 Wis. 27, 152 N. W. 417. But see *Peck v. Morgan* (Tex. Civ. App.), 156 S. W. 917.

tation of fact entitling the purchaser to rescind and recover the purchase-price when properly relied upon and thereby induced to make the purchase, or, in a proper case, to maintain an action in damages for the fraud.\* And this is also true where the false representation, so made and relied on, relates to boundaries or area of the land.<sup>5</sup> But there is conflict among the authorities as to whether an incorrect statement of area vitiates the contract or is actionable where the boundaries are correctly pointed out,<sup>6</sup> and in case of misrepresentations as to any of the matters above referred to in this section, while the mere fact that the purchaser saw the land may not be conclusive that he did not rely on them,<sup>7</sup> the fact that the purchaser made an examination and inspection of the land under such circumstances that he discovered or ought to have discovered the truth will usually defeat a recovery by him.<sup>8</sup> The same rules in general apply to contracts of sale of personal property. Thus, where the seller is peculiarly in a position to know the quantity of the goods, or the like, and falsely represents the same to the buyer, who properly relies thereon, this will usually vitiate the contract.<sup>9</sup> But it is otherwise as to a

<sup>4</sup> *Woodward v. Western Canada Colonization Co.* (Minn.), 158 N. W. 706, L. R. A. 1917C, 270 and note; *Schmeisser v. Albinson*, 119 Minn. 428, 138 N. W. 775 (character of soil and amount of crop of previous year); *Petrie v. Clarke*, 126 Minn. 119, 147 N. W. 1097 (that land is tillable); *Drake v. Fairmont Drain & Co.*, 129 Minn. 145, 151 N. W. 914 (that land contained clay suitable for tile making); *O'Neal v. Weisman*, 39 Tex. Civ. App. 592, 88 S. W. 290. See also *Danielson v. Skidmore*, 125 Ark. 572, 189 S. W. 57; *Haener v. McKenzie*, 188 Mich. 27, 154 N. W. 59. But compare *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423.

<sup>5</sup> *Selby v. Matson*, 137 Iowa 97, 114 N. W. 609, 14 L. R. A. (N. S.) 1210 and note; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55 and note. So as to misrepresentation as to location where material and property relied on: *Ballard v. Lyons*, 114 Minn. 264, 131 N. W. 320, 38 L. R. A. (N. S.) 301 and note. Even false representations as to value may sometimes constitute actionable fraud:

*New v. Jackson*, 50 Ind. App. 120, 95 N. E. 328, and cases there cited.

<sup>6</sup> *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, 23 L. R. A. (N. S.) 487, 132 Am. St. 484, 16 Ann. Cas. 500, and cases on both sides there reviewed in opinion and note.

<sup>7</sup> *Vanderbilt v. Bishop*, 199 Fed. 420, 117 C. C. A. 652; *Blampey v. Pike*, 155 Mich. 384, 119 N. W. 576; *Rudolphi v. Wright*, 124 Minn. 24, 144 N. W. 430.

<sup>8</sup> *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. 771; *Sohan v. Gibson*, 118 Ky. 403, 80 S. W. 1173; *Williamson v. Harris*, 167 Mo. App. 347, 151 S. W. 500. But see where he is still misled by fraud of the vendor or circumstances prevent discovery: *Schmeisser v. Albinson*, 119 Minn. 428, 138 N. W. 775; *Stonemets v. Head*, 248 Mo. 243, 154<sup>1</sup> S. W. 108; *Aitken v. Bjerkvig*, 77 Ore. 397, 150 Pac. 278; *Ford v. Sims* (Tex. Civ. App.), 190 S. W. 1165.

<sup>9</sup> *Beck v. Goar*, 180 Ind. 81, 100 N. E. 1; *Mt. Hope Nurseries v. Jackson*, 36 Okla. 273, 128 Pac. 250, 45 L. R. A. (N. S.) 243n; *Kirby v. Thurmond* (Tex. Civ. App.), 152 S.

mere estimate as to quantity, weight or calculation of cost, where the parties are on an equal footing.<sup>10</sup> Promoters and directors of corporations, also, have often been held guilty of fraud vitiating a contract induced by their false representations as to franchises or property owned and the value thereof, as to the amount of subscriptions already obtained, and the like.<sup>11</sup>

**§ 73. Fraud as to contents or substance of contracts.<sup>12</sup>—**

One who signs a contract without reading it is not, ordinarily at least, entitled to have it set aside for fraud where there is no misrepresentation as to its contents or the like by the other party.<sup>13</sup> The weight of authority and the better reason seem also to be to the effect that when a contract is executed by one in reliance on false representations by the other party as to its contents, it is not binding upon the former, if he elect to avoid it, as between the parties, even though he could read.<sup>14</sup> But the contrary has been held in a number of cases<sup>15</sup>

W. 1099. Representations of the seller in the sale of a hog remedy that experiments had been made and that it would cure cholera are representations of fact that constitute fraud if false: *Paxton-Eckman & Co. v. Mundell* (Ind. App.), 112 N. E. 546. See as to fraud of one purchasing goods with knowledge that he can not pay for them: *Gillespie v. Piles & Co.*, 178 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1 and note.

<sup>10</sup> *Dalhoff Construction Co. v. Block*, 157 Fed. 227, 85 C. C. A. 25, 17 L. R. A. (N. S.) 419n; *Navassa Guano Co. v. Commercial Guano Co.*, 93 Ga. 92, 18 S. E. 1000. See also *American Mfg. Co. v. O. C. Frey Hardw. Co.* (Tex. Civ. App.), 180 S. W. 956.

<sup>11</sup> *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307. See also *Wiser v. Lawler*, 189 U. S. 260, 47 L. ed. 802, 23 Sup. Ct. 624; *Halsell v. First Nat. Bank* (Okla.), 150 Pac. 489 and note; also note to *McFarland v. Carlshad & Co. Sanitarium Co.*, 68 Ore. 530, 137 Pac. 209, Ann. Cas. 1915C, 555n. But where the buyer of corporate stock lived near the factory and office of the company and could have inspected its records showing its salesman's representation as to dividends was false, but failed

to do so and delayed for more than twelve months after insolvency and general assignment by the corporation he could not rescind and tender back his stock certificate in a creditor's action against him on his note given for such stock: *Johnson v. Morgan* (Iowa), 160 N. W. 2.

<sup>12</sup> [Main section quoted in *Myler v. Fidelity Mut. Life Ins. Co.* (Okla.), 167 Pac. 601, 604.]

<sup>13</sup> *Muncy v. Thompson*, 26 Cal. App. 674, 147 Pac. 1178; *Parrott v. Peacock Military College* (Tex. Civ. App.), 180 S. W. 132. The fact that one party drew up the contract with a certain stipulation, and that the other did not know that it was inserted, does not justify the setting aside of the contract: *Parker v. Schrimsher* (Tex. Civ. App.), 172 S. W. 165.

<sup>14</sup> *Stern v. Moneyweight Scale Co.*, 42 App. D. C. 162; *Commercial Finance Co. v. Cooper* (Ala.), 71 So. 684; *Dunston Lithograph Co. v. Borgo*, 84 N. J. L. 623, 87 Atl. 334.

<sup>15</sup> *Parker v. Parrish*, 18 Ga. App. 258, 89 S. E. 381; *Colonial Jewelry Co. v. Bridges*, 43 Okla. 813, 144 Pac. 577; *Ames v. Milam* (Okla.), 157 Pac. 941. See also *Paxton-Eckman Chemical Co. v. Mundell* (Ind. App.), 112 N. E. 546; *McDonald v. Central R. Co.*, 89 N. J. L. 251, 98 Atl. 391.

§ 74. **Fraud where there is a fiduciary or confidential relation.**<sup>16</sup>—The rule that a contract between a fiduciary and one toward whom he occupies that relation must be free from imposition and concealment applies not only where there is a technical legal fiduciary relationship of trust and confidence between the parties, but in all cases where such relations exist in fact.<sup>17</sup>

§ 75. **Constructive fraud.**<sup>18</sup>—Fraud in law is what the law condemns from all the facts and circumstances surrounding the transaction and is synonymous with constructive fraud, which the law infers from the relationship of the parties and the surrounding circumstances regardless of the actual intention.<sup>19</sup>

§ 76. **Fraud in execution.**—Two kinds of fraud are recognized by the courts; namely, fraud in the consideration and fraud in the execution of an instrument, such, for instance, as misreading it to the signer.<sup>20</sup> A written contract, where there is such fraud in obtaining its execution, may be avoided by the party thus induced to sign it without knowing its contents.<sup>21</sup> But, as a general rule, there must be real fraud to excuse the signer's failure to know the contents, and a party can not avoid a contract on account of facts that he knew at the time of making it or could and ought to have ascertained from the other party, unless

<sup>16</sup> [Main section cited in *Leader Pub. Co. v. Grant Trust & Co.*, 182 Ind. 651, 661, 108 N. E. 121.]

Confidential relations authorizing a contracting party to rely on the other's representations arise, under Georgia Civ. Code, § 4627, only where one is so situated as to exercise a controlling influence over the other, or where the law, because of mutual confidence, requires the utmost good faith: *Boykin v. Franklin Life Ins. Co.*, 14 Ga. App. 666, 82 S. E. 60. See as to purchase of stock by director of corporation, *Shaw v. Cole Mfg. Co.*, 132 Tenn. 210, 177 S. W. 479, L. R. A. 1916B, 706, 708, and cases reviewed on both sides in opinion and note.

<sup>17</sup> *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71. See also *Godwin v. De Motte* (Ind. App.), 116 N. E. 17; *Gish v. St. Joseph Loan & Co.* (Ind. App.), 113 N. E. 394. But compare *Conrads v. Green*, 92 Wash. 269, 159 Pac. 102. Where a confidential rela-

tion exists, and it is claimed that a party standing in such relation has dealt with the other so as to gain a substantial advantage, the burden is upon the former to show that he acted in good faith, and that the transaction was equitable, voluntary, and well understood: *Teegarden v. Ristine*, 57 Ind. App. 158, 106 N. E. 641.

<sup>18</sup> [Main section cited in *Leader Pub. Co. v. Grant Trust & Co.*, 182 Ind. 651, 660, 661, 108 N. E. 121; *Southwestern Surety Ins. Co. v. Hico Oil Mill* (Tex. Civ. App.), 203 S. W. 137, 141.]

<sup>19</sup> [Main section cited in *Leader Pub. Co. v. Grant Trust & Co.*, 182 Ind. 651, 660, 661, 108 N. E. 121.]

<sup>20</sup> This would not, however, be actionable fraud or vitiate the contract in some jurisdictions if the signer could read: *Turner v. Bray* (Okla.), 143 Pac. 1011.

<sup>21</sup> *Great Northern Mfg. Co. v. Brown*, 113 Maine 51, 92 Atl. 993.

relieved of such duty by the fraud or warranty of such other party.<sup>22</sup>

§ 77. **Negligence.**—Negligence of a party in executing a contract without knowing its contents or ascertaining the facts may defeat him,<sup>23</sup> but, ordinarily, one who makes false material representations of fact to another, who properly relies on them, can not enforce the contract or prevent its avoidance by such other party even though the latter could have ascertained the truth or might otherwise be considered negligent if he had not been thus misled.<sup>24</sup>

§ 78. **Fraud of third persons.**—A principal is liable for the fraud of his agent acting within the scope of his employment and authority even though it is committed for the benefit of the agent and does not benefit the principal.<sup>25</sup>

§ 79. **Active concealment.**—Active or intentional concealment of material facts usually amounts to fraud which will prevent the enforcement of the contract by the party guilty of the fraud or justify its rescission by the other party.<sup>26</sup>

§ 80. **Misleading partial disclosure.**<sup>27</sup>

§ 82. **Must be as to fact.**<sup>28</sup>

<sup>22</sup> Metropolitan Life Ins. Co. v. Goodman, 10 Ala. App. 446, 65 So. 449; Avery Co. v. Powell, 174 Mo. App. 628, 161 S. W. 335.

<sup>23</sup> Metropolitan Life Ins. Co. v. Goodman, 10 Ala. App. 446, 65 So. 449; Calloway v. McKnight, 180 Mo. App. 621, 163 S. W. 932.

<sup>24</sup> Chisum v. Huggins (Okla.), 154 Pac. 1146; Davis v. Mitchell, 72 Ore. 165, 142 Pac. 788. See also Miller v. Haney (Ind. App.), 116 N. E. 21; Fidelity & Deposit Co. v. Anderson (Tex. Civ. App.), 189 S. W. 346.

<sup>25</sup> Lloyd v. Grace, L. R. (1912) App. Cas. 716, Ann. Cas. 1913B, 819. Misrepresentation, or concealment of material facts, by an advertising agency in making advertising contract with a newspaper, will not affect the liability of advertisers on contract with agent who placed contract through the agency to secure commission: Freese v. Pavloski (R. I.), 99 Atl. 81.

<sup>26</sup> Kitchen v. Long, 67 Fla. 72, 64

So. 429, L. R. A. 1917C, 617 (hidden defect in animal intentionally concealed by seller); Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61; Linton v. Sheldon, 98 Nebr. 834, 154 N. W. 724; Miller v. Mateer, 172 N. Car. 401, 90 S. E. 435. Compare Ford v. Shepard Co., 36 R. I. 497, 90 Atl. 805.

<sup>27</sup> Maywood Stock & Co. v. Pratt, 60 Ind. App. 131, 110 N. E. 243; Melick v. Metropolitan Life Ins. Co., 85 N. J. L. 727, 91 Atl. 1070, affirming Melick v. Metropolitan Life Ins. Co., 84 N. J. L. 437, 87 Atl. 75; Chicago & C. R. Co. v. Cotten (Okla.), 162 Pac. 763; Peerless Fire Ins. Co. v. Riveire (Tex. Civ. App.), 188 S. W. 254.

<sup>28</sup> Moore v. Carrick, 26 Colo. App. 97, 140 Pac. 485; Voorhees v. Coragan (Ind. App.), 112 N. E. 826; Woods v. Nicholas, 92 Kans. 258, 140 Pac. 862; Lembeck v. Gerken, 86 N. J. L. 111, 90 Atl. 698.

§ 83. **Promise or representations as to future.**—Although a mere promissory representation or expression of a future intention is not the representation of an existing fact on which fraud can be predicated at least where there is no bad faith or intention not to fulfill it,<sup>29</sup> it is held in a number of jurisdictions that it is otherwise where it is made to deceive and there is an intention at the time not to perform or carry it out.<sup>30</sup> As shown in the original section, however, there is considerable conflict among the authorities in regard to this last proposition.<sup>31</sup>

§ 84. **Opinions and predictions.**<sup>32</sup>—Although statements as to value are usually mere opinions upon which fraud can not be predicated, yet, as already shown, this is not true of false statements as to actual cost or price paid, offers received, or the like,<sup>33</sup> and even false representations as to value may be regarded as statements of fact rather than mere opinions, and fraud may be predicated upon them, where the vendor knows that the vendee is wholly ignorant of the value and knows that the vendee is relying upon them.<sup>34</sup> So, misrepresentations as to title, while

<sup>29</sup> *Mamaux v. Cape May Real Estate Co.*, 214 Fed. 757, 131 C. C. A. 181; *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275; *Jones v. Parker*, 197 Ill. App. 338 (rule applied to misrepresentation as to intention of third party); *Kiser v. Richardson*, 91 Kans. 812, 139 Pac. 373, Ann. Cas. 1915D, 539n; *Klebold Press v. Elmore*, 150 N. Y. S. 978; *Philadelphia & G. S. S. Co. v. Pechin*, 61 Pa. Super. Ct. 401; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L. R. A. 1916B, 1069. But see *Younger v. Hoge*, 211 Mo. 444, 111 S. W. 20, 18 L. R. A. (N. S.) 94; *Missouri Loan & Co. v. Federal Trust Co.*, 175 Mo. App. 646, 158 S. W. 111.

<sup>30</sup> *Cerny v. Paxton & Co.*, 78 Nebr. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640 and note; *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244, Ann. Cas. 1914B, 859 and note; *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127n, 20 Ann. Cas. 910; *Moore v. Moore*, 94 Misc. 370, 157 N. Y. S. 819; *Braddy v. Elliott*, 146 N. Car. 578, 60 S. E. 507, 16 L. R. A. (N. S.) 1121, 125 Am. St. 523; *McLean v. Southwestern & Ins. Co. (Okla.)*, 159 Pac. 660; *South Texas Mortgage Co. v.*

*Coe (Tex. Civ. App.)*, 166 S. W. 419.

<sup>31</sup> See also *Miller v. Sutliff*, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735 and note.

<sup>32</sup> *Huffstetter v. Our Home Life Ins. Co.*, 67 Fla. 324, 65 So. 1; *Gamet v. Haas*, 165 Iowa 565, 146 N. W. 465; *Hazlett v. Wilkin*, 42 Okla. 20, 140 Pac. 410; *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423.

<sup>33</sup> See *Hokanson v. Oatman*, 165 Mich. 512, 131 N. W. 111; *Kohl v. Taylor*, 62 Wash. 678, 114 Pac. 874, 35 L. R. A. (N. S.) 174 and note, reviewing many cases showing that such statements are generally regarded as statements of fact but that there is considerable difference of opinion as to when they are so material that fraud can be predicated upon them. False representations as to financial condition may also constitute actionable fraud: *Hood v. Wood (Okla.)*, 161 Pac. 210.

<sup>34</sup> *New v. Jackson*, 50 Ind. App. 120, 95 N. E. 328; *Kluge v. Ries (Ind. App.)*, 117 N. E. 262; *Rodee v. Seaman*, 33 S. Dak. 184, 145 N. W. 441. See also *Griesa v. Thomas*, 99 Kans. 335, 161 Pac. 670; *Knopfler v. Flynn (Minn.)*, 160 N. W. 860; *Hood v. Wood (Okla.)*, 161 Pac. 210.

sometimes mere expressions of opinion or not material, may be, and generally are representations of fact upon which fraud may be predicated.<sup>35</sup>

§ 85. **Misrepresentations as to law.**—Misrepresentation as to the law of the state of the domicile of the party to whom the representation is made is not ordinarily fraud, but misrepresentation as to the law of a foreign state is a misrepresentation of fact on which fraud can be predicated.<sup>36</sup>

§ 86. **Materiality.**<sup>37</sup>

§ 87. **Falsity.**<sup>38</sup>

§ 88. **Knowledge and intention.**—Where one makes a false and unqualified representation, as of his own knowledge, of a material fact relating to a matter in which he has an interest, and as to which he may well be expected to have knowledge, with intent to thereby induce action, such false representation constitutes fraud when acted upon by the other party to his damage,

<sup>35</sup> Gannon v. Hausaman, 42 Okla. 41, 140 Pac. 407, 52 L. R. A. (N. S.) 519; Fischer v. Hillman, 68 Wash. 222, 122 Pac. 1016, 39 L. R. A. (N. S.) 1140 and note; Kathan v. Comstock, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201 and note. See also Freeman v. Croom, 172 N. Car. 524, 90 S. E. 523.

<sup>36</sup> Where there is no relation of trust or confidence between parties, misrepresentations of law do not amount to fraud and will not constitute ground for rescission of a contract: Haviland v. Southern California Edison Co., 172 Cal. 601, 158 Pac. 328; Travelers' Protective Assn. v. Smith, 183 Ind. 59, 107 N. E. 283, Ann. Cas. 1917E, 1088 and note; Batesburg Cotton Oil Co. v. Southern R. Co., 103 S. Car. 494, 88 S. E. 360; Kinchen v. Austin (Tex. Civ. App.), 179 S. W. 924. But compare Coons v. Lain (Tex. Civ. App.), 168 S. W. 981. But a representation as to a foreign law is a representation of fact upon which fraud may be predicated: Travelers' Protective Assn. v. Smith, 183 Ind. 59, 107 N. E. 283, Ann. Cas. 1917E, 1088 and note; Schneider v. Schneider, 125 Iowa 1, 98 N. W. 159; Epp v. Hinton, 91 Kans. 513, 138 Pac. 576, L. R. A.

1915A, 675n. But compare Van Slochem v. Villard, 207 N. Y. 587, 101 N. E. 467.

<sup>37</sup> For representations held to be material, see: Firebaugh v. Trough, 57 Ind. App. 421, 107 N. E. 301; Johnson v. Olsen (Minn.), 158 N. W. 805; Westra v. Roberts, 156 Wis. 230, 145 N. W. 773. The false representations need not be the sole inducement: Ochs v. Woods (N. Y.), 117 N. E. 305; Allen v. Pendarvis (Okla.), 159 Pac. 1117. A false representation as to the circulation of the publication in which defendants ordered the printing of their advertisement which was made to and did induce the entering into a contract is material: Shallcross Printing & Co. v. Brown (Mo. App.), 185 S. W. 745. See generally as to materiality and as to when it is a question for the jury: Kohl v. Taylor, 62 Wash. 678, 114 Pac. 874, 35 L. R. A. (N. S.) 174 and note on pages 176, 177, 183.

<sup>38</sup> Gleason v. Thaw, 234 Fed. 570, 148 C. C. A. 336; Ranch v. Lynch (Del. Super.), 89 Atl. 134; Prout v. Hoy Oil Co., 263 Ill. 54, 105 N. E. 26; Ross v. Reynolds, 112 Maine 223, 91 Atl. 952; Loftus v. Sturgis (Tex. Civ. App.), 167 S. W. 14.



and the former can not be heard to say that he honestly believed it to be true.<sup>39</sup>

§ 89. **Reliance on false statement.**—To enable a party to rescind the fraud or misrepresentation must have been a part of the same transaction and must have been relied on and induced him to make the contract.<sup>40</sup> A contracting party is usually justified, however, in relying on representations of fact made to him where an investigation would be required to discover the truth, especially when the party making the representations knows the facts and the party to whom they are made does not know them and does not have the means of knowledge.<sup>41</sup>

§ 90. **Must mislead.**—Representations that are so unreasonable that the court may assume them to be false without proof will not vitiate a contract on the ground of fraud.<sup>42</sup> And in order to avoid a contract for false representations the party

<sup>39</sup> *Schlechter v. Felton* (Minn.), 158 N. W. 813, L. R. A. 1917A, 556. See also *Bethea-Starr Packing &c. Co. v. Mayben*, 192 Ala. 542, 68 So. 814; *Baker v. Clark*, 14 Ala. App. 152, 68 So. 593; *Wheatcraft v. Myers*, 57 Ind. App. 371, 107 N. E. 81; *Maywood Stock &c. Co. v. Pratt*, 60 Ind. App. 131, 110 N. E. 243; *Davis v. Central Land Co.*, 162 Iowa 269, 143 N. W. 1073, 49 L. R. A. (N. S.) 1219 and note; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Kerr v. Shurtleff*, 218 Mass. 167, 105 N. E. 871; *Agnew v. Hackett*, 80 Wash. 236, 141 Pac. 319; *Rogers v. Rosenfeld*, 158 Wis. 285, 149 N. W. 33. But compare *Johnson v. Holderman* (Idaho), 167 Pac. 1030; *Prout v. Hoy Oil Co.*, 263 Ill. 5, 105 N. E. 26; *Krankowski v. Knapp*, 268 Ill. 183, 108 N. E. 1006. Older cases, most of them supporting the general rule, but some of them to the contrary, or showing variations of the rule, and distinctions depending upon whether the case is in law or equity, are reviewed in the note to *Westerman v. Corder* (86 Kans. 239, 119 Pac. 868, 39 L. R. A. (N. S.) 500n), in Ann. Cas. 1913C, 61, 63, 64.

<sup>40</sup> *Harvey v. Squire*, 217 Mass. 411, 105 N. E. 355. See also *Hart v. Walsh*, 84 Misc. 421, 176 N. Y. S.

235. So, in an action for damages for deceit the plaintiff must show that he relied upon the representations and was deceived thereby to his injury: *Meland v. Youngberg*, 124 Minn. 446, 145 N. W. 167, Ann. Cas. 1915B, 775 and note (but partial investigation in such case will not prevent an action for deceit). See also *Gratz v. Schuler*, 25 Cal. App. 117, 142 Pac. 899; *Austin Powder Co. v. Crouch*, 175 Ill. App. 494; *Palmer v. Shields*, 71 Wash. 463, 128 Pac. 1051. As to what is sufficient to show or constitute such reliance, see: *Woodward v. Western Canada Colonization Co.* (Minn.), 158 N. W. 706, L. R. A. (N. S.) 1917C and note.

<sup>41</sup> *Sutton v. Greiner* (Iowa), 159 N. W. 268; *H. W. Abts Co. v. Cunningham*, 95 Nebr. 836, 146 N. W. 1036. See also *Gleason v. Proud*, 31 Cal. App. 123, 159 Pac. 885; *Jasper v. Bicknell* (Colo.), 162 Pac. 144. But if the party to whom false representations are made before contracting in reliance thereon, and while still able to retreat without prejudice, learns the truth, they will not be a good ground of defense against his contract: *Hayes v. Sheffield Ice Co.* (Mo. App.), 168 S. W. 294.

<sup>42</sup> *Peterson v. Hoftiezer*, 35 S. Dak. 101, 150 N. W. 934.

to whom they were made must usually show that he did not know the truth of the matters so represented.<sup>43</sup>

§ 91. Must result in damage or injury.<sup>44</sup>

§ 92. Parties in *pari delicto*.<sup>45</sup>

<sup>43</sup> *De Grasse v. Verona Mining Co.*, 185 Mich. 514, 152 N. W. 242. See also *Pritchard v. Dailey*, 168 N. Car. 330, 84 S. E. 392.

<sup>44</sup> *Martin v. Ford Motor Co.* (Okla.), 167 Pac. 993; *Curtis v. Buzard*, 254 Pa. 61, 98 Atl. 777.

<sup>45</sup> *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Isenbeck v. Burroughs*, 217 Mass. 537, 105 N. E. 595; *Conlon v. Hosier*, 165 N. Y. S. 745; also post, §§ 645, 656, et seq.; 2415; 2440-2447.

## CHAPTER V

### MISTAKE

#### § 100. Generally—Materiality.<sup>1</sup>

§ 101. **As to nature of transaction.**—Mistake may occur either in the formal statement of the agreement in an instrument, or in some matter causing the agreement to be made or to which it is to be applied.<sup>2</sup>

§ 102. **As to parties.**—Every one, as a general rule, has a right to determine with whom he will contract, and another party can not be thrust upon him without his consent even though he may have no good reason for desiring to contract with one rather than another.<sup>3</sup>

#### § 103. Mistake as to subject-matter.<sup>4</sup>

<sup>1</sup>Where there is an actual and honest misunderstanding, or if the language is equivocal, there is no contract because there is no meeting of minds such as is necessary to perfect a contract: *Clark v. Stetson*, 115 Maine 72, 97 Atl. 273. A contract may be rescinded in a proper case when it has been procured by fraud of the other party, or is the product of a mutual mistake of the parties: *Blake v. Osmundson* (Iowa), 159 N. W. 766. So a contract may be reformed in a proper case when the mistake is common to both parties or induced by the fraud of one and mistake of the other: *Wood v. Staton* (N. Car.), 93 S. E. 794. The court may, in its discretion, relieve parties from stipulations which they have inadvertently or mistakenly made, or fraudulently been induced to make: *White v. Kincade*, 95 Kans. 466, 148 Pac. 607, Ann. Cas. 1916B, 667n.

<sup>2</sup>*Wood v. Staton* (N. Car.), 93 S. E. 794. A contract to furnish the testimony given at a hearing at a specified sum per folio is binding on both parties as against the objection that one of them did not understand

the meaning of the word "folio": *Law Reporting Co. v. Texas Grain & Elevator Co.* (Tex. Civ. App.), 168 S. W. 1001.

<sup>3</sup>The right of a party to avoid a contract on account of mistake as to identity of the contracting party does not depend on its being important to know such party, or that he had reason for wanting to contract with him: *School Sisters of Notre Dame v. Kusnitt*, 125 Md. 323, 93 Atl. 928, L. R. A. 1916D, 792 and note. See also *Brighton Packing Co. v. Butchers' Slaughtering &c. Assn.*, 211 Mass. 398, 97 N. E. 780.

<sup>4</sup>Mistake of the parties as to a material fact entering into the agreement will in some cases enable the injured party to rescind, but the doctrine is not of general application: *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387. Compare: *Freeman v. Croom* (N. Car.), 90 S. E. 523. Acceptance of bid with knowledge of mistake of bidder as to subject-matter may not entitle party to hold bidder: *Hudson Structural Steel Co. v. Smith &c. Co.*, 110 Maine 123, 85 Atl. 384, 43 L. R. A. (N. S.) 654.

§ 105. As to identity of subject-matter.<sup>5</sup>

§ 106. As to nature or quality of subject-matter.<sup>6</sup>

§ 106a. Mistake as to quantity.<sup>7</sup>

§ 107. As to price.—A mistake by a bidder or contractor in making an estimate as to the cost of work will not ordinarily entitle him to avoid the contract or receive additional compensation.<sup>8</sup>

§ 109. In execution of writing.<sup>9</sup>

§ 110. Negligence.<sup>10</sup>—It is well settled as a general rule that one who has ability and opportunity to read a contract before

<sup>5</sup> *Taber v. Piedmont &c. Bldg. Co.*, 25 Cal. App. 222, 143 Pac. 319 (rescission where mistake as to particular lot contracted to be purchased in a real estate subdivision); *Clarke v. Cooper*, 148 Mo. App. 230, 128 S. W. 47; *Pittsburgh Lumber Co. v. Shell*, 136 Tenn. 466, 189 S. W. 879.

<sup>6</sup> Settlement of account for less than due, owing to mutual mistake as to state of account, may be set aside and true balance recovered: *Beck v. School Dist. No. 2*, 54 Colo. 546, 131 Pac. 398, 46 L. R. A. (N. S.) 279 and note. See as to mistake of extent of injury where release is executed: *Melisaac v. McMurray*, 77 N. H. 466, 93 Atl. 115, L. R. A. 1916B, 769 and note; *San Antonio &c. R. Co. v. Polka*, 57 Tex. Civ. App. 626, 124 S. W. 226; *El Paso &c. Co. v. Kramer* (Tex. Civ. App.), 141 S. W. 122. See also as to mistakes as to character, quality or quantity in auction sales, *Sohns v. Beavis*, 200 N. Y. 268, 93 N. E. 935, 34 L. R. A. (N. S.) 927 and note.

<sup>7</sup> *Cargill Com. Co. v. Mowery*, 99 Kans. 389, 161 Pac. 634, and on rehearing, 162 Pac. 313; *Welch Pub. Co. v. Johnson Realty Co.* (W. Va.), 89 S. E. 707, L. R. A. 1917A, 200.

<sup>8</sup> *American Water &c. Co. v. United States*, 50 Ct. Cl. 209; *Southridge Roofing Co. v. Providence Cornice Co.* (R. I.), 97 Atl. 210. Compare on the general subject *Bowser v. Marks*, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429, Ann. Cas. 1912B, 357n, with *Fstey Organ Co. v. Lehman*, 132 Wis. 144, 111

N. W. 1097, 122 Am. St. 951, 11 L. R. A. (N. S.) 254; *St. Nicholas Church v. Knopp* (Minn.), 160 N. W. 500, and see also notes in 15 L. R. A. (N. S.) 368, and 23 L. R. A. (N. S.) 1109. "Where a mistake in the price is made in a written bid following an oral estimate and bid, the person to whom the bid is offered can not create a contract by acceptance, if he knows of the mistake and the bidder's ignorance thereof": *Tyra v. Cheney*, 129 Minn. 428, 152 N. W. 835.

<sup>9</sup> *Kennedy v. Poole*, 213 Mass. 495, 100 N. E. 635, L. R. A. 1917A, 600 (mortgage reformed so as to make a deed); *Atwood v. Mikeska*, 29 Okla. 69, 115 Pac. 1011, L. R. A. 1917A, 602 (contract reformed so as to include additional matter). See also *Kansas City &c. R. Co. v. Smithson*, 113 Ark. 305, 168 S. W. 555 (rescission). The fact that a party did not know that contract required him to pay the sum therein specified is no defense, in the absence of fraud, accident, or mistake, though he was a foreigner and unable to read the language in which the contract was written: *International Text-Book Co. v. Anderson*, 179 Mo. App. 631, 162 S. W. 641.

<sup>10</sup> [Main section cited in *Jensen v. McConnell Bros.* (Idaho), 169 Pac. 292, 293.]

*Burt v. Los Angeles Olive Growers' Ass'n* (Cal.), 166 Pac. 993; *Blossi v. Chicago &c. R. Co.*, 144 Iowa 697, 123 N. W. 360, 26 L. R. A. (N. S.) 255 and note; also note in Ann. Cas. 1913A, 432.

signing it can not, after signing it, escape its obligations by saying that he did not read it or did not know what it contained.<sup>11</sup> So, if a party can not read he should have some one read the contract for him.<sup>12</sup>

§ 111. **Ratification—Laches.**—Equity will not relieve from a mistake where there is inexcusable delay or negligence in asserting a right, nor where it would be inequitable, but mere lapse of time or delay where there is a good excuse will not necessarily bar recovery or prevent relief.<sup>13</sup>

§ 112. **Mutuality of mistake.**—A contract may be rescinded in a proper case for the mistake of one party without a showing of fraud or inequitable conduct on the part of the

<sup>11</sup> *Hickman v. Sawyer*, 216 Fed. 281, 132 C. C. A. 425; *Ingram v. Coleman*, 110 Ark. 632, 160 S. W. 886; *Stone v. Prescott Special School Dist.* No. 14, 119 Ark. 553, 178 S. W. 399; *United Talking Mach. Co. v. Metcalf*, 164 Ky. 258, 175 S. W. 357; *Bowen v. Chenoa-Hignite Coal Co.*, 168 Ky. 588, 182 S. W. 635; *McGrath v. Peterson*, 127 Md. 412, 96 Atl. 551; *Ely v. Sutton*, 177 Mo. App. 546, 162 S. W. 755; *Spelman v. Delano*, 187 Mo. App. 119, 172 S. W. 1163; *Ames v. Milam (Okla.)*, 157 Pac. 941; *Frizzell v. Milam (Okla.)*, 157 Pac. 944; *Ross v. Northrup King & Co.*, 156 Wis. 327, 144 N. W. 1124. A contracting party will not be relieved from the results of his negligence in failing to read a contract not made under a disability or an emergency, or induced by fraud of the other party: *Parker v. Parrish*, 18 Ga. App. 258, 89 S. E. 381. Where a written contract expressly states that it includes all of the agreements between the parties, one who signs it without ascertaining its terms, relying on the agent's statement that a collateral agreement was contained therein, can not avoid it unless his signature was induced by fraud: *Outcult Advertising Co. v. Barnes*, 176 Mo. App. 307, 162 S. W. 631. The fact that one's eyes are weak, and he is a poor reader, will not exonerate him from negligence in failing to ascertain the terms of a written instrument which he executes: *McDonald v. McKin-*

*ney Nursery Co.*, 44 Okla. 62, 143 Pac. 191. To relieve a person from the obligations of a written contract he has signed, in absence of fraud or misrepresentation, the mistake must be mutual, as one is presumed to know contents of an instrument which he signs: *Pragi v. Lehigh Coal & Co.*, 176 App. Div. 265, 162 N. Y. S. 1011. Where parties in bidding for the plumbing work in a building omitted to check up the proper number of toilets and lavatories, on the plans, it was held that there was a mistake and they were not entitled to release on the ground that there was no meeting of minds: *Leonard v. Howard*, 67 Ore. 203, 135 Pac. 549.

<sup>12</sup> *Stern v. Moneyweight Scale Co.*, 42 App. D. C. 162; *Schmidt v. Bekins Van & Co.*, 27 Cal. App. 667, 155 Pac. 647; *Constantine v. McDonald*, 25 Idaho 342, 137 Pac. 531; *McKinney v. Boston & C. R. Co.*, 217 Mass. 274, 104 N. E. 446. But fraud, or possibly some emergency, may be a sufficient excuse for not reading or having a contract read, and "inability to read and understand the language in which a contract is negotiated, upon showing that its contents were misrepresented, justifies a court of equity in declaring it ineffective": *Smith v. Mosbarger (Ariz.)*, 156 Pac. 79.

<sup>13</sup> *Osincup v. Henthorn*, 89 Kans. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174n, Ann. Cas. 1914C, 1262n; post §§ 2431, 2433.

other,<sup>14</sup> and a deed may be rescinded or canceled for a negligent mistake of fact that is unilateral where the negligence is not a breach of legal duty and the mistake is material and under circumstances that render it inequitable for the other party to have the benefit thereof.<sup>15</sup> Omission from a written contract of part of what was orally agreed to is not a mutual mistake where one of the parties knows of the omission at the time of signing.<sup>16</sup>

§ 113. **Mistake as to the law.**—Mistake of law alone is not ordinarily ground for relief.<sup>17</sup> But mistake as to a foreign

<sup>14</sup> *Harper v. Newburgh*, 159 App. Div. 695, 145 N. Y. S. 59.

<sup>15</sup> *Crosby v. Andrews*, 61 Fla. 554, 55 So. 57, Ann. Cas. 1913A, 420n. But where there is no mutual mistake and a bidder in making a bid overlooks a part of the work covered by the contract, and is not led into error by anything said or done by the other party, there is no remedy and the bidder is not entitled to additional compensation under such circumstances for doing said work: *American Water Softener Co. v. United States*, 50 Ct. Cl. 209. So one can not repudiate his contract to furnish material and labor upon specified work at a certain figure and avoid liability, on the ground of his own mistake in estimating the cost: *Southbridge Roofing Co. v. Providence Cornice Co.* (R. I.), 97 Atl. 210. Where a company contracted to furnish iron doors under a contract that the doors should be acceptable to the architects and the board of fire underwriters, it was held that the fact that the doors would not pass the tests of the underwriters would not avoid the contract on the ground that there was a mutual mistake of fact: *Brown Bros. Mfg. Co. v. S. H. Harris Co.*, 185 Ill. App. 568. But a contract by which, for payments to be made, plaintiff abandoned lands on which she had located mining claims, was held void as incapable of performance, and made under a mutual mistake where it contemplated that defendant who was to withdraw the land under a certain statute could sell it, whereas he could only develop an irrigation plant and sell water to settlers: *Miller v. Thompson* (Nev.), 160 Pac. 775.

<sup>16</sup> *Tom v. Roberson* (Tex. Civ. App.), 182 S. W. 698. See generally as to mutuality of mistake and when it is necessary to relief: *St. Nicholas Church v. Kropp* (Minn.), 160 N. W. 500. A mistake by one of the parties as to the meaning of a contract when not induced by fraud, undue influence, or abuse of confidence is no defense to an action on the contract: *Outcault Advertising Co. v. Hooten*, 11 Ala. App. 454, 66 So. 901.

<sup>17</sup> *Kiefer Oil & C. Co. v. McDougal*, 229 Fed. 933, 144 C. C. A. 215, Ann. Cas. 1916D, 343 and note (not ground for annulment of compromise); *Clark v. Lehigh & C. Coal Co.*, 250 Pa. 304, 95 Atl. 462. A mistake of law by one party under circumstances not amounting to fraud on the part of the other party, is no ground for the avoidance of a contract: *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994. A "mistake of law," within the rule as to grounds for cancellation of instruments, is where a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect: *Palmer v. Cully* (Okla.), 153 Pac. 154. As to what is a "mutual mistake of law" see: *Northwest Thresher Co. v. McNinch*, 42 Okla. 155, 140 Pac. 1170; *Northwest Thresher Co. v. Pruitt*, 42 Okla. 163, 140 Pac. 1173; *Northwest Thresher Co. v. Bell*, 42 Okla. 164, 140 Pac. 1174; *Northwest Thresher Co. v. Long*, 42 Okla. 165, 141 Pac. 4; *Northwest Thresher Co. v. Washichek*, 42 Okla. 166, 141 Pac. 4; *Northwest Thresher Co. v. Minium*, 42 Okla. 168, 141 Pac. 5; *Northwest Thresher Co. v. Basey*, 42 Okla. 169, 141 Pac. 5.

law is a mistake of fact for which equity may give relief in a proper case.<sup>18</sup>

<sup>18</sup> *Osincup v. Henthorn*, 89 Kans. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174n, Ann. Cas. 1914C, 1262 and note. While ignorance of the law is not a good excuse, contractors engaged in work over the country can not be expected to be familiar with every detail of city and town charters: *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837.

## CHAPTER VI

### FAILURE TO DISCLOSE MATERIAL FACTS

§ 120. **Nondisclosure as to essential elements.**—The concealment by a party of a material fact which it is his duty to disclose may constitute fraud as much as if he had misrepresented it.<sup>1</sup>

§ 121. **Failure to disclose matter of inducement.**<sup>2</sup>

§ 123. **Silence where there is a duty to speak.**<sup>3</sup>—It is not ordinarily the duty of the seller to disclose open or patent defects in an animal sold, but where the defect is latent and he intentionally omits to disclose it, knowing that the buyer is acting on the belief that no such defect exists, the silence of the seller under such circumstances amounts to fraud.<sup>4</sup>

§ 124. **Relations of trust and confidence.**—An agent for the sale of property who fails to communicate to his principal an offer received for it can not enforce specific performance of a contract to take it himself even after the agency has ceased, where the contract to sell it to him was at a lower price induced by such failure.<sup>5</sup>

§ 125. **Failure to disclose changes in fact.**—It is the duty of an insured to disclose a change in the condition of his health where he is taken seriously ill between the time of the application, in which he has stated that he had never been afflicted with any such illness, and the time of the delivery of the policy.<sup>6</sup>

<sup>1</sup> Richardson v. Heney, 18 Ariz. 186, 157 Pac. 980; Corry v. Sylvia y Cia, 192 Ala. 550, 68 So. 891, Ann. Cas. 1917E, 1052. See also Union Lumber Co. v. W. J. Schouten Co., 25 Cal. App. 80, 142 Pac. 910; Hudson Structural Steel Co. v. Smith & Co., 110 Maine 123, 85 Atl. 384, 43 L. R. A. (N. S.) 654n.

<sup>2</sup> Peerless Fire Ins. Co. v. Riveire (Tex. Civ. App.), 188 S. W. 254.

<sup>3</sup> Gleason v. Thaw, 234 Fed. 570, 148 C. C. A. 336; Kurt v. Moscript (Kans.), 167 Pac. 1065; Hudson Structural Steel Co. v. Smith & Co.,

110 Maine 123, 85 Atl. 384, 43 L. R. A. (N. S.) 654n; Mishawaka Woolen & Co. v. Stanton, 188 Mich. 237, 154 N. W. 48, L. R. A. 1917B, 651n.

<sup>4</sup> Kitchen v. Long, 67 Fla. 72, 64 So. 429, L. R. A. 1917C, 617 and note; Puls v. Hornbeck, 24 Okla. 288, 103 Pac. 665, 29 L. R. A. (N. S.) 202 and notes 138 Am. St. 883; Fitzhugh v. Nirschl, 77 Ore. 514, 151 Pac. 735. But compare Overhulser v. Peacock, 148 Mo. App. 504, 128 S. W. 526.

<sup>5</sup> Kurt v. Moscript (Kans.), 167 Pac. 1065.

<sup>6</sup> Harris v. Security Mut. Life Ins.



§ 126. Insurance cases.<sup>7</sup>§ 127. Suretyship.<sup>8</sup>

§ 128. Sales.<sup>9</sup>—It is usually the duty of a vendor of land to disclose hidden defects therein which the purchaser could not discover by ordinary examination, but the vendor is not guilty of fraud in such case for failure to disclose them if he did not know of them and the circumstances were not such as to charge him with knowledge.<sup>10</sup>

§ 129. Warranties.<sup>11</sup>—Where articles such as medicines and food are sold directly to the consumer there is usually an implied warranty that they are sound and wholesome and fit for the purpose for which they are sold;<sup>12</sup> and manufacturers of such articles have been held liable for injuries to third persons who have bought from a dealer,<sup>13</sup> but it is generally held that, as there is no privity of contract, there is no implied warranty and liability in the latter case in the absence of negligence.<sup>14</sup>

§ 131. Commercial paper.—A maker of a note may be estopped as against a good-faith purchaser by making false rep-

Co., 130 Tenn. 325, 170 S. W. 474, L. R. A. 1915C, 153, Ann. Cas. 1916B, 380n. See also Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co., 109 Maine 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951n.

<sup>7</sup> Insurance Co. v. Indiana Reduction Co. (Ind. App.), 117 N. E. 273; Harris v. Security Mut. Life Ins. Co., 130 Tenn. 325, 170 S. W. 474, L. R. A. 1915C, 153, Ann. Cas. 1916B, 380n; Washington Fire Ins. Co. v. Cobb (Tex. Civ. App.), 163 S. W. 608; Peerless Fire Ins. Co. v. Riveire (Tex. Civ. App.), 188 S. W. 254.

<sup>8</sup> Larrabee v. Title Guaranty & Co., 250 Pa. 135, 95 Atl. 416, L. R. A. 1916F, 709 and note.

<sup>9</sup> Kitchen v. Long, 67 Fla. 72, 64 So. 429, L. R. A. 1917C, 617n; Clearwater v. Forrest, 72 Ore. 312, 143 Pac. 998 (both holding it the duty of seller to disclose latent defect or unsoundness of animal).

<sup>10</sup> Adkins v. Stewart, 159 Ky. 218, 166 S. W. 984.

<sup>11</sup> [Main section cited in Flaccomio v. Eysink (Md.), 100 Atl. 510, 515.]

<sup>12</sup> Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916D,

1006 (provided the buyer makes known to the dealer that reliance is placed on his skill and knowledge and does not make his own selection); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213n, Ann. Cas. 1915C, 140n.

<sup>13</sup> Parks v. C. C. Yost Pie Co., 93 Kans. 334, 144 Pac. 202, L. R. A. 1915C, 179; Jackson Coca Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791. See also Thornhill v. Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474; Statler v. George A. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063.

<sup>14</sup> Flaccomio v. Eysink (Md.), 100 Atl. 510 (also holding no liability under Uniform Sales Act); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155, L. R. A. 1916B, 877n; Liggett & Co. Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S. W. 1009, L. R. A. 1916A, 940, Ann. Cas. 1917A, 179n; Hasbrouk v. Armour, 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876. See also Welshausen v. Charles Parker Co., 83 Conn. 231, 76 Atl. 271; Roberts v. Anheuser-Busch Brewing Co., 211

resentations or even remaining silent when in good conscience he should make disclosure of facts affecting its validity or value.<sup>15</sup>

§ 133. **Compromise.**<sup>16</sup>

Mass. 449, 98 N. E. 95; and note in 19 L. R. A. (N. S.) 923.

<sup>15</sup> *Holzbog v. Bakrow*, 156 Ky. 161, 160 S. W. 792, 50 L. R. A. (N. S.) 1023, and note on page 1024.

<sup>16</sup> See as to fraud or misrepresentation in obtaining release notes in 48 L. R. A. (N. S.) 448, and 50 L. R. A. (N. S.) 1091. See as to relief in case of mistake in compromise, note in 46 L. R. A. (N. S.) 279.

## CHAPTER VII

### DURESS AND UNDUE INFLUENCE

§ 140. **What is meant by such terms.**—Duress is unlawful restraint whereby one is induced to do an act against his will.<sup>1</sup> Undue influence is a kind of mental coercion destroying the free agency of the party upon whom it is exerted and constraining him to do what he would not have done if left to his own judgment and volition, so that his act becomes that of the one exerting the influence rather than his own act.<sup>2</sup>

§ 141. **When it affects the contract.**<sup>3</sup>

<sup>1</sup> *Horn v. Davis*, 70 Ore. 498, 142 Pac. 544. See also *Dorsey v. Bryans*, 143 Ga. 186, 84 S. E. 467, Ann. Cas. 1917A, 172n; *Piekenbrock v. Smith*, 43 Okla. 585, 143 Pac. 675; *Edmondston v. Porter* (Okla.), 162 Pac. 692. Duress exists where one by unlawful act of the beneficiary or his authorized agent, or some person with his knowledge, is constrained under circumstances depriving him of exercise of free will, to agree to the act: *Koewing v. West Orange*, 89 N. J. L. 539, 99 Atl. 203. "It is a condition of mind resulting from such improper pressure that the will is overcome and an involuntary act or contract induced; a condition of mind produced by an unlawful intimidation, and resulting in the doing of an act which is not required by law": *O'Toole v. Lamson*, 41 App. D. C. 276. See also *United States v. Holland-American Line*, 205 Fed. 943; *Anderson v. Kelley* (Okla.), 156 Pac. 1167. Duress is such restraint or danger, either actually inflicted or threatened and impending as is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness: *Ortt v. Schwartz*, 62 Pa. Super. Ct. 70. It will not avoid a contract, unless sufficient to overcome the will of a man of ordinary firmness and courage: *Ford v. Engleman*, 118 Va. 89, 86 S. E. 852.

It will not avoid a contract unless the party seeking to enforce it or his agent imposed the duress, or unless it was done with his knowledge and was taken advantage of by him to obtain the contract: *Fears v. United Loan &c. Bank*, 172 Ky. 255, 189 S. W. 226. See also *Travis v. Unkart*, 89 N. J. L. 571, 99 Atl. 320.

<sup>2</sup> *Beard v. Beard*, 173 Ky. 131, 190 S. W. 703. Undue influence assumes that a condition exists where such baneful influence can be exerted: *Gillespie v. Smith*, 229 Fed. 760. For an illustration of undue influence, see: *Britton v. Esson*, 260 Ill. 273, 103 N. E. 218.

<sup>3</sup> The age, sex, capacity, situation, and relation of the parties and all the attending circumstances should be considered, and the evidence should be clear and convincing: *Denney v. Reber* (Ind. App.), 114 N. E. 424; *Lewis v. Doyle*, 182 Mich. 141, 148 N. W. 407; *Gate City Nat. Bank v. Elliott* (Mo.), 181 S. W. 25; *Roberts v. Little*, 92 Misc. 497, 157 N. Y. S. 121; *Ford v. Engleman*, 118 Va. 89, 86 S. E. 852. But where a fiduciary relation is shown, rendering it certain that the contracting parties did not deal on terms of equality, or that an unfair advantage was probable, it has been held that the transaction is presumed void, and the burden shifts to the fiduciary to show affirmatively

### § 144. Duress of goods.<sup>4</sup>

§ 145. **Duress by imprisonment.**—One unlawfully imprisoned who, in order to obtain his liberty, is induced by his prosecutor, or the latter's agent, to agree not to sue for damages, is not bound by such agreement.<sup>5</sup>

§ 146. **Duress by threats and oppression.**—In order to constitute duress by threats the party coerced must have been so moved or affected as to cease to be a free moral agent.<sup>6</sup> But it is sufficient if he was so acted upon by threats of the person claiming the benefit of the contract as to be bereft of that quality of mind essential to the execution of a contract.<sup>7</sup> A threat of litigation, however, by one having a right to institute it does not ordinarily constitute duress.<sup>8</sup>

§ 147. **When presumed.**—Where a confidential or fiduciary relation exists and the dominant party secures an advantage from the contract there is a presumption of undue influence.<sup>9</sup>

§ 148. **Relation of parties.**—The duress must generally have been exercised upon the person who sets it up by the person who claims the benefit of the contract, or by some one acting in his behalf or with his knowledge;<sup>10</sup> but the threatened prosecution

that no deception, or undue influence was used: *Dawson v. National Life Ins. Co.* (Iowa), 157 N. W. 929.

<sup>4</sup> The owner of property unlawfully withheld, may, in a proper case, avoid concessions made by him to obtain possession thereof, where the detention is accompanied by hardship or irreparable injury, though the compulsion does not amount to technical duress: *Nelson v. Nelson*, 99 Nebr. 456, 156 N. W. 1036. As to duress of real property, see *Hamilton v. Kentucky Title & Co.*, 159 Ky. 680, 167 S. W. 898, L. R. A. 1915B, 498 and note.

<sup>5</sup> *Lyons v. Davy-Pocahontas Coal Co.*, 75 W. Va. 739, 84 S. E. 744.

<sup>6</sup> *Dallavo v. Dallavo*, 189 Mich. 350, 155 N. W. 538.

<sup>7</sup> *Pickenbrock v. Smith*, 43 Okla. 585, 143 Pac. 675.

<sup>8</sup> *Abelman v. Indelli & Conforti Co.*, 170 App. Div. 740, 156 N. Y. S.

401; *Hart v. Walsh*, 84 Misc. 421, 146 N. Y. S. 235; *Cornwall v. Anderson*, 85 Wash. 369, 148 Pac. 1; *Zent v. Lewis*, 90 Wash. 651, 156 Pac. 848. Under Oklahoma Comp. Laws 1909, §§ 1049, 1050, a charge of duress can not be predicated on a threat to injure defendant's credit: *F. B. Collins Inv. Co. v. Easley*, 44 Okla. 429, 144 Pac. 1072.

<sup>9</sup> *Mors v. Peterson*, 261 Ill. 532, 104 N. E. 216; *Huddleston v. Henderson*, 181 Ill. App. 176; *Westphal v. Williams* (Ind. App.), 107 N. E. 91. See also *McDowell v. Edwards' Adm'r.*, 156 Ky. 475, 161 S. W. 534. Where confidence and influence exist, equity requires the utmost good faith: *In re Spann* (Okla.), 152 Pac. 68.

<sup>10</sup> *Fears v. United Loan & C. Bank*, 172 Ky. 255, 189 S. W. 226; *Koeving v. West Orange*, 89 N. J. L. 539, 99 Atl. 203; *Travis v. Unkart*, 89 N. J. L. 571, 99 Atl. 320.

of a husband or wife or near relative may operate as duress for which the contract may be avoided.<sup>11</sup>

**§ 149. Family relations.**—There is no presumption from the mere relation of parent and child that the former was unduly influenced by the latter in making a conveyance or the like to the latter.<sup>12</sup> But where confidential relations exist and the parent is old and weak in mind and the child strong and dominant, conveyances and other contracts for the benefit of the latter have often been held presumptively obtained by undue influence.<sup>13</sup> So, the

<sup>11</sup> *Embrey v. Adams*, 191 Ala. 291, 68 So. 20, L. R. A. 1915D, 1118 (threats to send grantor's father to chain gang); *Kirby v. Arnold*, 191 Ala. 263, 68 So. 17 (threat to prosecute grandfather). Threats to prosecute husband, see: *Denney v. Reber* (Ind. App.), 114 N. E. 424; *Fears v. United Loan & C. Bank*, 172 Ky. 255, 189 S. W. 226; *Lewis v. Doyle*, 182 Mich. 141, 148 N. W. 407. See also *Cromer v. Evett*, 11 Ga. App. 654, 75 S. E. 1056; *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 45 L. R. A. (N. S.) 1182; *Hoellworth v. McCarthy*, 93 Nebr. 246, 140 N. W. 141, 43 L. R. A. (N. S.) 1005; *Sykes v. Thompson*, 160 N. Car. 348, 76 S. E. 252; *Fountain v. Bingham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913D, 1185. But compare *Goodrum v. Merchants' & C. Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511; *Meredith v. Knox* (Del. Ch.), 83 Atl. 703; *Mad-dox v. Rowe*, 154 Ky. 417, 157 S. W. 714; *Englert v. Dale*, 25 N. Dak. 587, 142 N. W. 169; *Guinn v. Sumpter Val. R. Co.*, 63 Ore. 368, 127 Pac. 987; *Sulzner v. Cappeau & C. Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421. Under Oklahoma Rev. Laws 1910, §§ 900, 901, duress sufficient to avoid a contract exists when consent is obtained by unlawful confinement of the party or threat of such unlawful confinement; question being whether will of party was overcome by such threats, etc.: *Edmondston v. Porter* (Okla.), 162 Pac. 692. A contract is void for duress where a party's signature thereto was obtained by threats as to his personal liberty or safety or tending to deprive him of the free exercise of his will: *Kaus v. Gracey*, 162 Iowa

671, 144 N. W. 625. "Defendants' statements to plaintiff, who had wrongfully appropriated money belonging to it, that he was liable to a criminal prosecution, without representation that prosecution had been commenced or a warrant had issued, held not to constitute duress so as to invalidate a settlement": *Ingebrigt v. Seattle Taxicab & C. Co.*, 78 Wash. 433, 139 Pac. 188. "For one, who in good faith believes that he has been wronged, to threaten the wrongdoer with a civil suit, and if the wrong includes a violation of the criminal law with a criminal prosecution, without a statement that prosecution has been commenced, and without an actual arrest, is not duress as affecting a contract of settlement": *Ingebrigt v. Seattle Taxicab & C. Co.*, 78 Wash. 433, 139 Pac. 188.

<sup>12</sup> *Hawthorne v. Jenkins*, 182 Ala. 255, 62 So. 505, Ann. Cas. 1915D, 707, and note; *Kline v. Kline*, 14 Ariz. 369, 375, 128 Pac. 805; *Tompkins v. Tompkins*, 257 Ill. 557, 100 N. E. 965, Ann. Cas. 1914B, 158n; *Westphal v. Williams* (Ind. App.), 107 N. E. 91; *Steen v. Steen* (Iowa), 151 N. W. 115; *Henry v. Leech*, 123 Md. 436, 91 Atl. 694; *McEleney v. Donovan*, 119 Minn. 294, 138 N. W. 306; *Lee v. Lee*, 258 Mo. 599, 167 S. W. 1030; *Winslow v. Winslow*, 89 Nebr. 189, 130 N. W. 1042; *Howard v. Howard*, 112 Va. 566, 72 S. E. 133; *Turner v. Hinchman*, 72 W. Va. 384, 79 S. E. 18.

<sup>13</sup> *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561; *Smith v. Smith*, 84 Kans. 242, 114 Pac. 245, 35 L. R. A. (N. S.) 944 and note; *Gross v. Courtley*, 161 Ky. 152, 170 S. W. 600; *Beinbrink v. Fox*, 121 Md. 102, 88

relation of stepmother and stepson has been held to raise no presumption of trust and confidence in itself, but circumstances showing special trust and confidence may raise the presumption of undue influence,<sup>14</sup> and the same has been held as to the influence of an uncle on an orphan heir who relied on the uncle and had special confidence in him.<sup>15</sup>

§ 157. **Mental weakness.**<sup>16</sup>—Mere inadequacy of consideration is not ordinarily a distinct or sufficient ground for equitable relief, such, for instance, as cancelation or rescission; but the inadequacy of consideration may be so gross that it may furnish sufficient evidence of fraud, and, especially in connection with other circumstances, even though comparatively slight in themselves, justify and require such equitable relief.<sup>17</sup>

§ 159. **Unconscionable contracts.**<sup>18</sup>

§ 160. **Contracts with expectant heirs and the like.**<sup>19</sup>

§ 161. **Ratification.**—As a contract made under duress is voidable rather than void, one coerced by duress into making a contract may afterward affirm or ratify it.<sup>20</sup> But conduct in

Atl. 106; Lyons v. Elston, 211 Mass. 478, 98 N. E. 93; Guinon v. Guinon, 184 Mich. 56, 150 N. W. 311; Brown v. Brown, 237 Mo. 662, 141 S. W. 631.

<sup>14</sup> Nelson v. Brown, 164 Ala. 397, 51 So. 360, 137 Am. St. 61. See also as to adopted child: Stanfill v. Johnson, 159 Ala. 546, 49 So. 223; Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881.

<sup>15</sup> Riggs v. Gillespie, 241 Fed. 311. See also as to when there is or is not a presumption of undue influence in conveyances to in consideration of the support of the grantor or a third person: Boardman v. Loventson, 155 Wis. 566, 145 N. W. 750, 52 L. R. A. (N. S.) 476, and note. And see as to contract requiring servant to elect between benefits of relief fund and action for damages, note in 48 L. R. A. (N. S.) 448.

<sup>16</sup> "A transfer of property by persons mentally or physically infirm to those having custody of them will be set aside in equity, where influence has been acquired and abused, or confidence reposed and betrayed": McDowell v. Edwards, 156 Ky. 475, 161 S. W. 534.

<sup>17</sup> Bruner v. Cobb, 37 Okla. 228, 131 Pac. 165, L. R. A. 1916D, 377, and elaborate note. See also Schwarz v. Reznick, 257 Ill. 479, 100 N. E. 900.

<sup>18</sup> The mere fact that one is led to accept considerably less than his original offer to sell or than the property is worth does not show coercion or undue influence and unconscionableness when the consideration is not grossly inadequate: McDonald v. Smith, 95 Ark. 523, 130 S. W. 515; Olson v. Ostly, 178 Ill. App. 165. For contracts held unconscionable, see: Fecht v. Freeman, 251 Ill. 84, 95 N. E. 1043; Barker v. Wiseman (Okla.), 151 Pac. 1047; Sherman v. Glick, 71 Ore. 451, 142 Pac. 606.

<sup>19</sup> See as to difference between the rule where there is an attempted sale of an expectancy and the rule where there is a mere release to the ancestor, note to In re Thompson's Estate (26 S. Dak. 576, 128 N. W. 1127), in Ann. Cas. 1913B, 446; also Pritchard v. Pritchard, 76 W. Va. 91, 85 S. E. 29.

<sup>20</sup> Knowlton v. Ross, 114 Maine 18, 95 Atl. 281; Guinn v. Sumpter Val. R. Co., 63 Ore. 368, 127 Pac. 987. He

apparent recognition of the validity of the contract does not constitute ratification when induced by the influence of duress which still continues.<sup>21</sup>

§ 162. **In pari delicto, principle of, when not applicable to contracts procured through undue influence.**—In cases of contracts induced by and made under duress or undue influence the ordinary rule governing parties in *pari delicto* does not apply.<sup>22</sup>

must act promptly; procuring an extension to obtain an advance is a ratification of the original agreement: *Hewitt v. Andrews*, 69 Ore. 581, 140 Pac. 437. Where payments are made after a contract has been executed and duress ended, duress in procurement of the contract is waived:

*Abelman v. Indelli & Comforti Co.*, 170 App. Div. 740, 156 N. Y. S. 401.  
<sup>21</sup> *Eureka Bank v. Bay*, 90 Kans. 506, 135 Pac. 584.

<sup>22</sup> *Sykes v. Thompson*, 160 N. Car. 348, 76 S. E. 252. See also *Catskill Nat. Bank v. Lasber*, 165 App. Div. 548, 151 N. Y. S. 191.

## CHAPTER VIII

### CERTAINTY

§ 170. **General rule.**—For a contract to be valid and enforceable there must be a meeting of minds on every material and essential matter, and it must not be so indefinite that the intent of the parties can not be ascertained with reasonable certainty.<sup>1</sup>

§ 171. **That is certain which can be made certain.**<sup>2</sup>

§ 172. **Illustration of the maxim *id certum est quod certum reddi potest*.**<sup>3</sup>

§ 173. **Other illustrative cases.**<sup>4</sup>

§ 174. **Reference to plans and specifications.**—Plans and specifications may be made part of a contract by reference and must be considered if so referred to although it is not expressly stated that they are attached or made part of the contract.<sup>5</sup>

<sup>1</sup>Radzinski v. Ahlswede, 185 Ill. App. 513; Breitenstein v. Independent Button &c. Co., 192 Ill. App. 399; De Bearn v. De Bearn, 126 Md. 629, 95 Atl. 476; Central Mortgage Co. v. Michigan State Life Ins. Co., 43 Okla. 33, 143 Pac. 175; Belmont v. McAllister, 116 Va. 285, 81 S. E. 81. See also Jones v. Lanier (Ala.), 73 So. 535. While a contract, incomplete on its face, may be ambiguous, it is not necessarily void: Wisconsin Farm Co. v. Watson, 160 Wis. 638, 152 N. W. 449. And the fact that some of the terms of an offer are part of a conversation does not make it indefinite or uncertain: Mercer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co., 87 Conn. 691, 89 Atl. 909.

<sup>2</sup>Where by reasonable interpretation a contract can be sustained, it will not be avoided for uncertainty, if that which is uncertain can be made certain: Faucett v. Northern Clay Co., 84 Wash. 382, 146 Pac. 857.

<sup>3</sup>An oral contract for working in a mine, the work to continue until the mineowner begins shipping from the

mine, may be rendered certain as to its termination, by proof of the date when shipping began, and is not void for uncertainty: Barney Coal Co. v. Davis, 9 Ala. App. 235, 62 So. 985.

<sup>4</sup>A contract by which a landlord agreed to purchase all the tenant's kaffir corn except the amount the tenant wished to feed his teams is rendered certain as to the subject-matter, by the tenant tendering to the landlord a definite amount of the corn: Stanley v. Sumrell (Tex. Civ. App.), 163 S. W. 697.

<sup>5</sup>Bird v. American Surety Co. (Cal.), 166 Pac. 1009. But a provision in a bid for supplying fire engines on instalment deliveries at certain fixed dates, prescribing that the "contractor shall pay" to the city a sum of \$25 per day "as liquidated damages" for failure to deliver "said engine or engines" at the time designated, without any reference thereto in the contract to which the bid is attached, notwithstanding another printed part of the bid makes the bid part of the contract to which attached, has been held uncertain and



### § 175. Agreement to make future contract.<sup>6</sup>

§ 176. **Uncertainty as to time.**—A contract is not necessarily too indefinite or uncertain although it does not expressly fix the time for payment.<sup>7</sup> And a contract of employment for the life of the employé, or one for so long as he is able to work is sufficiently definite and certain in this respect and will support an action for its breach in not giving the employment, if otherwise sufficient.<sup>8</sup> But such a contract may be invalid or unenforceable because of uncertainty in regard to the work or compensation.<sup>9</sup>

§ 178. **Uncertainty as to subject-matter.**—A contract in and regarding a particular business, service or relation is not required to explain and define terms peculiar to such business, service or relation, but it must describe or express the subject-matter with sufficient certainty.<sup>10</sup>

ambiguous: *Cleveland v. Connelly*, 33 Ohio Cir. Ct. R. 64, judgment affirmed 75 Ohio St. 590, 80 N. E. 1124.

<sup>6</sup> A contract under which an architect is to draw plans and superintend the construction of a building for the defendants, if at any time in the future the defendants should erect a building, is too indefinite and uncertain to be enforced: *Ryan v. Hanna*, 89 Wash. 379, 154 Pac. 436. See also *W. J. Oliver Const. Co. v. Reeder*, 7 Ga. App. 276, 66 S. E. 955.

<sup>7</sup> *Greenstreet v. Cheatum*, 99 Kans. 290, 161 Pac. 596. But compare *Briggs v. Morris*, 244 Pa. 139, 90 Atl. 532. An instrument promising to pay a given sum on the happening of a contingency may be sufficiently certain, on the theory that the only uncertain element in the contract, that of time, has been rendered certain by the happening of the event: *Ryan v. Hanna*, 89 Wash. 379, 154 Pac. 436.

<sup>8</sup> *Carter v. Richart* (Ind. App.), 114 N. E. 110; *Texas & C. R. Co. v. Eldredge* (Tex. Civ. App.), 155 S. W. 1010. See also *Cox v. Baltimore & C. R. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453n; *Louisville & C. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389. See also as to when or how it may be terminated: *St. Louis & C. R. Co. v. Morgan*, 107 Ark.

202, 154 S. W. 518; *Sax v. Detroit & C. R. Co.*, 125 Mich. 252, 84 N. W. 314, 84 Am. St. 572; and notes in 25 L. R. A. (N. S.) 529, and 51 L. R. A. (N. S.) 629.

<sup>9</sup> *Ingram-Day Lumber Co. v. Rodgers*, 105 Miss. 244, 62 So. 230, 48 L. R. A. (N. S.) 435 and note, Ann. Cas. 1916E, 174n.

<sup>10</sup> *Sloss-Sheffield Steel & C. Co. v. Payne*, 186 Ala. 341, 64 So. 617 (holding contract to quarry and deliver all the outcrop of certain ore lands, in view of the fact that the term outcrop did not define the quantity of ore on the land, unenforceable for uncertainty in that respect). A contract which provides, "In case I return from Alaska, whatever riches I possess, she shall have 50 per cent. of same," held sufficiently certain as to subject-matter in *Elliott v. Northern Trust Co.*, 178 Ill. App. 439. A contract of an employer in settlement of employee's claim for injuries, to give him a job for life, or so long as the former remained in business, is uncertain and indefinite, and so will not support an action for its breach, where it does not specify the position to be filled or the compensation to be paid: *Ingram-Day Lumber Co. v. Rodgers*, 105 Miss. 244, 62 So. 230, 48 L. R. A. (N. S.) 435n, Ann. Cas. 1916E, 174n. See also *Ogden v. Philadelphia & C. Trac. Co.*, 202

§ 179. Uncertainty as to description.<sup>11</sup>

§ 180. Uncertainty as to amount.<sup>12</sup>

§ 182. Uncertainty as to what is to be done.<sup>13</sup>

§ 183. Miscellaneous instances of uncertainty.—An executory contract to pay an employé a “fair share” of the profits, in addition to his salary, is too indefinite and uncertain to support a recovery thereon.<sup>14</sup> So, agreements to give a “proper and suf-

Pa. 480, 52 Atl. 9. But compare *Schaub v. Arc Welding Co.*, 123 Mich. 487, 82 N. W. 235. A verbal contract as to services to be performed in connection with the sale of bonds is uncertain and unenforceable, where it fails to disclose the extent of the services and when payment therefor is to be made: *Briggs v. Morris*, 244 Pa. 139, 90 Atl. 532. “Payments on account of a contract void for indefiniteness can not render it definite and valid”: *Briggs v. Morris*, 244 Pa. 139, 90 Atl. 532.

<sup>11</sup> *Fletcher v. Southern Loan Co.* (Ga. App.), 93 S. E. 313 (description of land in option contract held sufficiently certain where it could easily be identified by the aid of extrinsic evidence); *Allen v. Kitchen*, 16 Idaho 133, 100 Pac. 1052, L. R. A. 1917A, 563 and note, 18 Ann. Cas. 914 (uncertainty in description of real estate in executory contract so great and of such a nature as to prevent reformation by parol evidence).

<sup>12</sup> An alleged contract whereby plaintiff was to give certain secret processes and was to elaborate them for defendant's profits for a reasonable share of profits, and under which \$25,000 out of \$75,000 profits made by defendant was alleged to be a reasonable share, was held too vague and uncertain in *Canet v. Smith*, 173 App. Div. 241, 159 N. Y. S. 593. So an agreement, made on the mutual rescission of a contract of sale and trade, that defendant would give plaintiff “part of the money” which he had paid, has been held too vague to be enforced: *Burney v. Jones*, 140 Ga. 758, 79 S. E. 840. See also *Hawksworth v. Durant*, 93 Misc. 149, 156 N. Y. S. 1026.

<sup>13</sup> A contract is not too indefinite

and uncertain, so long as the acts required for performance are expressed so definitely that the court can tell when the promisor has fulfilled the contract, though damages for failure to perform can not be measured: *Harms v. Stern*, 222 Fed. 581. But a letter written by defendant to plaintiff's agent, stating that: “B. tells me that F. will take all of his corn and fodder on what he owes. Settle with him and send me the amount due, and I will take it up”—is too indefinite and ambiguous to constitute a contract: *Barrow v. Pennington*, 17 Ga. App. 481, 87 S. E. 719. So where an alleged contract for the repair work of a railroad did not bind the railroad company to give the other party its repair work for any length of time, did not fix a price for the work, and it did not appear who was to furnish materials, it was held too indefinite to be enforceable: *Ashley & Co. v. Baggott*, 125 Ark. 1, 187 S. W. 649. And a contract employing plaintiff to cut timber, but not definitely describing the timber or stating when the cutting was to be done, or where it was to be delivered, or the number of teams and carts to be furnished by defendant, or when, is too uncertain to furnish a basis for a recovery of damages for breach thereof: *Prior v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 80 S. E. 559.

<sup>14</sup> *Varney v. Ditmars*, 217 N. Y. 223, 111 N. E. 822, Ann. Cas. 1916B, 758n. But compare *Silver v. Graves*, 210 Mass. 26, 95 N. E. 948. See also generally as to profit sharing agreements note to *Zwolanek v. Baker Mfg. Co.* (150 Wis. 517, 137 N. W. 769, 44 L. R. A. (N. S.) 1214n), in Ann. Cas. 1914A, 793.

ficient mortgage," or "a reasonable amount from the profits," and the like have been held too indefinite and uncertain to be enforceable.<sup>15</sup> And the same has been held as to an agreement employing an agent to procure a team and sell sewing machines with the exclusive right in the county so long as he should sell such machines.<sup>16</sup>

**§ 184. Miscellaneous instances of contracts held sufficiently certain.**—A contract to construct a private crossing has been held not too uncertain merely because it leaves the exact location of the crossing to be determined by the property owner and the agent of the railroad company.<sup>17</sup> So, an agreement by an officer of the lessor of a mine to advance to the lessee the money to pay his employes has been held not to be void for uncertainty.<sup>18</sup> And a dealer's contract to buy certain goods from a manufacturer during the next selling season has been held sufficiently definite and certain where they had made and performed similar contracts before.<sup>19</sup>

<sup>15</sup> Meixel v. Meixel, 161 App. Div. 518, 146 N. Y. S. 587; Canet v. Smith, 86 Misc. 99, 149 N. Y. S. 101; Butler v. Kemnerer, 218 Pa. 242, 67 Atl. 332.

<sup>16</sup> Rogers v. White Sewing Mach. Co. (Okla.), 157 Pac. 1044. For other illustrative cases, see: National Elec. Signaling Co. v. Fessenden, 207 Fed. 915, 125 C. C. A. 363; Wineburgh v. Gay, 27 Cal. App. 603, 150 Pac. 1003; Carr v. Louisville & C. R. Co., 141 Ga. 219, 80 S. E. 716; Douglass v. W. L. Williams Art Co., 143 Ga. 846, 85 S. E. 993; Miller v. Crusel, 135 La. 649, 65 So. 873; Wooten v. S. R. Biggs Drug Co., 169 N. Car. 64, 85 S. E. 140; Arkansas Val. Town & Land Co. v. Atchison & C. R. Co. (Okla.), 151 Pac. 1028; Wade v. Cohen (Tex. Civ. App.), 173 S. W. 1168.

<sup>17</sup> Chesapeake & C. R. Co. v. Her-

ringer, 158 Ky. 267, 164 S. W. 948.

<sup>18</sup> Pugh v. Jackson, 154 Ky. 649, 157 S. W. 1082. See also Sulzer v. Mover, 161 Wis. 435, 154 N. W. 700. A contract by the purchaser from the community administrator of land, which was the property of the community, to pay the children the value of their interest in the community land so sold is not too uncertain to be enforced: Hales v. Peters (Tex. Civ. App.), 162 S. W. 386.

<sup>19</sup> Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316. For other illustrative cases, see: Pritz v. Consolidated Adjustment Co., 189 Ill. App. 287; Lewis v. Creech, 162 Ky. 763, 173 S. W. 133; Great Northern R. Co. v. Sheyenne Tel. Co., 27 N. Dak. 256, 145 N. W. 1062; De Pauw University v. Ankeny (Wash.), 166 Pac. 1148.

## CHAPTER IX

### CONSIDERATION

§ 195. **Necessity for.**—The general rule is well settled that an executory contract, whether express or implied, must be supported by a valid consideration.<sup>1</sup>

§ 196. **When it is presumed or imported.**—Contract under seal imports consideration.<sup>2</sup> But want of consideration may be shown in some instances notwithstanding the instrument is under seal.<sup>3</sup>

§ 198. **When presumed or imported—Statutory abolition of seals.**—The New York statute making a seal upon an executory instrument only presumptive evidence of consideration has not changed the rule that as to delivered and executed instruments a seal imports consideration.<sup>4</sup>

§ 202. **When presumed—Executed contracts.**—Although one may avoid an executory contract for lack of consideration, when called upon for performance, he can not do so, or have it rescinded, after he has executed it by performance.<sup>5</sup>

§ 203. **What is meant by consideration.**—"Consideration" is a benefit to the party promising or a loss or detriment to the

<sup>1</sup> *United States v. Cooke*, 207 Fed. 682; *Corletto v. Morgan*, 27 Del. 530, 89 Atl. 738; *Murphy v. Nett*, 51 Mont. 82, 149 Pac. 713, L. R. A. 1915E, 797; *Thomas v. Mott*, 74 W. Va. 493, 82 S. E. 325. Consideration is necessary for assumption by corporation of debt due minority stockholders from majority stockholders, agreed to be paid out of the profits of the corporation: *National Elec. Signaling Co. v. Fessenden*, 207 Fed. 915, 125 C. C. A. 363. Consideration is a matter of agreement and the minds of the contracting parties must meet upon it: *Gross v. Bibb*, 19 N. Mex. 495, 145 Pac. 480.

<sup>2</sup> *Conowingo Land Co. v. McGaw*, 124 Md. 643, 93 Atl. 222; *Lodi v. Goyette*, 219 Mass. 72, 106 N. E. 601; *Werner v. Werner*, 169 App. Div. 9, 154 N. Y. S. 570. See also *Chamber-*

*lain v. Sanders*, 268 Ill. 41, 108 N. E. 666.

<sup>3</sup> *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418. But in the absence of statutory provision for such defenses, want of consideration and total failure of consideration, or the like, can not be shown in an action at law for the purpose of barring a suit on a sealed instrument; and the Negotiable Instrument Act only makes such defenses applicable to negotiable instruments: *Burroughs v. Selleck*, 185 Ill. App. 446.

<sup>4</sup> *Hull v. Hull*, 172 App. Div. 287, 158 N. Y. S. 743.

<sup>5</sup> *Peavey v. Wells (Minn.)*, 161 N. W. 508; *Sooy v. Winter*, 188 Mo. App. 150, 175 S. W. 132. But compare *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387.

party to whom the promise is made.<sup>6</sup> Damage, detriment, or inconvenience to the promisee may be sufficient to support a promise without anything of value or any actual benefit being given to or received by the promisor.<sup>7</sup> In other words, it is not necessary that there should be both a benefit to the one and a detriment to the other, for a valid consideration may consist of either such a benefit or such a detriment.<sup>8</sup> The terms "benefit" and "detriment" in this connection are not limited to pecuniary gain or loss; the former means, in general, some legal right acquired by the promisor to which he would not otherwise have been entitled, and the latter means, in general, the waiver, forbearance or loss of some legal right which the promisee would have otherwise been entitled to exercise.<sup>9</sup>

§ 203a. **Illustrative cases of consideration.**—Many cases, in addition to those cited in the last preceding section, illustrate the doctrine therein stated and show what is a benefit or detriment constituting a consideration. Thus, an undertaking by a contractor, assented to by the subcontractor, to withhold for the benefit of the party furnishing articles to the subcontractor so much of the money going to the subcontractor as would pay for such articles is a valuable consideration for furnishing such articles.<sup>10</sup> So, a contract under which a street railroad company cares for its tracks at the expense of a construction company building a sewer under them is supported by a sufficient consideration where the latter company is thereby enabled to perform its work without delay that would otherwise result.<sup>11</sup> Detriment

<sup>6</sup> Butson v. Misz, 81 Ore. 607, 160 Pac. 530, 531, citing Visalia Gas Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. 105. To same effect are: Hill v. Horsley, 142 Ga. 12, 82 S. E. 225; Trackwell v. Irvin (Ind. App.), 115 N. E. 807, 809. A consideration is some right, interest, profit, or benefit accruing to the party who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered, or undertaken by the other party: Ward v. Erie R. Co., 87 Misc. 365, 149 N. Y. S. 717; Keitt v. Gresham (Tex. Civ. App.), 174 S. W. 884.

<sup>7</sup> Cates v. Seagraves, 56 Ind. App. 486, 105 N. E. 594; Nelson v. Diffeenderfer, 178 Mo. App. 48, 163 S. W. 271; Fuller v. Tootle-Campbell Dry

Goods Co., 189 Mo. App. 514, 176 S. W. 1091; Ball v. White (Okla.), 150 Pac. 901.

<sup>8</sup> Parsons v. Cashman, 23 Cal. App. 298, 137 Pac. 1109, 1111; Waggoner v. Davidson, 189 Mo. App. 345, 175 S. W. 232; Condon v. Extton-Hall Brokerage & Vessel Agency, 80 Misc. 369, 142 N. Y. S. 548; Werner v. Werner, 169 App. Div. 9, 154 N. Y. S. 570; Drovers' Deposit Nat. Bank v. Tichenor, 156 Wis. 251, 145 N. W. 777.

<sup>9</sup> McDevitt v. Stokes, 174 Ky. 515, 192 S. W. 681, L. R. A. 1917D, 1100, 1102.

<sup>10</sup> Fairbanks v. Tafel, 159 Ky. 602, 167 S. W. 887.

<sup>11</sup> W. G. Root Const. Co. v. West Jersey &c. R. Co., 85 N. J. L. 645,

to the promisee by conveyance of land to a corporation is a sufficient consideration to support a promise to pay the value of stock taken in exchange even though of no benefit to the promisor.<sup>12</sup> So, consent of an heir to the sale of property,<sup>13</sup> an agreement to discontinue a lawsuit,<sup>14</sup> the surrender of an insurance policy,<sup>15</sup> abstaining from the sale of a newspaper,<sup>16</sup> or forbearing to exercise some other right, may each and all constitute a valid consideration, although of no benefit to the promisor,<sup>17</sup> and benefit to a third person secured by a contractual promise is sufficient consideration to support it.<sup>18</sup>

### § 204. Distinguished from motive.<sup>19</sup>

### § 205. Concurrent, executed, executory and continuing consideration.<sup>20</sup>

90 Atl. 271. See also *Rigney v. New York Cent. & R. Co.*, 161 App. Div. 187, 146 N. Y. S. 395.

<sup>12</sup> *Clement v. Rowe*, 33 S. Dak. 499, 146 N. W. 700.

<sup>13</sup> *Walters v. Miller*, 70 Fla. 432, 70 So. 629.

<sup>14</sup> *Weiss v. Levy*, 150 N. Y. S. 489.

<sup>15</sup> *Miller v. Missouri State Life Ins. Co.* (Mo. App.), 186 S. W. 762.

<sup>16</sup> *Rague v. New York Evening Journal Pub. Co.*, 164 App. Div. 126, 149 N. Y. S. 668.

<sup>17</sup> *Werner v. Werner*, 169 App. Div. 9, 154 N. Y. S. 570; *Keck v. Michigan Quartz Silica Co.*, 158 Wis. 500, 149 N. W. 208. An agreement to pay costs of a will case in which defendant's wife was a party, although the defendant had no legal interest, was held supported by sufficient consideration in the work done by the plaintiff and his agreement to look solely to the defendant for his pay: *Davis v. Blum*, 104 S. Car. 218, 88 S. E. 465. See also *Sears v. Krekel* (Mo. App.), 184 S. W. 911; *Thomas v. Matthews* (Ohio St.), 113 N. E. 669, L. R. A. 1917A, 1068.

<sup>18</sup> *Fuller v. Tootle-Campbell Dry Goods Co.*, 189 Mo. App. 514, 176 S. W. 1091; *O'Dowd v. Elliott*, 77 N. H. 319, 91 Atl. 872. Delivery by third person of notes and trust deeds may be sufficient consideration for defendant's promise to such person that he would pay plaintiff's bills for lumber furnished: *Boone County Lum-*

*ber Co. v. Niedermeyer*, 187 Mo. App. 180, 173 S. W. 57. For other cases showing valid consideration, see: *McKenzie v. Stewart* (Ala.), 72 So. 109; *Dawley v. Dawley's Estate*, 60 Colo. 73, 152 Pac. 1171; *Rockland v. Anderson*, 110 Maine 272, 85 Atl. 1066, 43 L. R. A. (N. S.) 1137n; *In re Lutz Estate*, 181 Mo. App. 267, 170 S. W. 334; *Stone v. Demarest*, 95 Misc. 543, 159 N. Y. S. 800; *Leaksville-Spray Institute v. Mebane*, 165 N. Car. 644, 81 S. E. 1020; *Withers v. Poe*, 167 N. Car. 372, 83 S. E. 614; *Bauer v. Northwest Blowpipe Co.*, 75 Ore. 1, 146 Pac. 129. Where an executrix wrote letters to creditors of her testator on which they deferred enforcement of their claims, it was held that their mere indulgence in this respect was not sufficient consideration for a promise by her to personally assume the debt: *Rositzke v. Meyer*, 95 Misc. 356, 159 N. Y. S. 464. See also for agreement to take back shares of stock held unsupported by consideration: *Fuller v. Tootle-Campbell Dry Goods Co.*, 189 Mo. App. 514, 176 S. W. 1091.

<sup>19</sup> [Main section cited in *Gross v. Bibb*, 19 N. Mex. 495, 145 Pac. 488.]

See also *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387, 392.

<sup>20</sup> *Waddle v. Smith*, 58 Ind. App. 587, 108 N. E. 537. The absolute and executed part of a contract may be a sufficient consideration to support other portions of the contract: *Scott*

§ 206. **Good consideration.**—Love and affection is a good consideration and will support the transfer and assignment of a promissory note.<sup>21</sup>

§ 207. **Valuable consideration.**—A valuable consideration for a promise may consist of a benefit to the promisor, as, where the promisor has thereby acquired some legal right to which he would not otherwise be entitled; or, it may consist of a detriment to the promisee, as, where the promisee has, in return for the promise, forborne some legal right which he would otherwise have been entitled to exercise.<sup>22</sup>

§ 208. **Nudum pactum.**<sup>23</sup>—A naked promise of a third person taken by one as collateral to a debt, where such third person is not indebted either to the taker or the taker's debtor, is without consideration.<sup>24</sup> So, a gratuitous agreement to become bailee is likewise without consideration and unenforceable.<sup>25</sup> Other illustrative cases are cited below.<sup>26</sup>

v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

<sup>21</sup> *Gooch v. Gooch* (Iowa), 160 N. W. 333, L. R. A. 1917C, 582. Love and affection may be a sufficient consideration to support an agreement to pay money to an adopted son as much as if the son had been born to the promisor: *Dawley v. Dawley's Estate*, 60 Colo. 73, 152 Pac. 1171. Love and affection is a sufficient consideration to support a contract by a father to pay monthly to his divorced wife a specified sum for the support, education, and maintenance of his infant son: *Marshall v. Marshall*, 61 Pa. Super. Ct. 513.

<sup>22</sup> *Harp v. Hamilton* (Tex. Civ. App.), 177 S. W. 565. Where under the law some three out of all the saloons in a town would be compelled to go out of business, and the saloon keepers agreed that a certain three of them should be given \$500 each to retire, was held to be a valuable consideration for the promise to pay: *Jones v. Maes*, 76 Wash. 517, 136 Pac. 680. Consideration of one dollar or the like recited in a written contract is ordinarily sufficient to support it: *Rohwer v. Burrell*, 42 Utah 510, 134 Pac. 573; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360, and note.

<sup>23</sup> [Main section cited in *Gile v. Inter-State Motor Car Co.*, 27 N. Dak. 108, 145 N. W. 732, L. R. A. 1915B, 109n, dissenting opinion.]

<sup>24</sup> *Bank of Montreal v. Beecher*, 133 Minn. 81, 157 N. W. 1070.

<sup>25</sup> *Tomko v. Sharp*, 87 N. J. L. 385, 94 Atl. 793.

<sup>26</sup> An assurance by the holder of a trust deed, that one who advanced money to the owner for the erection of an improvement, would be repaid, has been held without consideration and hence no more than an unenforceable promise: *Mulkey v. Britt*, 117 Ark. 656, 174 S. W. 1193. An agreement after the execution of a contract for the sale of land, upon the purchaser complaining of his bargain being a hard one, and asking that he be allowed to have the rents of the property until the closing of the transaction, to which the seller assented, is without consideration and not enforceable: *Bonzer v. Garrett* (Tex. Civ. App.), 162 S. W. 934. A promise, at time part payment for hauling logs was made, that the promisor would see that the debtor did not get away owing promisee anything, was held without consideration: *Bay v. Beam*, 190 Mo. App. 393, 177 S. W. 395. And in another case, an agreement by defendant who had misap-

§ 209. **Sufficient or adequate consideration.**—As a general rule, if the parties get what they bargain for the mere fact that the consideration may seem inadequate or the contract rash or unwise makes no difference.<sup>27</sup> The fairness of the contract and the adequacy of the consideration, where involved, are usually to be judged as of the date of the contract and from the facts and circumstances under which it is made.<sup>28</sup>

§ 210. **Insufficient or inadequate consideration.**—Where the consideration is so grossly inadequate as to shock the conscience and raise, under the circumstances, the presumption or inference of fraud the grantor or promisor may, in a proper case, have the contract canceled or defeat specific performance.<sup>29</sup>

§ 211. **Moral consideration.**—A purely moral obligation is not a sufficient consideration, but the obligation may be sufficient

propriated whisky sold and shipped by plaintiff to a third person, to pay plaintiff its claim against the third person, was held not supported by a consideration unless plaintiff released the third person and he had released defendant from its misappropriation of the whisky: *L. & A. Scharff Distilling Co. v. Springfield Coal & Co.*, 180 Mo. App. 497, 166 S. W. 654. But in another case a promise by defendant to those hauling for another to go on hauling and he would be responsible for the pay was held not without consideration: *Bay v. Beam*, 190 Mo. App. 393, 177 S. W. 395. See also for other cases where there was held to be no consideration: *Murray v. Miller*, 112 Ark. 227, 166 S. W. 536, Ann. Cas. 1916B, 30n; *Wooten v. S. R. Biggs Drug Co.*, 169 N. Car. 64, 85 S. E. 140.

<sup>27</sup> *Sellers v. Knight*, 185 Ala. 96, 64 So. 329; *Cates v. Scagraves*, 56 Ind. App. 486, 105 N. E. 594; *Trackwell v. Irvin* (Ind. App.), 115 N. E. 807, 809; *Fraser v. State Savings Bank*, 18 N. Mex. 340, 137 Pac. 592; *Ga Nun v. Palmer*, 216 N. Y. 603, 111 N. E. 223. See also *Hayes v. Huddleson*, 40 App. Cas. (D. C.) 183, Ann. Cas. 1914B, 1037n. A stockholders' agreement, dissolving a corporation and providing for settlement of all claims between stockholders, including unliquidated dividends, where \$1,000 consideration is

paid to the chief stockholder, who turns over property worth \$6,500, is not void for inadequate consideration: *Schmidt v. J. F. Schmidt Bros. Co.*, 272 Ill. 340, 111 N. E. 1025. The furnishing of the use of certain fixtures by one to another is sufficient consideration for the latter's promise not to sell any other beer than that manufactured by complainant: *Joseph Schlitz Brewing Co. v. Travi*, 179 Ill. App. 269.

<sup>28</sup> *Elliott v. Northern Trust Co.*, 178 Ill. App. 439.

<sup>29</sup> *Bruner v. Cobb*, 37 Okla. 228, 131 Pac. 165, L. R. A. 1916D, 377, and note. See also *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317n, 12 Ann. Cas. 120; *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756n; *Schwarz v. Reznick*, 257 Ill. 479, 100 N. E. 900; *Johnson v. Woodworth*, 134 App. Div. 715, 119 N. Y. S. 146. Where contracts between a railroad company and a telephone company provided that the latter could place telephones in two depots in consideration of the furnishing free service to it were not mutual in obligation, and they could last so long as to render the privilege wholly inadequate as a consideration, it was held that the contracts were invalid: *Great Northern R. Co. v. Sheyenne Tel. Co.*, 27 N. Dak. 256, 145 N. W. 1062.



even though it is not a technical legal or enforceable obligation at the time.<sup>30</sup>

**§ 212. New promise—Equitable consideration.**—While it is generally conceded that a purely moral obligation that never could have been enforced even if not barred or suspended by some statute or positive rule of law is not a sufficient consideration to support a promise, it is equally well settled that where it could once have been enforced as a legal obligation and is not a mere “past consideration” it may constitute a sufficient consideration for a subsequent express promise. But there is much conflict among the authorities as to whether it is always essential that there should once have been an enforceable legal obligation. The better rule seems to be that there may be a sufficient equitable consideration even though the obligation may not have been capable of legal enforcement because it was not in writing as required by some statute as well as where its enforcement had been barred by the statute of limitations, discharge in bankruptcy or the like.<sup>31</sup> A provable debt which would be barred by discharge in bankruptcy may be revived and made effectual by a new promise made after the filing of the petition or the adjudication though before the discharge.<sup>32</sup>

**§ 213. Past or antecedent consideration.**—A past consideration, such as past services rendered without expectation of either party that payment shall be made for such services, is not a valuable consideration and will not support the transfer of a

<sup>30</sup> *Nelson v. Diffenderffer*, 178 Mo. App. 48, 163 S. W. 271. See also *Mohr v. Rickganer*, 82 Nebr. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533; *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519 and note, 19 Ann. Cas. 1180. Where a lease is void under the statute of frauds, a promise of the lessee to pay the lessor any loss which he might sustain by reason of the lessee's failure to take the property is without consideration: *Huey v. Frank*, 182 Ill. App. 431. Where one, aided by a town under a contract not benefiting it, stated, upon coming into possession of property, that he would repay the town, the promise was held to be without consideration: *Warren v. Weaver* (N. H.), 97 Atl. 748. Where

a creditor has been compelled to accept corporate stock in full settlement of an indebtedness, there is an obligation which is a sufficient consideration for a subsequent promise to pay the deficiency, although it is otherwise where such stock is accepted in voluntary proceedings or compromise: *Straus v. Cunningham*, 159 App. Div. 718, 144 N. Y. S. 1014.

<sup>31</sup> *Mohr v. Rickganer*, 82 Nebr. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533; *Edson v. Poppe*, 24 S. Dak. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534; *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519n, 19 Ann. Cas. 1180, where the whole subject is elaborately treated in the note.

<sup>32</sup> *Zavelo v. Reeves*, 227 U. S. 625,

promissory note so as to enable the transferee to enforce it.<sup>33</sup> So, as a general rule at least, a subsequent agreement, not forming any part of the original contract, must be supported by a new consideration.<sup>34</sup> Where an agreement by the seller of a lumber business not to engage again in such business was made about two hours after the contract of sale had been executed, it was held to be without consideration although it was attached to the contract of sale and stated that it was a part thereof and supplemental thereto.<sup>35</sup> But such an agreement made at the time of sale and as part thereof is usually held to be supported by a sufficient consideration.<sup>36</sup>

**§ 214. Exceptions to rule that past consideration will not support a subsequent promise.**—A past consideration will support a promise when, under the circumstances, such a promise would be implied by law.<sup>37</sup>

**§ 215. Doing what one is legally bound to do.**<sup>38</sup>—It is well settled that merely promising to do, or doing, what one is already legally bound to do is no consideration for another promise, and this doctrine is applied in a variety of cases.<sup>39</sup>

57 L. ed. 676, 33 Sup. Ct. 365, Ann. Cas. 1914D, 664n; *Spann v. Read Phosphate Co.*, 238 Fed. 338, 151 C. C. A. 354. But compare *Holt v. Akarman*, 84 N. J. L. 371, 86 Atl. 408.

<sup>33</sup> *Gooch v. Gooch* (Iowa), 160 N. W. 333, L. R. A. 1917C, 582. See also *Homeopathic Hospital v. Chalmers*, 94 Misc. 600, 157 N. Y. S. 1000.

<sup>34</sup> *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837. See also *Norris v. Letchworth*, 140 Mo. App. 19, 124 S. W. 559; and note in L. R. A. 1914B, 3-68.

<sup>35</sup> *Kimbrow v. Wells*, 112 Ark. 126, 165 S. W. 645.

<sup>36</sup> *Fleischman v. Rahmstorf*, 226 Fed. 443, 141 C. C. A. 273; *Weiss v. Stein*, 187 Mich. 369, 153 N. W. 810; *Locke v. Murdoch*, 20 N. Mex. 522, 151 Pac. 298. See also *Hurless v. Wiley*, 91 Kans. 347, 137 Pac. 981, L. R. A. 1915C, 177. And an agreement of brokers to refund commission if the seller purchased other property through them, though made a few days after the seller's acceptance of the purchaser's offer to buy at less

than the offering price, has been held a part of the same transaction and not subject to the objection that there was a want of consideration: *Turner v. Frazier*, 157 Ky. 388, 163 S. W. 245.

<sup>37</sup> *Neal v. Stanley*, 17 Ga. App. 502, 87 S. E. 718. See also *Feltrup v. Schloemer*, 33 Ohio Cir. Ct. R. 467; *Edson v. Poppe*, 24 S. Dak. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534. Continuance of services pursuant to a request may be a sufficient consideration for a promise to pay for services rendered prior to the request: *Blackwell v. Kercheval*, 27 Idaho 537, 149 Pac. 1060.

<sup>38</sup> [Main section quoted in *McDevitt v. Stokes*, 174 Ky. 515, 192 S. W. 681, L. R. A. 1917D, 1100, 1102.]

<sup>39</sup> *In re Riff*, 205 Fed. 406; *Feldman v. Fox*, 112 Ark. 223, 164 S. W. 766 (agreement by landlord to guarantee cropper a certain sum for his share in crop if he would refrain from selling his interest and would gather the crop not supported by consideration); *Benedict v. Greer-Robbins Co.*, 26 Cal. App. 468, 147

§ 216. **Same—Refusal to perform without further consideration.**—A promise or agreement to pay additional compensation for what one is already bound to do, in order to induce him to go on with the work, or the like, the original contract remaining in force, is, ordinarily at least, without consideration and unenforcible.<sup>40</sup> But changed and unforeseen conditions, may sometimes prevent the application of this rule, and new adjustments and agreements by way of compromise, where disputes arise, may find a sufficient consideration in such circumstances and the settlement of disputes.<sup>41</sup>

§ 217. **Part payment of liquidated liability.**—The general rule is well settled in almost every jurisdiction that an agreement,

Pac. 486; Pacific R. Advertising Co. v. Carr, 29 Cal. App. 722, 157 Pac. 529; Leonard v. Hallett, 57 Colo. 274, 141 Pac. 481; Temple v. Brooks, 165 App. Div. 661, 151 N. Y. S. 490; Thomas v. Mott, 74 W. Va. 493, 82 S. E. 325; Vance v. Ellison, 76 W. Va. 592, 85 S. E. 776. Payment of interest due on a note is no consideration for a parol contract not to enforce the note for a time: Tudor v. Security Trust Co., 163 Ky. 514, 173 S. W. 1118. Payment of a valid debt by one who owes it constitutes no consideration for a promise by the creditor: Seneca Falls v. Botsch, 86 Misc. 481, 149 N. Y. S. 320. Promise by the obligor upon a bond and mortgage to pay the rate of interest he is legally obliged to pay is no consideration for a corresponding promise to extend the time of the payment of the principal of the bond and mortgage: Sands v. Gilleran, 159 App. Div. 37, 144 N. Y. S. 337. Compare, however, Diehl v. McKinnon, 173 Iowa 32, 155 N. W. 259, L. R. A. 1916C, 384 and note. Where accountants had contracted to audit books of a corporation, a promise of the corporation's president individually to be responsible for their compensation is without consideration: Teele v. Mayer, 173 App. Div. 869, 160 N. Y. S. 116. Promise by a stranger to pay one already under contract with its owner to ride a certain horse in a race a specified sum if he wins the race is not supported by consideration although the value of horses owned by

the promisor will be increased by the winning of the race: McDevitt v. Stokes, 174 Ky. 515, 192 S. W. 681, L. R. A. 1917D, 1100n. Agreement of a minority stockholder to remain in the company's employ is not a sufficient consideration for its assumption of an indebtedness due him from majority stockholders which was to be paid out of profits, where he had already agreed to stay in its employ in consideration of an agreement with a majority stockholder: National Elec. Signaling Co. v. Fessenden, 207 Fed. 915, 125 C. C. A. 363. But while doing what a party is legally bound to do may not be a consideration, yet a contract settling disputes and determining the manner of doing it is not necessarily lacking in consideration: Illinois Cent. R. Co. v. Waterloo & C. R. Co. (Iowa), 164 N. W. 208, citing Richmond & C. R. Co. v. Richmond, 96 Va. 670, 32 S. E. 787 and distinguishing and apparently disapproving Baltimore & C. R. Co. v. Cincinnati & C. R. Co., 52 Ind. App. 639, 99 N. E. 1018.

<sup>40</sup> Shriner v. Craft, 166 Ala. 146, 51 So. 884, 28 L. R. A. (N. S.) 450n, 139 Am. St. 19; Feldman v. Fox, 112 Ark. 223, 164 S. W. 766.

<sup>41</sup> Russell v. Lambert, 14 Idaho 284, 94 Pac. 54, L. R. A. 1915B, 20n; John King Co. v. Louisville & C. R. Co., 131 Ky. 46, 114 S. W. 308, 116 S. W. 1201; Scanlon v. Northwood, 147 Mich. 139, 110 N. W. 493; Marten v. Brown, 80 N. J. L. 143, 76 Atl. 1009.

not under seal, to accept, or the actual acceptance of part of a past-due liquidated and undisputed indebtedness in discharge of the entire indebtedness, without other consideration, is not binding as a discharge of the amount remaining unpaid.<sup>42</sup>

§ 218. **Rule against satisfaction by payment of lesser sum strictly construed.**—The rule stated in the last preceding section is, however, strictly construed and the courts are astute to discover and give effect to even slight benefit to the one party or loss or inconvenience to the other as constituting a consideration to carry out and enforce the understanding and agreement of the parties.<sup>43</sup>

§ 219. **Other consideration—Receiving property in addition to sum paid.**<sup>44</sup>

§ 220. **Other consideration—Payment of debt before due or at different place.**—Payment of part of a debt before it is due, or even at a different place may be sufficient to discharge the entire debt when so agreed;<sup>45</sup> but an agreement to pay at a different place does not support an agreement to accept such a partial payment in full where the debt is already past due.<sup>46</sup>

§ 221. **Other consideration — Additional security.** — A creditor's agreement with the father of his debtor to accept part

<sup>42</sup> *Abercombie v. Good*, 187 Ala. 310, 65 So. 816; *Phillips v. Graham County*, 17 Ariz. 208, 149 Pac. 755; *Weber v. Head Camp*, 60 Colo. 529, 154 Pac. 728; *Kushner v. Perlman*, 189 Ill. App. 59; *Driscoll v. Sullivan (Ind.)*, 115 N. E. 331; *Foster County State Bank v. Lammers*, 117 Minn. 94, 134 N. W. 501; *Miners & Co. Bank v. American Bonding Co. (Mo. App.)*, 186 S. W. 1139; *Decker v. Smith*, 88 N. J. L. 630, 96 Atl. 915; *Greenberg v. Eisenberg*, 154 N. Y. S. 119; *Sherman v. Pacific Coast Pipe Co. (Okla.)*, 159 Pac. 333, L. R. A. 1917A, 716 and note; *Schumacher v. Moffit*, 71 Ore. 79, 142 Pac. 353; *Lustin v. Philadelphia & Co.*, 250 Pa. 425, 95 Atl. 595; *Johnson v. Hoover (Tex. Civ. App.)*, 165 S. W. 900; *Smoot v. Checketts*, 41 Utah 211, 125 Pac. 412, Ann. Cas. 1915C, 1113n; Mississippi and New Hampshire seem to be the only jurisdictions in which the contrary is held.

See note in L. R. A. 1917A, 719, 720, also *Frey v. Hubbell*, 74 N. H. 358, 68 Atl. 325, 17 L. R. A. (N. S.) 1197.

<sup>43</sup> *Sigler v. Sigler*, 98 Kans. 524, 158 Pac. 864, L. R. A. 1917A, 725. See also *Donahue v. Brooks*, 143 Ill. App. 188; *Kuhn v. Kuhn*, 171 Ill. App. 298.

<sup>44</sup> *Ikard v. Armstrong*, 10 Ala. App. 657, 65 So. 849.

<sup>45</sup> *Zabludowsky v. Gottfried*, 95 Misc. 623, 159 N. Y. S. 785.

<sup>46</sup> *Foster County State Bank v. Lammers*, 117 Minn. 94, 134 N. W. 501. See also *Gilia v. Robbins (Minn.)*, 158 N. W. 807. Where a will required a legatee to make a payment at the end of each year, it was held that there was no consideration for a promise to make it in more frequent instalments: *Steele v. Syracuse University*, 174 App. Div. 41, 160 N. Y. S. 39.

payment in full of the indebtedness, and the creditor's acceptance of a check for the agreed sum and retention of the proceeds preclude recovery of any balance of the original indebtedness remaining.<sup>47</sup>

§ 222. **Miscellaneous exceptions.**—Payment by the debtor's own check, or by a cashier's check, will not make an exception to the rule that payment of part of a liquidated and undisputed liability is not an accord and satisfaction of it all.<sup>48</sup> Nor is an agreement by joint makers of a note, to get one of their number, who is insolvent, to pay his proportionate share, a sufficient consideration for an agreement to accept less than the whole amount in full payment.<sup>49</sup>

§ 224. **Impossible consideration.**<sup>50</sup>

§ 226. **Illegal consideration.**<sup>51</sup>—Every part of the consideration goes equally to the whole promise, and, therefore, if any part of it is contrary to public policy or otherwise illegal, the whole promise fails and the contract will not be enforced.<sup>52</sup>

§ 227. **Voluntary subscription.**<sup>53</sup>

§ 228. **Voluntary subscription valid when supported by consideration.**<sup>54</sup>—Where a subscription to a charity is acted on before its withdrawal and the promisee expends money, performs services or incurs liabilities on the faith thereof and in

<sup>47</sup> *Punamchand v. Temple*, L. R. (1911) 2 K. B. 330, 80 L. J. K. B. (N. S.) 1155, 105 L. T. (N. S.) 277. See also *Cunningham v. Irvin*, 182 Mich. 629, 148 N. W. 786. But compare *Barber Asphalt Pav. Co. v. Mullen*, 220 Mass. 308, 107 N. E. 978.

<sup>48</sup> *Stewart v. Riley*, 189 Ala. 519, 66 So. 488; *Jordy v. Maxwell*, 62 Fla. 236, 56 So. 946; *Foster County State Bank v. Lammers*, 117 Minn. 94, 134 N. W. 501. But see *American Seeding & Co. v. Baker*, 55 Ind. App. 625, 104 N. E. 524; *Neubacker v. Perry*, 57 Ind. App. 362, 103 N. E. 805.

<sup>49</sup> *Foster County Sav. Bank v. Lammers*, 117 Minn. 94, 134 N. W. 501.

<sup>50</sup> [Main section quoted in *Berry*

*v. Wells*, 43 Okla. 70, 141 Pac. 444, and in *Clements v. Jackson County Oil & C. Co. (Okla.)*, 161 Pac. 216, 218.]

<sup>51</sup> *McKay v. McKay* (Tex. Civ. App.), 189 S. W. 520.

<sup>52</sup> *Western Indemnity Co. v. Crafts*, 240 Fed. 1, citing *Hazelton v. Sheckells*, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. 567, 6 Ann. Cas. 217, and other cases. Compare also *Kuhn v. Buhl*, 251 Pa. 348, 96 Atl. 977. But see post § 682.

<sup>53</sup> See note in 48 L. R. A. (N. S.) 785.

<sup>54</sup> [Main section cited in *Young Men's Christian Assn. v. Estell*, 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (N. S.) 783, 791, Ann. Cas. 1914D, 136n.]

furtherance of the enterprise such subscription is thereby supported by a consideration and may be enforced.<sup>55</sup>

§ 229. Mutual promises as a consideration therefor.<sup>56</sup>

§ 231. Promise for promise.—The general rule that mutual promises may be a consideration for each other is well settled and illustrated by many cases.<sup>57</sup> But there must be mutuality of engagement and obligation so that, in general, each party may have an action upon it.<sup>58</sup> If, however, from the terms of the

<sup>55</sup> *Owenby v. Georgia Baptist Assembly*, 137 Ga. 698, 74 S. E. 56, Ann. Cas. 1913B, 238n; *Young Men's Christian Assn. v. Estell*, 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (N. S.) 783 and note, Ann. Cas. 1914D, 136n; *Brokaw v. McElroy*, 162 Iowa 288, 143 N. W. 1087, 50 L. R. A. (N. S.) 835 (but commission paid for obtaining subscription to endowment is not a sufficient consideration for such subscription); *Converse's Estate*, 240 Pa. 458, 87 Atl. 849.

<sup>56</sup> See and compare *Brokaw v. McElroy*, 162 Iowa 288, 143 N. W. 1087, 50 L. R. A. (N. S.) 835, with *Evangelist &c. Gemenide v. Pruess*, 140 Wis. 349, 122 N. W. 719, 17 Ann. Cas. 1074.

<sup>57</sup> *Wilkes v. Stacy*, 113 Ark. 556, 169 S. W. 796; *Federal Realty Co. v. Evins*, 120 Ark. 259, 179 S. W. 344; *Matzen v. Morton Bldg. Co.*, 28 Cal. App. 330, 152 Pac. 317; *Dallavo v. Dallavo*, 189 Mich. 350, 155 N. W. 538; *Milholland v. Payne*, 159 App. Div. 10, 143 N. Y. S. 1090; *Harbeck v. Harbeck*, 87 Misc. 420, 149 N. Y. S. 791; *Flannery v. Wessels*, 244 Pa. 321, 90 Atl. 715; *Fourth Nat. Bank v. Stahlman*, 132 Tenn. 367, 178 S. W. 942, L. R. A. 1916A, 568n; *Farabee-Treadwell Co. v. Union & Planters' Bank &c. Co.*, 135 Tenn. 208, 186 S. W. 92, L. R. A. 1916F, 501n; *J. B. Farthing Lumber Co. v. Galveston &c. R. Co.* (Tex. Civ. App.), 178 S. W. 725; *Stack v. Roth Bros. Co.*, 162 Wis. 281, 156 N. W. 148.

<sup>58</sup> *McGowin Lumber &c. Co. v. R. J. & B. F. Camp Lumber Co.*, 192 Ala. 35, 68 So. 263; *Strauss v. Brier*, 57 Colo. 65, 140 Pac. 183; *Hall v. Edwards*, 140 Ga. 765, 79 S. E. 852; *Friedman v. Ware*, 17 Ga. App. 677, 87 S. E. 1099; *Haynes Auto*

*Co. v. Turner* (Ga. App.), 88 S. E. 717; *Houser v. Hobart*, 22 Idaho 735, 127 Pac. 997, 43 L. R. A. (N. S.) 410n; *Nicholl v. Wetmore* (Iowa), 156 N. W. 319; *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393; *Wilt v. Hammond*, 179 Mo. App. 406, 165 S. W. 362. See also *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324, 114 C. C. A. 284; *Oakland Motor Car Co. v. Indiana Auto Co.*, 201 Fed. 499, 121 C. C. A. 319; *Ellis v. Dodge Bros.*, 237 Fed. 860; *The Gleaner*, 240 Fed. 163; *Rehm-Zeiber Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S. W. 777, 49 L. R. A. (N. S.) 694. Where there is no other consideration for a contract, the mutual promises must be binding on both parties, but, where there is any other valid consideration, mutuality of obligation is not essential to the validity of the contract: *Roberts v. Anthony* (Tex. Civ. App.), 185 S. W. 423. "An agreement to purchase shares of stock one year from date at a price to be mutually agreed upon, with a provision that if the seller desires to sell he should give the purchaser 30 days' notice of his intention to sell, is unilateral; the seller not being bound to sell and making no promise whatsoever": *Martin v. Cox*, 13 Ga. App. 236, 79 S. E. 39. So, generally, where one party is not bound to perform work the other agrees to pay for or to take goods the other agrees to sell, and the like: *Grayling Lumber Co. v. Hemingway*, 124 Ark. 354, 187 S. W. 327; *Olson v. Whiffen*, 175 Ill. App. 182; *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393; *Quigley v. King*, 182 Mo. App. 196, 168 S. W. 285; *Jermyn v. Searing*, 170 App. Div. 707, 156 N. Y. S. 718; *Butchers' Advocate Co. v. Berkof*, 94 Misc. 299,

contract mutuality of engagement is necessarily implied, a binding obligation is thereby created.<sup>59</sup> And a want of mutuality is not a defense after a contract has been executed; and perform-

158 N. Y. S. 160; *Sigsbee v. New Era Mfg. Co.*, 95 Misc. 579, 159 N. Y. S. 740; *Rogers v. White Sewing Mach. Co.* (Okla.), 157 Pac. 1044. There is a lack of mutuality in consideration preventing recovery for breach of an agreement to notify plaintiff when it would be ready to let bids for the sale of fixtures, where plaintiff did not agree to bid: *Wooten v. S. R. Biggs Drug Co.*, 169 N. Car. 64, 85 S. E. 140. Contracts between a railroad company and a telephone company which gave the latter the privilege of placing telephones in two depots in consideration of free service for it were not mutual, where they were subject to termination at the will of one with a provision that no such right should be exercised by the other: *Great Northern R. Co. v. Sheyenne Tel. Co.*, 27 N. Dak. 256, 145 N. W. 1062; *Weegham v. Killefer*, 215 Fed. 168. To same effect are the following: *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. S. 6 (baseball player's contract terminable at will of one party alone); *Texas Produce Exchange v. Sorrell* (Tex. Civ. App.), 168 S. W. 74; *Owens v. Corsicana Petroleum Co.* (Tex. Civ. App.), 169 S. W. 192. See also *Fire Ass'n v. Perry* (Tex. Civ. App.), 185 S. W. 374. But in many other cases provisions giving one party the right to terminate the contract on notice, or the like, have been held not to destroy mutuality: *Mayo v. American Malt-ing Co.*, 211 Fed. 945, 128 C. C. A. 443; *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823; *Bozzone v. Stafford*, 85 Misc. 53, 146 N. Y. S. 1076; *Realty Advertising &c. Co. v. Englebert Tyre Co.*, 89 Misc. 371, 151 N. Y. S. 885; *Davis v. Conn* (Tex. Civ. App.), 161 S. W. 39; *White v. McCullagh*, 74 W. Va. 160, 81 S. E. 720.

<sup>59</sup> *Rotzien-Furber Lumber Co. v. Franson*, 123 Minn. 122, 143 N. W. 253, holding a contract for sale of an article not void for want of mutuality, though there was no express

understanding on the part of the seller to sell, as such undertaking was sufficiently implied from the express terms; and citing *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202n; *Hoffman v. Maffioli*, 104 Wis. 630, 637, 80 N. W. 1032, 1035, 47 L. R. A. 427. See also *Conley Camera Co. v. Multi-scope & Film Co.*, 216 Fed. 892, 133 C. C. A. 96; *Hamby v. Truitt*, 14 Ga. App. 515, 81 S. E. 593; *Bendix v. Staver Carriage Co.*, 174 Ill. App. 589; *Carterville Coal Co. v. Covey-Durham Coal Co.*, 186 Ill. App. 163; *Turner v. Frazier*, 157 Ky. 388, 163 S. W. 245; *Elkhorn Consol. Coal &c. Co. v. Eaton*, 163 Ky. 306, 173 S. W. 798; *Ayer & Lord Tie Co. v. O'Bannon*, 164 Ky. 34, 174 S. W. 783; *Scott v. T. W. Stevenson Co.*, 130 Minn. 151, 153 N. W. 316; *Western Macaroni Mfg. Co. v. Fiore*, 47 Utah 108, 151 Pac. 984. A contract for future delivery of goods is void for want of mutuality if the quantity to be delivered depends wholly upon the will, wish, or want of a party; but it may be upheld if the quantity can be ascertained and determined otherwise with reasonable certainty: *Parks v. Griffith & Boyd Co.*, 123 Md. 233, 91 Atl. 581. See and compare *Ellis v. Dodge Bros.*, 237 Fed. 860. For other cases where it was held there was sufficient mutuality of consideration, see *Clark v. Belt*, 223 Fed. 573, 138 C. C. A. 1; *Gibbs v. Wallace*, 58 Colo. 364, 147 Pac. 686; *Cooper v. Dixie Cotton Co.*, 144 Ga. 33, 86 S. E. 242; *Atlanta Oil &c. Co. v. Phosphate Mining Co.*, 144 Ga. 75, 86 S. E. 216; *Miller v. Duntley*, 182 Ill. App. 205; *Richmond-Smith Co. v. Richardson*, 183 Ill. App. 204; *First Nat. Bank v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084; *Young v. Millon* (Mo. App.), 183 S. W. 355; *Boonton v. United Water Supply Co.*, 83 N. J. Eq. 536, 91 Atl. 814, affirmed in 93 Atl. 1086; *Huebner v. Huebner*, 163 Wis. 166, 157 N. W. 765.

ance, or, in some instances, tender by the promisee may make good a lack of mutuality in the beginning.<sup>60</sup> But it is held in some cases that there is a fatal lack of mutuality where the contract is not enforceable as to one of the parties because it is defectively signed or within the statute of frauds as to him, and that the principle that a contract may be validated and rendered mutual by tender or performance has no application where it was never at any time enforceable.<sup>61</sup>

§ 232. **Mutuality—Options.**—Although a promise by one party without any corresponding promise, or consideration, or obligation on the part of the other is voidable,<sup>62</sup> an option contract, though unsupported by consideration, may be accepted before it expires or is withdrawn, and this will obviate the original want of consideration and make a binding contract so far as that objection is concerned.<sup>63</sup>

<sup>60</sup> Pratt Consol. Coal Co. v. Short, 191 Ala. 378, 68 So. 63; Pullman Co. v. Meyer, 195 Ala. 397, 70 So. 763; McKenzie v. Stewart (Ala.), 72 So. 109; Marin Water & Co. v. Sausalito, 168 Cal. 587, 143 Pac. 767; Watson v. Vollentine, 183 Ill. App. 559; Victoria Limestone Co. v. Hinton, 156 Ky. 674, 161 S. W. 1109; Wallace v. Workman, 187 Mo. App. 113, 173 S. W. 35; Fisk v. Batterson, 165 App. Div. 952, 150 N. Y. S. 242; Merritt v. Adams County Land & Co., 22 N. Dak. 496, 151 N. W. 11; Stanley v. Sumrell (Tex. Civ. App.), 163 S. W. 697; Halff Co. v. Waugh (Tex. Civ. App.), 183 S. W. 839; Roberts v. Anthony (Tex. Civ. App.), 185 S. W. 423; Carter v. Hook, 116 Va. 812, 83 S. E. 386; Taylor v. Ewing, 74 Wash. 214, 132 Pac. 1009; John E. De Wolf Co. v. Harvey, 161 Wis. 535, 154 N. W. 988. An agreement to buy stock if it did not pay the holder certain dividends is not void for want of mutuality, where by a contemporaneous contract the holder accepted the stock as part of the price of property sold by him: Poole v. Corker, 15 Ga. App. 622, 83 S. E. 1101. But where, in a writing, reciting a \$1 consideration, the defendant offered to sell land at a certain price, but plaintiff did not agree to purchase, there was held to be a lack of mutuality, although plaintiff tendered defendant

a \$1 check upon the execution of the instrument: Houghtling v. Eubank (Tex. Civ. App.), 186 S. W. 364.

<sup>61</sup> Wood v. Lett, 195 Ala. 601, 71 So. 177; Houser v. Hobart, 22 Idaho 735, 127 Pac. 997, 43 L. R. A. (N. S.) 410n; Rehm-Zeiber Co. v. F. G. Walker Co., 156 Ky. 6, 160 S. W. 777, 49 L. R. A. (N. S.) 694. See also Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324, 114 C. C. A. 284; Oakland Motor Car Co. v. Indiana Automobile Co., 201 Fed. 499, 121 C. C. A. 319; Ellis v. Dodge Bros., 237 Fed. 860; Kooman v. De Jonge, 186 Mich. 292, 152 N. W. 1016. Some of the above cases, or at least the Idaho case, would seem to be contrary to the weight of authority. See note in 43 L. R. A. (N. S.) 410, and note in 28 L. R. A. (N. S.) 680; also Flagg v. Hitchcock, 143 Ga. 379, 85 S. E. 125; Knapp v. Beach, 52 Ind. App. 573, 101 N. E. 37.

<sup>62</sup> Lemler v. Bord, 80 Ore. 224, 156 Pac. 427.

<sup>63</sup> Carter v. Hook, 116 Va. 812, 83 S. E. 386. For contract held mutual and not a mere option see Clark v. Cagle, 141 Ga. 703, 82 S. E. 21, L. R. A. 1915A, 317. Where a lease at specified annual rental to the lessee contained the privilege of purchasing at such amount as might be offered by another, the option was supported



§ 233. **Abandonment of legal right.**—The bona fide surrender and satisfaction of an existing debt operates as a present consideration.<sup>64</sup> So a release or an agreement to release from a bona fide claim is a sufficient consideration for a promise to pay money.<sup>65</sup> The release of an inchoate right of dower or of an equity of redemption is likewise a sufficient consideration for a promise.<sup>66</sup> And a waiver of a legal right is also a sufficient consideration for a promise.<sup>67</sup>

§ 234. **Forbearance.**—An agreement to forbear the enforcement or exercise of a legal right is a sufficient consideration for a promise.<sup>68</sup> And forbearance to exercise a legal right may constitute a good consideration for giving security even though there is no express agreement to forbear.<sup>69</sup>

by general consideration for entire contract and was not unilateral: *Turman v. Smarr*, 145 Ga. 312, 89 S. E. 214.

<sup>64</sup> *Sutton v. Ford*, 144 Ga. 587, 87 S. E. 799.

<sup>65</sup> *Miller v. Duntley*, 182 Ill. App. 205; *Reichman v. Pretzfelder*, 151 N. Y. S. 898.

<sup>66</sup> *Fitcher v. Griffiths*, 216 Mass. 174, 103 N. E. 471; *Lane v. Flint*, 217 Mass. 96, 104 N. E. 570.

<sup>67</sup> A promise by one to pay another a sum of money in consideration of his waiving his rights to purchase the former's plant is supported by such consideration: *Skinner v. Fisher*, 120 Ark. 91, 178 S. W. 922. A subcontractor's waiver of his right to file a lien is sufficient consideration for the property owner's promise to pay the amount due: *Schade v. Muller*, 75 Ore. 225, 146 Pac. 144. See also *Weisse v. Fowler*, 176 Ill. App. 260.

<sup>68</sup> *Brinkley Car & C. Mfg. Co. v. Cook*, 110 Ark. 325, 161 S. W. 1065; *Bank of Montreal v. Beecher*, 133 Minn. 81, 157 N. W. 1070; *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492. An agreement by a woman to waive and forbear her claim for alimony against her husband in a divorce suit is sufficient to support a promise by her father to pay her a certain sum if she will come to his home and keep house for him: *Spalding v.*

*White*, 184 Ill. App. 217. The agreement of one in a position to contest a will, to forbear opposing its establishment, is a sufficient consideration to support a promise to pay: *Brandenburger v. Puller*, 266 Mo. 534, 181 S. W. 1141. Where one's house admittedly encroached for about a foot and a half upon another's right of way, an allowance of eight months' time to remove the encroachment was a sufficient consideration for her agreement to do so: *Bochterle v. Saunders*, 36 R. I. 39, 88 Atl. 803. See also for other illustrative cases: *Weisse v. Fowler*, 176 Ill. App. 260; *Orr v. Orr*, 181 Ill. App. 148; *Powell v. Union Pac. R. Co.*, 255 Mo. 42, 164 S. W. 628; *Williams v. City Nat. Bank* (Tex. Civ. App.), 166 S. W. 130. But compare *Roberts v. Anthony* (Tex. Civ. App.), 185 S. W. 423.

<sup>69</sup> *In re All Star Feature Corp.*, 232 Fed. 1004. But where there was no promise to forbear and no grant of any favor on account of the promise to pay, it was held that mere forbearance to press a claim is not sufficient consideration for the promise of one who had taken a conveyance of land with an agreement to pay the grantor's debts, to pay a debt contracted subsequent to the execution of the deed: *In re Rohrig*, 176 Mich. 407, 142 N. W. 561.

§ 235. **Forbearance to sue—Time.**—Forbearance to sue is generally a valid and sufficient consideration;<sup>70</sup> but forbearance to sue upon a claim that is clearly invalid and not enforceable either in law or equity for want of consideration is not a sufficient consideration for a new promise.<sup>71</sup>

§ 236. **Extension of time.**—Extension of time for payment of an existing debt is a valuable consideration.<sup>72</sup> But an agreement to extend the time is not a binding contract unless supported by a consideration.<sup>73</sup>

§ 237. **Compromise of disputed claims.**—The compromise of a doubtful disputed claim is sufficient consideration for a

<sup>70</sup> *Corletto v. Morgan*, 4 Del. 530, 89 Atl. 738 (good consideration for promise to plaintiff to pay any judgment rendered against defendant in another action); *R. & L. Co. v. Metz*, 165 App. Div. 533, 150 N. Y. S. 843. See also *Gaar v. Vanhook*, 162 Ky. 332, 172 S. W. 680; *Robinson v. Oliver*, 171 App. Div. 349, 156 N. Y. S. 896; *Williams v. City Nat. Bank* (Tex. Civ. App.), 166 S. W. 130. Forbearance to sue upon a claim which is asserted in good faith, though it may be a doubtful one, is a good consideration for a promise founded thereon: *Sellers v. Jones*, 164 Ky. 458, 175 S. W. 1002. A promise by the purchaser of an interest in partnership to pay a creditor if he would forbear suing and attaching was held supported by consideration, though the partnership affairs so turned out that he received nothing from his purchase: *Miller v. Davis*, 168 Ky. 661, 182 S. W. 839. A creditor's agreement to withhold suit against his debtor, followed by actual forbearance, is a sufficient consideration to support a third party's promise to pay the debt, although no definite time of extension was expressly agreed on: *Enterprise Trading Co. v. Bank of Crowell* (Tex. Civ. App.), 167 S. W. 296.

<sup>71</sup> *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492. See also *Baillargeon v. Dumoulin*, 148 N. Y. S. 443.

<sup>72</sup> *Robertson v. United States Live Stock Co.*, 164 Iowa 230, 145 N. W. 535. See also *Leonard v. Hallett*,

57 Colo. 274, 141 Pac. 481. An agreement to extend the time of payment of a debt for a reasonable time is a sufficient consideration for a contract, since, while the extension must be definite, an extension for a reasonable time is capable of being made definite: *Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549. And a promise by the creditor to extend for an indefinite time followed by delay for a reasonable time to enforce payment, is a good consideration for a new obligation of the debtor: *Starr Piano Co. v. Baker*, 8 Ala. App. 449, 62 So. 549; *Security Nat. Bank v. Pulver*, 131 Minn. 454, 155 N. W. 641.

<sup>73</sup> *Maker v. Taft*, 41 Okla. 663, 139 Pac. 970, 52 L. R. A. (N. S.) 328, and note. Where a creditor promised to give his debtor until the next spring within which to pay the debt, provided he accepted a certain employment from a third person, and the debtor had already accepted such employment before the promise was made, it was held that such extension agreement was without consideration: *Hoeven v. Morley*, 36 S. Dak. 421, 155 N. W. 191. As to what is or is not a sufficient consideration for extension, see and compare *Lohn v. Koep*, 139 Iowa 349, 115 N. W. 877, 52 L. R. A. (N. S.) 327n, with *Maker v. Taft*, 41 Okla. 663, 139 Pac. 970, 52 L. R. A. (N. S.) 328 and note, to those cases in 52 L. R. A. (N. S.) 331-368, elaborately reviewing authorities.

promise,<sup>74</sup> and this is held where the claim is in good faith and on reasonable grounds even though the claim could not be enforced in court.<sup>75</sup>

### § 240. Services.<sup>76</sup>

§ 242. **Name and change of name.**—The privilege of naming a child is a valid consideration for a promise to pay money, and the child may enforce an agreement made by a stranger with its parents to place a certain sum in trust for it in consideration of such privilege.<sup>77</sup>

§ 243. **Contracts and contractual rights generally.**—A contract by one since deceased to pay an adopted son and wife a specific sum annually, substituted for a previous settlement by deed of a life estate is supported by a sufficient consideration even though the son would not have acquired a valid right under the deed.<sup>78</sup>

§ 245. **Interests in real property.**—Release of inchoate right of dower, or surrender of equity of redemption may be a sufficient consideration.<sup>79</sup>

§ 247. **Evidence of consideration.**—A consideration may be agreed on impliedly as well as expressly.<sup>80</sup> And a contract in writing signed by the party to be bound has been held in some jurisdictions, at least, to import a consideration.<sup>81</sup> Where the

<sup>74</sup> *Weisse v. Fowler*, 176 Ill. App. 260; *Pyle v. Murphy*, 180 Ill. App. 18; *Missouri &c. R. Co. v. Edwards* (Tex. Civ. App.), 176 S. W. 60.

<sup>75</sup> See also generally *Butson v. Miaz*, 81 Ore. 607, 160 Pac. 530.

<sup>76</sup> See note in *Ann. Cas.* 1913A, 865; also *Farley v. Stacey* (Ky.), 197 S. W. 636. See as to consideration and mutuality in contracts of employment for life and the like in case of release of liability, note to *Cox v. Baltimore &c. R. Co.*, 180 Ind. 495, 103 N. E. 337, in 50 L. R. A. (N. S.) 453. See post §§ 1363-1372.

<sup>77</sup> *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108n. See also *Daily v. Munck*, 117 Iowa 563, 91 N. W. 913, 60 L. R. A. 840.

<sup>78</sup> *Dawley v. Dawley's Estate*, 60 Colo. 73, 152 Pac. 1171. See also for other illustrative cases: *Kreuser v.*

*Thomas B. Jeffery Co.*, 191 Ill. App. 598; *Welty v. Taylor* (Ind. App.), 115 N. E. 257; *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022; *Carolina Hardware Co. v. Raleigh Banking & Trust Co.*, 169 N. Car. 744, 86 S. E. 706. But compare *Liebmann v. Dean*, 95 Misc. 97, 158 N. Y. S. 537; *Packing Co. v. Lewis C. Troughton, Inc.*, 90 Wash. 196, 155 Pac. 758.

<sup>79</sup> *Fitcher v. Griffiths*, 216 Mass. 174, 103 N. E. 471; *Lane v. Flint*, 217 Mass. 96, 104 N. E. 570.

<sup>80</sup> *Wadin v. Czuczka*, 16 Ariz. 371, 146 Pac. 491.

<sup>81</sup> *Geddes v. McElroy*, 171 Iowa 633, 154 N. W. 320; *Maxwell v. Harroun* (Mo. App.), 180 S. W. 993; *Crawford v. Woods* (Tex. Civ. App.), 185 S. W. 667. See also *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650.

instrument sued on recites an adequate consideration, this is generally sufficient and the plaintiff is not required, at least in the first instance, to prove the consideration by other evidence.<sup>82</sup>

§ 248. **Entire or indivisible consideration.**—Where the consideration is entire and indivisible and any part of it is illegal it goes to the whole contract and renders it unenforcible.<sup>83</sup>

§ 249. **Divisible consideration or promises.**—A contract may be valid although some particular clause or part of it may not be mutually binding or reciprocal.<sup>84</sup>

§ 250. **From whom consideration must move.**<sup>85</sup>

§ 252. **To whom consideration must move.**<sup>86</sup>

§ 253. **Want of consideration.**—Under many statutes a written contract imports or raises a presumption of consideration, and the burden of showing want of consideration is upon the party who seeks to defend or invalidate the instrument on that ground.<sup>87</sup>

§ 254. **Failure of consideration.**—Where one pays money to another for a promise to perform acts and the latter wholly fails to perform there is a failure of consideration; but where the promisee loaned money for which the promisor agreed to give shares of stock in a corporation to be formed to build a machine, and to set aside other shares to repay the promisee from their

<sup>82</sup> *In re Thompson's Estate*, 192 Ill. App. 415. As to what is sufficient or admissible on the question of consideration, see *Bradley v. Western Casket & Undertaking Co.*, 185 Ill. App. 375; *Mack v. Mack*, 94 Nebr. 504, 143 N. W. 454; *Empire Lighting Fixture Co. v. Browning*, 93 Misc. 489, 157 N. Y. S. 284; *Leaksville-Spray Institute v. Mebane*, 165 N. Car. 644, 81 S. E. 1020. Actual forbearance to sue may often, in connection with other circumstances, sometimes slight, be sufficient evidence of an implied agreement to forbear, forming a consideration for a promise: *Sellers v. Jones*, 164 Ky. 458, 175 S. W. 1002.

<sup>83</sup> *Western Indemnity Co. v. Crafts*, 240 Fed. 1.

<sup>84</sup> *Montanus v. Buschmeyer*, 158 Ky. 53, 164 S. W. 802.

<sup>85</sup> *Olston v. Ostby*, 178 Ill. App. 165. See *Clement v. Rowe*, 33 S. Dak. 499, 146 N. W. 700.

<sup>86</sup> See *Olson v. Ostby*, 178 Ill. App. 165; *Nicholson v. Nicholson Coal Co.*, 190 Ill. App. 607; *Reed v. Adams Steel & C. Works*, 57 Ind. App. 259, 106 N. E. 882; *McDonald v. Finseth*, 32 N. Dak. 400, 155 N. W. 863; *Union Mach. & C. Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183; *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543.

<sup>87</sup> *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994; *In re McLaughlin's Estate*, 182 Mich. 707, 151 N. W. 745; *Ball v. White (Okla.)*, 150 Pac. 901; *St. Louis & C. R. Co. v. Bruner (Okla.)*, 152 Pac. 1103; *Reeves v. Dyer (Okla.)*, 153 Pac. 850.

dividends, and both parties knew that this depended on the perfection of an invention on which the promisor was working and he continued to work diligently thereon but failed, it was held that there was no failure of consideration.<sup>88</sup> A promise may be sustained in a proper case where several considerations are recited and some of them are good and sufficient, notwithstanding one or more of the others may be insufficient but not illegal.<sup>89</sup>

<sup>88</sup> *Palmer v. Guillo*, 224 Mass. 1, 112 N. E. 493. But see *Craddick v. Emery*, 93 Wash. 648, 161 Pac. 484 (note given for device represented to be patentable and practicable held valueless and unpatentable and without consideration). Where a contract gave a party the right to use certain premises together with the spur track under the regulations of a railroad company owning the same, a change in the regulations of the railroad, which deprived him of the use of the spur track, did not make a failure of consideration: *Roberts v. Chatwin*, 108 Ark. 562, 158 S. W. 497. Where a contract for aeroplane exhibitions provided for an advance payment as soon as the machine reached the place of exhibition, there was no right to recover such ad-

vance payment on the ground of failure of consideration, although the defendant failed to make the number of flights required by the contract after her arrival: *Harrington v. Law* (R. I.), 90 Atl. 660. See as to when burden of showing failure of consideration is on defendant: *Kennedy v. Winfrey* (Tex. Civ. App.), 163 S. W. 1018.

<sup>89</sup> Upon partial failure of the consideration for an agreement to pay another's debts, it has been held that the deficiency should be borne by the creditors pro rata in the proportion that the claim of each bears to the whole consideration: *Gunn v. McAlpine*, 125 Minn. 343, 147 N. W. 111; *Drummond Realty & Investment Co. v. W. H. Thompson Trust Co.* (Mo.), 178 S. W. 479.

## CHAPTER X

### PARTIES

§ 261. **Capacity is generally presumed.**—Mental capacity to contract is presumed.<sup>1</sup>

§ 263. **United States or state as a party.**—A state has power, although it may not have the right, to break a contract; and, whether it may be liable in damages or not, specific performance of a contract to build a public building can not be enforced against it.<sup>2</sup> Statutes in many states prohibit members of the legislature from becoming interested, either directly or indirectly, in contracts with the state, and a contract in which such a member is pecuniarily interested can not be enforced by him and is usually void.<sup>3</sup>

§ 265. **Aliens.**—As a general rule all unlicensed agreements made with an alien enemy during war involving commercial intercourse with adherents of the enemy or otherwise calculated, directly or indirectly, to augment the enemy's resources or result in detriment to the home country are invalid.<sup>4</sup> Contracts made before the war are sometimes merely suspended, but in many instances they are dissolved by the war, the result depending largely on the nature of the contract and the effect further performance might have.<sup>5</sup> A domestic corporation may be re-

<sup>1</sup> *Lambert v. State*, 13 Ala. App. 289, 69 So. 261.

<sup>2</sup> *Caldwell v. Donaghey*, 108 Ark. 60, 156 S. W. 839, 45 L. R. A. (N. S.) 721n, Ann. Cas. 1915B, 133n. See also *Dawson v. Columbia Ave. Sav. &c. Co.*, 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. 420; *Northern Pac. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341; *Falls City Const. Co. v. Fort Smith*, 107 Ark. 148, 154 S. W. 496.

<sup>3</sup> *Norbeck v. State*, 32 S. Dak. 189, 142 N. W. 847, and note. As to compromise or part payment of claims against United States, a state, county, or municipality and when it is or is not settlement in full, see: *Paulson v. Ward County*, 23 N. Dak. 601, 137

N. W. 486, 42 L. R. A. (N. S.) 111n, and cases reviewed in note to that case as reported in Ann. Cas. 1914D, 822, 824-830.

<sup>4</sup> *Robson v. Premier Oil &c. Co.*, L. R. (1915) 2 Ch. 124, Ann. Cas. 1917C, 227; *Zinc Corp. v. Hirsch*, L. R. (1916) 1 K. B. 541, L. R. A. 1917C, 650.

<sup>5</sup> *Watts v. Union Austriaca di Navigazione*, 224 Fed. 188; *Zinc Corp. v. Hirsch*, L. R. (1916) 1 K. B. 541, L. R. A. 1917C, 650. Some contracts, such as agency, are not necessarily affected. The whole subject is elaborately treated in note in L. R. A. 1917C, 662-689, and see also note in Ann. Cas. 1917C, 189-214.

garded as an alien enemy during the war when its actual control and management are vested in individuals who are citizens and residents of the enemy country or adhere to the enemy; and no action that could be authorized only by directors can be authorized and taken by it when all the directors are alien enemies domiciled in the enemy country.<sup>6</sup>

§ 266. **Convicts.**—In this country the general rule is that a convict has legal capacity to contract, and this has been held as to some contracts at least even under a statute providing that “all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights” and that “a sentence of imprisonment in the penitentiary for any term less than life suspends all civil rights.”<sup>7</sup>

§ 267. **Effect of laws requiring license or the like.**<sup>8</sup>—Failure of a money lender to give the borrower a memorandum of the transaction as required by a statute which merely subjects him to a fine for such failure does not prevent the enforcement of the securities therefor, and neither does his failure to secure a pawnbroker's license, required by municipal ordinance for revenue purposes under penalty for transacting of such business without it, do so.<sup>9</sup> Many of the state statutes make contracts by foreign corporations void or at least unenforceable by them where they have not complied with the domestic law, but under some of the statutes such a contract is not void nor even voidable or unenforceable in all cases and courts.<sup>10</sup>

<sup>6</sup> *Daimler Co. v. Continental Tyre & Co.*, L. R. (1916) 2 App. Cas. 307, Ann. Cas. 1917C, 170. See also *Porter v. Freudenberg*, L. R. (1915) 1 K. B. 857, Ann. Cas. 1917C, 215 (as to who are alien enemies and their rights).

<sup>7</sup> *Byers v. Sun Savings Bank*, 41 Okla. 728, 139 Pac. 948, Ann. Cas. 1916D, 222n, 52 L. R. A. (N. S.) 320n.

<sup>8</sup> [Main section cited in *Wood v. Krepps*, 168 Cal. 382, 143 Pac. 691, L. R. A. 1915B, 851n, 855; *Goldsmith v. Manufacturers' & Ins. Co. (Md.)*, 103 Atl. 627, 628.]

<sup>9</sup> *Wood v. Krepps*, 168 Cal. 382, 143 Pac. 691, L. R. A. 1915B, 851n. But compare *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424; *In re Robinson*, L. R. (1912) 1 Ch. 717, 81 L. J. Ch. (N. S.) 393, 106 L. T. (N. S.) 443.

<sup>10</sup> *David Lupton's Sons Co. v. Automobile Club*, 225 U. S. 489, 56 L. ed. 1177, 32 Sup. Ct. 711, Ann. Cas. 1914A, 699, and note reviewing many cases under different statutes. Among the recent cases holding such contracts void or unenforceable are the following: *Thomas v. Birmingham R. & Co.*, 195 Fed. 340; *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, 56 So. 961; *Ulmer v. St. Petersburg First Nat. Bank*, 61 Fla. 460, 55 So. 405; *Morris-Roberts Co. v. Mariner*, 24 Idaho 788, 135 Pac. 1166; *Fruin-Colnon Cont. Co. v. Chatterton*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857n; *Parke-Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461; *Duluth Music Co. v. Clancy*,

§ 268. **Youth or lack of age.**—In England an infant's contract for necessities is binding and can not be repudiated by him on the ground that it is partly executory.<sup>11</sup> But, where a substantial part of a contract entire and indivisible in its character, is for other than necessities, it fails as an entirety and no action can be maintained thereon for the price.<sup>12</sup> In this country, while there may be a liability on implied contract for necessities, it is generally held that he may repudiate an express executory contract even for necessities and escape liability thereon.<sup>13</sup>

§ 269. **Mental incapacity.**—A man may be of unsound mind and in a sense insane in some respect or on some subject and still be capable of acting with judgment and understanding and making contracts as to other matters or in other respects.<sup>14</sup>

§ 270. **Deaf mutes.**<sup>15</sup>

139 Wis. 189, 120 N. W. 854, 131 Am. St. 1051. Among those holding the contract enforceable are the following, in several of which the company was held not to be doing business within the state or the contract was otherwise not within the statute: *Wilson-Moline Buggy Co. v. Hawkins*, 223 U. S. 713, 56 L. ed. 625, 32 Sup. Ct. 520 (does not prevent interstate commerce contract being enforced); *Vulcan Steam Shovel Co. v. Flanders*, 205 Fed. 102; *Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295 (not absolutely void and statute not enforced so as to injure innocent person); *Simmons-Burks Clothing Co. v. Linton*, 90 Ark. 73, 117 S. W. 775; *G. Ober & Sons Co. v. Katzenstein*, 160 N. Car. 439, 76 S. E. 476; *Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807 (executed contract). Some statutes merely suspend the remedy. As to right to set up the contract as a defense, see: *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210n; *Kendrick v. Warren Bros. Co.*, 110 Md. 47, 72 Atl. 461; *Hirschfield v. McCullagh*, 64 Ore. 502, 127 Pac. 541, 130 Pac. 1131. See also *National Fertilizer Co. v. Fall River & Co. Bank*, 196 Mass. 458, 82 N. E. 671, 14 L. R. A. (N. S.) 561n, 13 Ann. Cas. 510.

<sup>11</sup> *Roberts v. Gray*, L. R. (1913) 1 K. B. 520, Ann. Cas. 1914C, 236.

<sup>12</sup> *Stocks v. Wilson*, L. R. (1913) 2 K. B. 235.

<sup>13</sup> *Appeal of Ennis*, 84 Conn. 610, 80 Atl. 772; *International Textbook Co. v. McKone*, 133 Wis. 200, 113 N. W. 438. See also notes in Ann. Cas. 1914C, 239, 240; and in 44 L. R. A. (N. S.) 411.

<sup>14</sup> *Cathcart v. Matthews*, 105 S. Car. 329, 89 S. E. 1021. As to competency to agree to arbitrate, see note in 47 L. R. A. (N. S.) 345. As to insanity of subscriber to charity as revoking subscription, see note in 48 L. R. A. (N. S.) 801. As to right of attorney to recover for services rendered insane person as necessities, see: *In re Freshour's Estate*, 174 Mich. 114, 140 N. W. 517, Ann. Cas. 1915A, 726, and note; also note in 45 L. R. A. (N. S.) 67n; and for evidence held sufficient to justify jury in finding injured employé did not have sufficient mental capacity to execute release, see *Buggs v. Rock County Sugar Co.*, 143 Wis. 462, 128 N. W. 100.

<sup>15</sup> The fact that a party is blind and unlearned in English does not make him incompetent to contract or render his contract invalid or voidable in the absence of fraud: *Guerra v. Rocco*, 181 Ill. App. 528.



§ 271. **Coverture.**—Although the maker of a note was a married woman on the day of its date this will not invalidate the note if she was unmarried at the time it was actually made and executed.<sup>16</sup>

§ 272. **Artificial persons and corporations.**<sup>17</sup>

§ 274. **Drunken persons.**—Mere drunkenness may not be sufficient in degree or effect to incapacitate a person from contracting, but when it does have that effect it renders the contract voidable by him even though the other party had nothing to do with causing the intoxication.<sup>18</sup> It may be disaffirmed when he becomes sober and comprehends its terms, or it may be ratified; and failure to disaffirm it within a reasonable time after becoming sober and having full knowledge is deemed a ratification of it.<sup>19</sup>

§ 276. **Where incapacity is such as to make contracts voidable.**—Contracts of an infant are generally voidable and not absolutely void.<sup>20</sup> So, contracts by an insane person before "office found" or adjudication of incompetency are usually voidable only.<sup>21</sup> And intoxication, even when sufficient to overcome the judgment of a party and make him incapable of understanding the engagement, ordinarily renders the contract merely voidable.<sup>22</sup>

<sup>16</sup> *Becker v. Noegel* (Wis.), 160 N. W. 1055.

<sup>17</sup> As to powers of corporation to make particular contracts, see notes in 47 L. R. A. (N. S.) 898; and L. R. A. 1915C, 793; as to ultra vires and estoppel, see notes in L. R. A. 1917A, 749; and L. R. A. 1917B, 821. A compromise is a contract, so that the parties must have capacity to make a contract relating to the matter which forms its object; and a state board of health has no power to compromise with the surety of a depository of its public funds on the failure of such depository and the appointment of a liquidator: *Board of Health v. Teutonia Bank & Co.*, 137 La. 422, 68 So. 748, Ann. Cas. 1916B, 1251n.

<sup>18</sup> *Coody v. Coody*, 39 Okla. 719, 136 Pac. 754, L. R. A. 1915E, 465.

<sup>19</sup> *Matz v. Martinson*, 127 Minn.

262, 149 N. W. 370, L. R. A. 1915B, 1121n.

<sup>20</sup> *Hudson v. Hudson*, 160 Ky. 432, 169 S. W. 891; *Chandler v. Jones*, 172 N. Car. 569, 90 S. E. 580; *Hobbs v. Hinton Foundry & Co.*, 74 W. Va. 443, 82 S. E. 267.

<sup>21</sup> *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021n; *National Metal Edge Box Co. v. Vanderveer*, 85 Vt. 488, 82 Atl. 837, 42 L. R. A. (N. S.) 343n, Ann. Cas. 1914D, 865n. But see where made after adjudication, *Anderson v. Hicks*, 150 App. Div. 289, 134 N. Y. S. 1018. And see generally, notes in 79 L. R. A. (N. S.) 461; and in 14 L. R. A. (N. S.) 962.

<sup>22</sup> *Snead v. Scott*, 182 Ala. 97, 62 So. 36; *Matz v. Martinson*, 127 Minn. 262, 149 N. W. 370, L. R. A. 1915B, 1121n.

§ 277. **Ratification.**—Contracts such as those referred to in the last preceding section, being merely voidable, may be ratified.<sup>23</sup>

<sup>23</sup> Sellers v. Knight, 185 Ala. 96, 1195; Hobbs v. Hinton Foundry &c. 64 So. 329; Lee v. Equitable Life Assurance Soc. (Mo. App.), 189 S. W. Co., 74 W. Va. 443, 82 S. E. 267.

## CHAPTER XI

### INFANTS

§ 292. **Contracts authorized by statute, contracts of enlistment.**—An enlistment is not an ordinary contract, and, under the Florida laws, the enlistment of a minor, over eighteen years of age, in the military service of the state is binding and can not be avoided by him even though the consent of his parents was not obtained.<sup>1</sup>

§ 293. **Marriage contracts.**—At common law a marriage of a person under the age of consent is voidable and not absolutely void.<sup>2</sup> This is also the rule in many of the states and even under statutes making it a criminal offense to issue a license without consent of the parent or guardian and to perform the marriage ceremony without such license, the marriage is not void.<sup>3</sup>

§ 295. **Valid contracts—Necessities.**—In England an infant is liable on his contract for necessities and it can not be repudiated by him on the ground that it is partly executory.<sup>4</sup> But in this country it is generally held that he is not liable on an express executory contract although he may be liable on implied contract for the reasonable value of necessities furnished.<sup>5</sup>

§ 296. **What are necessities.**—In order to constitute necessities, the articles must supply the infant's personal needs, and

<sup>1</sup> *Acker v. Bell*, 62 Fla. 108, 57 So. 356, 39 L. R. A. (N. S.) 454n, Ann. Cas. 1913C, 1269.

<sup>2</sup> Note in L. R. A. 1917C, 740.

<sup>3</sup> *Reifschneider v. Reifschneider*, 241 Ill. 92, 89 N. E. 255; *Browning v. Browning*, 89 Kans. 98, 130 Pac. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288 (nor even ground for annulment); *Levy v. Downing*, 213 Mass. 334, 100 N. E. 638; *Titsworth v. Titsworth*, 78 N. J. Eq. 47, 78 Atl. 687; *Cushman v. Cushman*, 80 Wash. 615, 142 Pac. 26, L. R. A. 1916C, 732

(nor even ground for annulment). But compare *Powers v. Powers*, 138 Ga. 65, 74 S. E. 759; *Crapps v. Smith*, 9 Ga. App. 400, 71 S. E. 501; *American Gas &c. Co. v. Coleman*, 16 Ga. App. 17, 84 S. E. 493. See as to conflict of laws in such cases, note in 43 L. R. A. (N. S.) 357.

<sup>4</sup> *Roberts v. Gray*, L. R. (1913) 1 K. B. 520, Ann. Cas. 1914C, 236.

<sup>5</sup> Note in Ann. Cas. 1914C, 239, 240. See also *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092n, Ann. Cas. 1916A, 959n.

the employment of a janitor for the infant's store building is not a contract for necessities.<sup>6</sup>

§ 298. **Necessities, education.**—A common school education is a necessary, but a five-year course of instruction in engineering is not ordinarily a necessary.<sup>7</sup>

§ 299. **Necessities, services of an attorney.**—It is generally held that legal services for the personal relief, protection or liberty of an infant, and even for the prosecution of action for personal injuries, and the like, are necessities for which he is liable to the extent of reasonable compensation.<sup>8</sup> So, where the services were for enforcing or protecting his property rights, and beneficial to him or his estate, he has been held liable for reasonable attorney's fees.<sup>9</sup> But such contracts with an attorney for professional service are voidable unless shown to be for necessities,<sup>10</sup> and in ordinary cases services in regard to property merely, such as the protection of title to real estate, or the like, are not regarded as necessities.<sup>11</sup>

§ 302. **Voidable contracts generally.**<sup>12</sup>

§ 303. **Conveyances, transfers and mortgages of property.**<sup>13</sup>

§ 304. **Bills and notes.**—An infant's indorsement is not void but voidable.<sup>14</sup>

<sup>6</sup> Covault v. Nevitt, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092n, Ann. Cas. 1916A, 959n.

<sup>7</sup> International Text Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115n.

<sup>8</sup> Hickman v. McDonald, 164 Iowa 50, 145 N. W. 322; Sutton v. Heinze, 84 Kans. 756, 115 Pac. 560, 34 L. R. A. (N. S.) 238; Sanders v. Woodbury, 146 Ky. 153, 142 S. W. 207; Everson v. Hurn, 89 Nebr. 716, 131 N. W. 1130.

<sup>9</sup> Owens v. Gunther, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130; Senseney v. Repp, 94 Md. 77, 50 Atl. 416; Helps v. Clayton, 112 E. C. L. 553, 17 C. B. (N. S.) 553; note in Ann. Cas. 605.

<sup>10</sup> Spencer v. Collins, 156 Cal. 298, 104 Pac. 320, 20 Ann. Cas. 49; Slusher v. Weller, 151 Ky. 203, 151

S. W. 684; Pope v. Lyttle, 157 Ky. 659, 163 S. W. 1121.

<sup>11</sup> Grissom v. Beidleman, 35 Okla. 343, 129 Pac. 853, 44 L. R. A. (N. S.) 411n, Ann. Cas. 1914D, 599n.

<sup>12</sup> Muller v. Chure Grocery Co., 241 Ill. 398, 89 N. E. 796, 132 Am. St. 216, 28 L. R. A. (N. S.) 128n, 16 Ann. Cas. 522 (infant may rescind subscription for stock and recover what he has paid on tendering back stock remaining in his possession); Hudson v. Hudson, 160 Ky. 432, 169 S. W. 891; Chandler v. Jones, 172 N. Car. 569, 90 S. E. 580; Hobbs v. Hinton Foundry & Co., 74 W. Va. 443, 82 S. E. 267.

<sup>13</sup> See post §§ 335, 337.

<sup>14</sup> Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917B, 1172n.

§ 305. **Contracts for service, work and labor.**<sup>15</sup>

§ 306. **Awards and compromises.**<sup>16</sup>

§ 309. **Corporate stock and membership.**<sup>17</sup>

§ 313. **Other illustrative cases—Leases made by guardian extending beyond term of guardianship.**<sup>18</sup>

§ 316. **Active concealment, estoppel.**—It is held in a recent English case that no recovery can be had against an infant for money loaned even though the loan was obtained by his false representations as to his age;<sup>19</sup> but, while there are other authorities to the same effect, there are also recent cases holding that an infant may be estopped by misrepresentations as to his age inducing the other party to make the contract and part with the consideration.<sup>20</sup>

§ 320. **Summary.**<sup>21</sup>

§ 323. **Express ratification.**<sup>22</sup>

§ 325. **Ratification by conduct—Retention of property.**—Although an infant can not ordinarily retain possession of real estate under a lease an unreasonable time after reaching majority and at the same time avoid payment of the stipulated rent, yet if he leases under a contract by which he is to pay rent for a certain number of months, after which he is to receive a deed for the property, and under which failure to make payments creates a forfeiture of his rights, he may, where he has never taken pos-

<sup>15</sup> *Ramsdell v. Combs Aeroplane Co.*, 161 N. Y. S. 360. As to right of infant who repudiates contract for services to recover therefor, see *Yancey v. Boyce*, 28 N. Dak. 187, 148 N. W. 539, Ann. Cas. 1916E, 258, and note.

<sup>16</sup> As to settlement of guardian with ward, see: *Harrison v. Harrison*, 21 N. Mex. 372, 155 Pac. 356, L. R. A. 1916E, 854, and note.

<sup>17</sup> *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 132 Am. St. 216, 28 L. R. A. (N. S.) 128, and note, 16 Ann. Cas. 522.

<sup>18</sup> See as to infants as lessees, note in 47 L. R. A. (N. S.) 543, 549.

<sup>19</sup> *Leslie v. Sheill*, L. R. (1914) 3 K. B. 607, Ann. Cas. 1916C, 992. See

also *Tobin v. Spann*, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N. S.) 672n, and note in 9 L. R. A. (N. S.) 1117.

<sup>20</sup> *Asher v. Bennett*, 143 Ky. 361, 136 S. W. 879; *County Board of Education v. Hensley*, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643n. But compare *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115n.

<sup>21</sup> See *Putnal v. Walker*, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33 and note; also *County Board of Education v. Hensley*, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643 and note.

<sup>22</sup> *Fletcher v. A. W. Koch Co.* (Tex. Civ. App.), 189 S. W. 501.

session and his contract is forfeited during his minority, recover payments he has made thereunder.<sup>23</sup>

§ 328. **Ratification by conduct—Miscellaneous.**<sup>24</sup>—Ratification usually requires affirmative action on the part of the infant showing a clear intention to confirm the contract.<sup>25</sup>

§ 329. **Ratification by laches.**<sup>26</sup>

§ 332. **Ratification—Knowledge as to legal liability.**—It is held in some cases that in order to effect a ratification or confirmation of a contract entered into during infancy, the act claimed to have such effect must have been done with knowledge that the contract was voidable.<sup>27</sup>

§ 334. **Disaffirmance and avoidance.**—As a general rule, except for necessities at least, an infant may, at his election, avoid any executory contract made by him during infancy, including a contract for his performance of personal labor and service.<sup>28</sup>

§ 335. **Who may disaffirm or avoid.**—The general rule that infancy is a personal privilege which others can not exercise to avoid the contract<sup>29</sup> does not apply as against the heirs and representatives of the infant in proper cases where the privilege is sought to be exercised by them. Thus it is well settled that the privilege of disaffirming deeds of real estate existing at the death of the infant descends to his heirs.<sup>30</sup> And the same has been held as to the personal representatives in cases of contracts of infants relating to personal property.<sup>31</sup>

§ 336. **Time and manner of disaffirmance—Personal contracts and contracts concerning personalty.**—Contracts of an

<sup>23</sup> Ex parte McFerren, 184 Ala. 223, 63 So. 159, 47 L. R. A. (N. S.) 543n, Ann. Cas. 1915B, 672n.

<sup>24</sup> Lee v. Equitable Life Assur. Soc. (Mo. App.), 189 S. W. 1195; Healy v. Kellogg, 145 N. Y. S. 943.

<sup>25</sup> Grolier Soc. &c. v. Forshay, 157 N. Y. S. 776. For acts held not sufficient to constitute ratification, see: Moser v. Renner (Mo. App.), 179 S. W. 970.

<sup>26</sup> Nobles v. Poe, 121 Ark. 613, 182 S. W. 270; Chandler v. Jones, 172 N. Car. 569, 90 S. E. 580.

<sup>27</sup> Manning v. Gannon, 44 App. D. C. 98.

<sup>28</sup> Cain v. Garner, 169 Ky. 633, 185 S. W. 122.

<sup>29</sup> Crosby v. Ardoin (Tex. Civ. App.), 145 S. W. 709.

<sup>30</sup> Blake v. Hollandsworth, 71 W. Va. 387, 76 S. E. 814, 43 L. R. A. (N. S.) 714, and note.

<sup>31</sup> See note in 43 L. R. A. (N. S.) 716. It has also been held that a guardian may disaffirm a contract of brokerage agency: Benson v. Tucker, 212 Mass. 60, 98 N. E. 589, 41 L. R. A. (N. S.) 1219n.

infant relating to personalty may usually be disaffirmed and repudiated by him even during his minority.<sup>32</sup> Contracts concerning real estate can not as a rule be disaffirmed and repudiated during minority, although there is some conflict among the authorities as to the application or effect of this rule in the case of leases and mortgages.<sup>33</sup>

**§ 338. Time of disaffirmance—Executory contracts.**<sup>34</sup>

**§ 339. Disaffirmance after majority.**—An infant remainderman is bound to affirm or disaffirm an administrator's sale, made without consent, within a reasonable time after reaching majority and failure to disaffirm within such time prevents him from disputing the purchaser's title.<sup>35</sup>

**§ 343. Can not disaffirm in part and ratify in part.**—An infant can not disaffirm a contract in part and repudiate it in part so as to escape its burdens and obtain its benefits.<sup>36</sup> But, in a proper case, he may repudiate a contract of employment and thereafter maintain an action to recover the reasonable value of services actually performed by him.<sup>37</sup>

**§ 346. Restoration of consideration.**<sup>38</sup>—Where, during his minority, the infant has lost or wasted the property or other consideration received, he may disaffirm or rescind the contract without restoring such consideration.<sup>39</sup>

<sup>32</sup> *Gonacky v. General Accident & Assur. Corp.*, 6 Ga. App. 381, 65 S. E. 53 (settlement under insurance policy); *Tucker v. Eastridge*, 51 Ind. App. 632, 100 N. E. 113 (agreement not to prosecute); *Stoll v. Hawks*, 179 Mich. 571, 146 N. W. 229, 51 L. R. A. (N. S.) 28n; *Star v. Watkins*, 78 Nebr. 610, 111 N. W. 363; *Gage v. Menczer* (Tex. Civ. App.), 144 S. W. 717; *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092n, Ann. Cas. 1916A, 959n. But compare *Lansing v. Michigan Cent. R. Co.*, 126 Mich. 663, 86 N. W. 147, 86 Am. St. 567.

<sup>33</sup> Note in 51 L. R. A. (N. S.) 31-33.

<sup>34</sup> *Stoll v. Hawks*, 179 Mich. 571, 146 N. W. 229, 51 L. R. A. (N. S.) 28n; *Covault v. Nevitt*, 157 Wis. 113,

146 N. W. 1115, 51 L. R. A. (N. S.) 1092n, Ann. Cas. 1916A, 959n.

<sup>35</sup> *Criswell v. Criswell* (Nebr.), 163 N. W. 302. See also to effect that disaffirmance of contract must be within reasonable time after majority: *Havard v. Carter & Co. Lumber Co.* (Tex. Civ. App.), 181 S. W. 756, and compare *Nobles v. Poe*, 121 Ark. 613, 182 S. W. 270.

<sup>36</sup> *Yancey v. Boyce*, 28 N. Dak. 187, 148 N. W. 539, Ann. Cas. 1916E, 258n.

<sup>37</sup> Note in Ann. Cas. 1916E, 261.

<sup>38</sup> *Tucker v. Eastridge*, 51 Ind. App. 632, 100 N. E. 113.

<sup>39</sup> *Gray v. Grimm*, 157 Ky. 603, 163 S. W. 762; *Britton v. South Penn. Oil Co.*, 73 W. Va. 792, 81 S. E. 525.

§ 347. **Restoration of consideration—Can not use privilege as a sword instead of a shield.**—Equity seeks to prevent the unearned enrichment at the expense of another, and, where infants borrow money and give a mortgage to secure the same, for the purpose of paying off a prior mortgage on the land, they can not keep the money and at the same time disaffirm the mortgage or have it canceled without restoring the consideration.<sup>40</sup>

§ 348. **Restoration of consideration—Contract fair and reasonable.**<sup>41</sup>

§ 352. **Effect and result of disaffirmance.**—The parties in general stand in the same relation to each other and to the property where an infant disaffirms a conditional sale contract as they would if it had been an ordinary sale; the title remains in the vendor and the infant is usually entitled to recover part payments made by him on the purchase-price.<sup>42</sup>

§ 353. **Disaffirmance—Effect—Miscellaneous instances.**<sup>43</sup>

<sup>40</sup> *Berry v. Stigall*, 253 Mo. 690, 162 S. W. 126, 50 L. R. A. (N. S.) 489n, Ann. Cas. 1915C, 118n; *Lefler v. Oelrichs*, 173 App. Div. 759, 160 N. Y. S. 119.

<sup>41</sup> See *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630. And compare *Klaus v. A. C. Thompson Auto &c. Co.*, 131 Minn. 10, 154 N. W. 508.

<sup>42</sup> See as supporting the text and

also generally as to disaffirmance and effect in case of conditional sale: *Ross P. Curtice Co. v. Kent*, 89 Nebr. 496, 131 N. W. 944, 52 L. R. A. (N. S.) 723n.

<sup>43</sup> *Oneida County Sav. Bank v. Saunders*, 166 N. Y. S. 280 (disaffirmance of deed by infant relates back to execution of deed and infant's interest is not subject to mortgage made by grantee).



## CHAPTER XII

### INSANE PERSONS

**§ 365. When one is of such unsound mind as to be incapable of contracting.**—Mental weakness is not necessarily sufficient to invalidate or avoid a contract; it must, in order to have such an effect, in the absence of fraud, duress or undue influence, be of such a character as to render the party incapable of understanding the transaction and nature of the engagement.<sup>1</sup> But mental weakness may render a person more susceptible to fraud, duress or undue influence, and when coupled with any of these, or even with unfairness, such as great inadequacy of consideration, may make a contract voidable when neither such weakness nor any of these other things alone or of themselves would do so.<sup>2</sup>

**§ 366. Insanity must bear directly on the agreement.**<sup>3</sup>

**§ 367. Contracts of insane persons generally voidable.**—The deed or other contract of an insane person, who has not been adjudicated to be insane or placed under guardianship, is voidable only, and may be ratified by him if he becomes of sound mind.<sup>4</sup>

<sup>1</sup> *Bevins v. Lowe*, 159 Ky. 439, 167 S. W. 422; *Hodges v. Wilson*, 165 N. Car. 323, 81 S. E. 340; *Loman v. Paullin* (Okla.), 152 Pac. 73; *Hatch v. Hatch*, 46 Utah 218, 148 Pac. 433. Incapacity to such an extent as to render a party incapable of comprehending or understanding the subject of the contract, its nature and probable consequences, though not so great as to dethrone his reason, will make the contract voidable: *Central Bank & Co. v. Weiss* (Tex. Civ. App.), 170 S. W. 820; *Smith v. Guerre* (Tex. Civ. App.), 175 S. W. 1093. See also for evidence held to show that a party was in such a weak mental and physical condition as to be incapable of contracting: *Volz v. Scully*, 159 Ky. 226, 166 S. W. 1015. See as to marriage capacity, note in *Ann. Cas.* 1913B, 1234, 1238.

<sup>2</sup> *Smith v. Mosbarger*, 18 Ariz. 19, 156 Pac. 79; *McKinnon v. Henderson*, 145 Ga. 373, 89 S. E. 415; *Herzog v. Gipson*, 170 Ky. 325, 185 S. W. 1119; *Buchanan v. Wilson*, 97 Nebr. 369, 149 N. W. 802. See also note in 52 L. R. A. (N. S.) 476.

<sup>3</sup> *Dunphy v. Dunphy*, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818n, *Ann. Cas.* 1913B, 1230 (marriage contract); *Cathcart v. Matthews*, 105 S. Car. 329, 89 S. E. 1021.

<sup>4</sup> *Cochran Timber Co. v. Fisher*, 190 Mich. 478, 157 N. W. 282; *Duroderigo v. Culwell* (Okla.), 152 Pac. 605. Under the laws of Arkansas in force in Indian Territory prior to statehood, where a contracting party was mentally unsound to such an extent as to be unable to comprehend the business affairs out of which the contract grew and the

§ 368. **Contracts of insane persons—When void.**<sup>5</sup>—A note executed by the maker while mentally incompetent and under guardianship is void not only in the hands of the payee but also in the hands of one who holds it as collateral security.<sup>6</sup>

§ 370. **Rule holding contracts of insane persons void strictly construed.**<sup>7</sup>

§ 371. **Voidable contracts of insane persons.**<sup>8</sup>

§ 372. **Valid contracts of insane persons.**<sup>9</sup>

§ 379. **Effect of knowledge of the other party.**<sup>10</sup>—Knowledge by one party of the insanity of the other party to a contract destroys good faith and when coupled with want or gross inadequacy of consideration establishes fraud.<sup>11</sup>

§ 381. **Ratification and avoidance.**—A contract which is otherwise binding and voidable only on the ground of unsound mind is usually valid and effective until disaffirmed.<sup>12</sup> But disaffirmance and restoration are not required where the contract is void, nor, ordinarily, as a condition precedent to a suit for cancellation where the party's insanity was known to the other party.<sup>13</sup> It has been held that the contract of a lunatic even though made after office found may be ratified on restoration to capacity.<sup>14</sup>

§ 382. **Who may affirm or avoid.**—It is generally held that a guardian is without power to ratify conveyances of his incom-

consequences of his act, the contract was void: *Continental Gin Co. v. De Bord* (Okla.), 150 Pac. 892. Conveyance, being voidable only, was held good in hands of good faith purchaser for value, in *Kentland Coal & Co. v. Keen*, 168 Ky. 836, 183 S. W. 247.

<sup>5</sup> *Weeks v. Reliance Fertilizer Co.* (Ga. App.), 93 S. E. 152. In the absence of statute to the contrary, want of requisite mental capacity renders marriage absolutely void: In re *Gregorson's Estate*, 160 Cal. 21, 116 Pac. 60, Ann. Cas. 1912D, 1124 and note.

<sup>6</sup> *Burgedorff v. Hamer*, 95 Nebr. 113, 145 N. W. 250.

<sup>7</sup> See *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678n.

<sup>8</sup> See ante, §§ 276, 367.

<sup>9</sup> See *National Metal Edge Box Co. v. Vanderveer*, 85 Vt. 488, 82 Atl. 837, 42 L. R. A. (N. S.) 343n, Ann. Cas. 1914D, 865n.

<sup>10</sup> [Main section cited in *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678n.]

<sup>11</sup> *Barkley v. Barkley*, 182 Ind. 322, 327, 106 N. E. 609, L. R. A. 1915B, 678n.

<sup>12</sup> *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678n; *Weber v. Bottger*, 172 Iowa 418, 154 N. W. 579.

<sup>13</sup> *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678n.

<sup>14</sup> *Lawrence v. Morris*, 167 App. Div. 186, 152 N. Y. S. 177.

petent ward,<sup>15</sup> and that the right to ratify or repudiate exists in the ward if she becomes competent and passes to the heirs if the ward continues incompetent until death.<sup>16</sup>

§ 383. **Acts showing disaffirmance.**—At common law it seems that there can not be a disaffirmance-in and by an action in ejectment.<sup>17</sup>

§ 384. **Restoration of consideration.**—As a general rule, at least in the case of executed contracts, the consideration must be restored and the other party placed in statu quo before the contract of an insane person can be avoided and property recovered.<sup>18</sup>

§ 386. **Restoration as a condition precedent.**<sup>19</sup>—Where the mental incapacity of the one who has made a conveyance or other contract is known to the other party at the time it was made no allegation of tender or offer to restore the consideration is necessary.<sup>20</sup>

<sup>15</sup> De Vries v. Crofoot, 148 Mich. 183, 111 N. W. 775; King v. Siple, 166 Mich. 258, 131 N. W. 572, 34 L. R. A. (N. S.) 1058n, Ann. Cas. 1912D, 702n; Bowman v. Wade, 54 Ore. 347, 103 Pac. 72. But the guardian may and generally should disaffirm it: Bowman v. Wade, 54 Ore. 347, 103 Pac. 72; Hatland v. Egan, 36 S. Dak. 413, 155 N. W. 3.

<sup>16</sup> King v. Siple, 166 Mich. 258, 131 N. W. 572, 34 L. R. A. (N. S.) 1058n, Ann. Cas. 1912D, 702n.

<sup>17</sup> Walton v. Malcolm, 264 Ill. 389, 106 N. E. 211, 213, Ann. Cas. 1915D,

1021n. But see Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461n, 123 Am. St. 609, 14 Ann. Cas. 505.

<sup>18</sup> Loman v. Paullin (Okla.), 152 Pac. 73; Duroderigo v. Culwell (Okla.), 152 Pac. 605. But see Brown v. Brenner (Tex. Civ. App.), 161 S. W. 14.

<sup>19</sup> [Main section cited in Barkley v. Barkley, 182 Ind. 322, 327, 106 N. E. 609, L. R. A. 1915B, 678n.]

<sup>20</sup> Barkley v. Barkley, 182 Ind. 322, 327, 106 N. E. 609, L. R. A. 1915B, 678n.

## CHAPTER XIII

### MARRIED WOMEN

§ 392. **Contracts in case of necessity.**—A married woman had, as a general rule, no contractual capacity at common law, but there were a few exceptions based on necessity.<sup>1</sup>

§ 395. **Equitable separate estate—Limitations on power over.**<sup>2</sup>

§ 401. **Conveyances directly to husband.**<sup>3</sup>

§ 402. **Contracts under modern statutes.**—In Oregon the common-law disability of married women to contract has been entirely removed, but in Idaho it has not been removed except as to contracts of a married woman for her own use or benefit or in reference to the management or control or use and benefit of her separate property, yet a contract made in Oregon by a married woman while there domiciled, and there to be performed, will be enforced in Idaho.<sup>4</sup>

§ 405. **Power to contract with reference to statutory separate estate as feme sole.**—In Arkansas, under the statute, a married woman may contract with reference to her separate property or business as effectively as if she were feme sole.<sup>5</sup> And in Missouri, under the statute of 1909, empowering a married woman to transact business on her own account, it was held that she might convey property to her husband in 1897 although it was acquired prior to the adoption of the Married Woman's Act of 1889.<sup>6</sup> Under statutes of this character a married woman may usually enter into contracts of partnership, but, according to the weight of authority, most of the statutes do not authorize her to make such contracts with her husband.<sup>7</sup>

<sup>1</sup> *Blakely v. Kanaman* (Tex. Civ. App.), 168 S. W. 447. See generally as to when married woman has right to contract because of necessity, notes in L. R. A. 1915D, 1184, and Ann. Cas. 1917C, 561.

<sup>2</sup> *Nadel v. Weber Bros. Shoe Co.*, 70 Fla. 218, 70 So. 20.

<sup>3</sup> See post § 413.

<sup>4</sup> *Meier v. Bruce* (Idaho), 168 Pac.

<sup>5</sup> *Cooper v. Burel* (Ark.), 195 S. W. 356.

<sup>6</sup> *Smelzer v. Meier* (Mo.), 196 S. W. 22. But see *Akin v. Thompson* (Tex. Civ. App.), 196 S. W. 625.

<sup>7</sup> Note in L. R. A. 1916D, 1233, 1239. Even when this is held, however, she or her separate property or estate may sometimes become liable:

§ 406. **Other statutes conferring limited capacity.**—Under many of the statutes a married woman, although not otherwise liable even for necessities, is liable where she voluntarily and expressly contracts therefor in her own name, notwithstanding her husband's duty to support.<sup>8</sup> But the presumption, where the wife is living with the husband, is that she is contracting as his agent or on his credit for necessary articles or services falling under the head of family expenditures, so that in such cases she, or her estate, is not usually liable without a showing that the contract was her own individual contract.<sup>9</sup> A few of the statutes expressly make the wife, or her separate property at least when acquired after marriage, also liable for family expenses or necessities even though not contracted for on her own responsibility.<sup>10</sup>

§ 407. **Statutes requiring husband to join or consent.**—In Alabama a conveyance by a wife to her daughter and husband of lands belonging to her separate estate, her husband not joining, is invalid as to the daughter, but the statute requiring a joinder by the husband does not apply to conveyances to him.<sup>11</sup> A married woman's deed signed and acknowledged by her husband as well as herself shows his joinder therein and passes her title to her separate realty therein conveyed.<sup>12</sup> In North Carolina a married woman may make a valid contract for conveyance of her land without consent of her husband.<sup>13</sup>

Nadel v. Weber Bros. Shoe Co., 70 Fla. 218, 70 So. 20, L. R. A. 1916D, 1230, 1246.

<sup>8</sup> Bell v. Rossignol, 143 Ga. 150, 84 S. E. 542, L. R. A. 1915D, 1184, Ann. Cas. 1917C, 576; Oliver v. Webb, 12 Ga. App. 216, 76 S. E. 1081; Lipinsky v. Revell, 167 N. Car. 508, 83 S. E. 820. See also Adair v. Arendt (Ark.), 190 S. W. 445; Leonard v. Stowe, 166 Mich. 681, 132 N. W. 454; Clark v. Tenneson, 146 Wis. 65, 130 N. W. 895, Ann. Cas. 1912C, 141n, 33 L. R. A. (N. S.) 426 and note.

<sup>9</sup> Mooney v. McMahon, 83 N. J. L. 120, 83 Atl. 504; Speckmann v. Foote, 138 N. Y. S. 380; Butterworth v. Bredemeyer, 74 Wash. 524, 133 Pac. 1061 (funeral expenses directed by widow presumed on credit of estate rather than charge against her).

<sup>10</sup> Evans v. Noonan, 20 Cal. App. 288, 128 Pac. 794; Dale v. Marvin,

76 Ore. 528, 148 Pac. 1116, 1151; and also note in Ann. Cas. 1917C, 564-576, where the general subject is treated, the statutes of the different states are referred to and cases are also cited showing what have and have not been held to be necessities or legitimate family expenses.

<sup>11</sup> Crosby v. Turner (Ala.) 75 So. 937.

<sup>12</sup> Linn v. Collins (W. Va.), 87 S. E. 934.

<sup>13</sup> Warren v. Dail, 170 N. Car. 406, 87 S. E. 126. In Indiana husband must join in executory contract for sale of real estate: Knepper v. Eggiman, 177 Ind. 56, 97 N. E. 161. But she may lease or grant right to explore separate lands for gas or oil without husband joining: Kokomo &c. Oil Co. v. Matlock, 177 Ind. 225, 97 N. E. 787, 39 L. R. A. (N. S.) 675n.

§ 409. Statutes giving power to contract as a feme sole.<sup>14</sup>

§ 411. Contracts of suretyship.—Some statutes remove the disabilities of married women to contract either wholly or so far as her separate property is concerned except as to contracts of suretyship;<sup>15</sup> others remove it except as to becoming surety for her husband.<sup>16</sup> In some states she may mortgage her property as security for her husband's debts although she is not personally liable for any deficiency;<sup>17</sup> but in other states she can not do so.<sup>18</sup>

§ 412. Securing husband's debt.—The real nature of the transaction controls and it can not be evaded by subterfuge or mere form, but where she agrees to pay her husband's debt and receives a valid consideration therefor it has been held the contract is not one of suretyship within the prohibition of the statute.<sup>19</sup> She may be estopped by her representation from claiming that she or her property received no benefit and that the contract was one of suretyship where the other party had no knowledge thereof and there was nothing to charge him with knowledge, but even an affidavit has been held, in some instances, insufficient to estop her; and, under a statute providing that where she executes her note or other evidence of indebtedness for a loan and the lender shall pay the proceeds to her in cash or by check or draft payable to her order, she shall not be permitted to claim that the loan was made for the use or benefit of any one else after making an affidavit that it is for her own separate use or the betterment of her property or separate business, it is held

<sup>14</sup> Under most of such statutes a married woman enters into contracts of partnership: Note in L. R. A. 1916D, 1234.

<sup>15</sup> *Grosman v. Union Trust Co.*, 228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917B, 613n; *Holland v. Bond*, 125 Ark. 526, 189 S. W. 165; *National Bank v. Smith*, 142 Ga. 663, 83 S. E. 526, L. R. A. 1915B, 1116n; *Wright v. Fox*, 56 Ind. App. 315, 103 N. E. 442; *Gillett v. Citizens' Nat. Bank*, 56 Ind. App. 694, 104 N. E. 775; *Lucas v. Hagedorn*, 158 Ky. 369, 164 S. W. 978.

<sup>16</sup> *First Nat. Bank v. Bertoli*, 87 Vt. 297, 89 Atl. 359, Ann. Cas. 1917B, 590 and note.

<sup>17</sup> *Bode v. Jussen*, 93 Nebr. 482, 140 N. W. 768. See also *Holland v. Bond*, 125 Ark. 526, 189 S. W. 165; *Ilite v. Reynolds*, 163 Ky. 502, 173 S. W. 1108, Ann. Cas. 1917B, 619n.

<sup>18</sup> *Sharpe v. Denmark*, 143 Ga. 156, 84 S. E. 554, Ann. Cas. 1917B, 617n. See also *Gravlee v. Cannon*, 195 Ala. 549, 70 So. 719; *Vinegar Bend Lumber Co. v. Leftwich (Ala.)*, 72 So. 538; *Gillett v. Citizens' Nat. Bank*, 56 Ind. App. 694, 104 N. E. 775. But compare *Union Nat. Bank v. Finley*, 180 Ind. 470, 103 N. E. 110.

<sup>19</sup> *Washburn v. Gray*, 49 Ind. App. 271, 97 N. E. 190; *Thomas v. Boston Banking Co.*, 157 Ky. 473, 163 S. W. 480.

that she is not estopped by such an affidavit where the proceeds are not so paid to her but are paid to some one else.<sup>20</sup>

**§ 413. Contracts with husband.**—In Alabama a wife may convey to her husband land belonging to her separate estate and the statute requiring a husband to join in conveyances by his wife does not apply to a conveyance by a married woman directly to her husband.<sup>21</sup> But in many states, under such a statute, it is held that she can not convey real estate directly to him, no matter whether he joins therein as grantor or not.<sup>22</sup>

**§ 417. May appoint husband her agent.**—A married woman may appoint her husband as her agent, as a general rule, wherever she has power to appoint an agent, and in the same manner.<sup>23</sup> The husband's agency may sometimes be implied or ratified or the wife estopped from disputing.<sup>24</sup>

**§ 418. Evidence of husband's agency.**<sup>25</sup>

**§ 419. Wife may act as husband's agent.**—A husband may appoint his wife as his agent in a proper case, and such agency may often be implied.<sup>26</sup>

**§ 420. Power to pledge credit of husband.**—A wife generally has implied authority to purchase necessities on the credit of her husband.<sup>27</sup> But not, ordinarily, where he has furnished a

<sup>20</sup> *Pabst Brewing Co. v. Schuster*, 55 Ind. App. 375, 103 N. E. 950. See also *Union Nat. Bank v. Finley*, 180 Ind. 470, 103 N. E. 110. But compare *Trinkle v. Ladoga Bldg. & C. Ass'n* (Ind. App.), 117 N. E. 542.

<sup>21</sup> *Crosby v. Turner* (Ala.), 75 So. 937.

<sup>22</sup> *Wicker v. Durr*, 225 Pa. 305, 74 Atl. 64; *Alexander v. Shalala*, 228 Pa. 297, 77 Atl. 554, 31 L. R. A. (N. S.) 844 and note, 139 Am. St. 1004, 20 Ann. Cas. 1330. As to conveyance through trustee see: *Brandau v. McCurley*, 124 Md. 243, 92 Atl. 540, L. R. A. 1915C, 767 and note.

<sup>23</sup> *Marbury Lumber Co. v. Woolfolk*, 186 Ala. 254, 65 So. 43; *Irwin v. Hoyt*, 162 Iowa 679, 144 N. W. 584; *Stenson v. Lancaster*, 178 Mo. App. 340, 165 S. W. 1158.

<sup>24</sup> *Queen of Arkansas Ins. Co. v. Dumas*, 113 Ark. 598, 168 S. W. 561; *Helwig v. Foglesong*, 166 Iowa 715, 148 N. W. 990; *Shull v. Cummings*, 174 Mo. App. 569, 161 S. W. 360; *Journal Pub. Co. v. Barber*, 165 N.

*Car. 478*, 81 S. E. 694. The bare marital relation, however, is insufficient to warrant the inference of such agency: *Harvey v. Squire*, 217 Mass. 411, 105 N. E. 355.

<sup>25</sup> For evidence held sufficient to show husband's agency, see: *Helwig v. Foglesong*, 166 Iowa 715, 148 N. W. 990. For evidence held insufficient, see: *Corn v. Meredith*, 160 Ky. 677, 170 S. W. 22; *Carle v. Ladd*, 111 Maine 422, 89 Atl. 689; *Taylor v. George*, 176 Mo. App. 215, 161 S. W. 1187.

<sup>26</sup> *Meyer v. Frenkil*, 116 Md. 411, 82 Atl. 208, Ann. Cas. 1913C, 875n; *Lilly v. Yearly* (Tex. Civ. App.), 152 S. W. 823; *Swoper v. Keystone Coal & C. Co.* (W. Va.), 89 S. E. 284, L. R. A. 1917A, 1128. See also note in Ann. Cas. 1913C, 879. But it is not, as a rule, implied from the mere marriage relation, further than as to matters concerning care and management of the household: *Harvey v. Squire*, 217 Mass. 411, 105 N. E. 355.

<sup>27</sup> *Clark v. Tenneson*, 146 Wis. 65,

sufficient allowance therefor and forbidden her to pledge his credit.<sup>28</sup> Nor where she is living apart from him because of her own fault, especially if it consists of such a violation of marital obligations as would entitle him to a divorce.<sup>29</sup>

§ 422. Ratification or confirmation.<sup>30</sup>

§ 424. Estoppel.—In most jurisdictions a married woman may be estopped by acts or conduct constituting an equitable estoppel the same as any other person, at least as to any matter in regard to which she has capacity to contract.<sup>31</sup>

§ 430. Conflict of laws—*Lex loci contractus*.—As a general rule the contracts of a married woman in regard to personal property are governed by the law of the place where they are made.<sup>32</sup> A note executed by a married woman in a state where she has no power or capacity to contract, and then placed in the mail, can not be enforced even in another state where such notes are valid and of which she was a resident and even though it was made payable in such other state.<sup>33</sup>

§ 432. *Lex fori* controls as to remedy.<sup>34</sup>

130 N. W. 895, Ann. Cas. 1912C, 141 and note, 33 L. R. A. (N. S.) 426; also note in 47 L. R. A. (N. S.) 279-283. As to what is included in "necessaries," see: Wickstrom v. Peck, 163 App. Div. 608, 148 N. Y. S. 596. Legal services may be necessities: Maddy v. Prevulsky (Iowa), 160 N. W. 762, L. R. A. 1917C, 335; Moran v. Montz, 175 Mo. App. 360, 162 S. W. 323. But compare Meaher v. Mitchell, 112 Maine 416, 92 Atl. 492, L. R. A. 1915C, 467, Ann. Cas. 1917A, 688n.

<sup>28</sup> McCreery & Co. v. Martin, 84 N. J. L. 626, 87 Atl. 433, 47 L. R. A. (N. S.) 279n, Ann. Cas. 1915A, 1n.

<sup>29</sup> Denver Dry Goods Co. v. Jester, 60 Colo. 290, 152 Pac. 903, L. R. A. 1917A, 957, and note. See also Johnson v. Coleman, 13 Ala. App. 520, 69 So. 318. But the husband is generally liable where the separation is because of his fault or by agreement, without her fault: Note in L. R. A. 1917A, 958, 965.

<sup>30</sup> Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081.

<sup>31</sup> Goldberg v. Parker, 87 Conn. 99,

87 Atl. 555, 46 L. R. A. (N. S.) 1097n, Ann. Cas. 1914C, 1059n; Whitchard v. Exchange Nat. Bank, 15 Ga. App. 190, 82 S. E. 770; Taylor v. Griner, 55 Ind. App. 617, 104 N. E. 607; Brusha v. Board of Education, 41 Okla. 595, 139 Pac. 298, L. R. A. 1916C, 233; McCauley v. Grim, 115 Va. 610, 79 S. E. 1041; H. W. Wright Lumber Co. v. McCord, 145 Wis. 93, 128 N. W. 873, 34 L. R. A. (N. S.) 762n, Ann. Cas. 1912B, 92, and notes. See also note on the general subject, showing the general rule and conflict in some jurisdictions in L. R. A. 1916C, 240-251.

<sup>32</sup> Lamkin v. Lovell, 176 Ala. 334, 58 So. 258; Meier v. Bruce (Idaho), 168 Pac. 5; Union Trust Co. v. Knabe, 122 Md. 584, 89 Atl. 1106; note in L. R. A. 1916A, 1055-1060.

<sup>33</sup> Burr v. Beckler, 264 Ill. 230, 106 N. E. 206, L. R. A. 1916A, 1049n, Ann. Cas. 1915D, 1132n. See also note to the above case on the general subject.

<sup>34</sup> Lawler v. Lawler, 107 Ark. 70, 153 S. W. 1113; Shane v. Dickson, 111 Ark. 353, 163 S. W. 1140.



## CHAPTER XIV.

### DRUNKEN PERSONS

§ 440. **Effect of intoxication on contracts generally.**—Mere intoxication of a party to some extent or in some degree does not necessarily render his contract void nor even voidable, but if one is so drunk that he does not know what he is doing, so that he does not understand the nature of the transaction nor the terms of the engagement, his contract is voidable, and a slighter degree of intoxication may have the same effect when induced by the other party or otherwise coupled with fraud, duress or undue influence.<sup>1</sup>

§ 441. **Extent or degree of intoxication.**—As a general rule, where there is no fraud, duress or undue influence, intoxication, in order to render a contract voidable, must be of such a degree or to such an extent that the party was incapable of understanding the nature of the transaction and comprehending its terms or consequences.<sup>2</sup>

§ 442. **Contracts voidable when intoxication is such as to render party incapable of understanding.**<sup>3</sup>

<sup>1</sup> *Snead v. Scott*, 182 Ala. 97, 62 So. 36; *Sellers v. Knight*, 185 Ala. 96, 64 So. 329; *Matthis v. O'Brien*, 137 Ky. 651, 126 S. W. 156; *Coody v. Coody*, 39 Okla. 719, 136 Pac. 754, L. R. A. 1915E, 465; *Straughan v. Cooper*, 41 Okla. 515, 139 Pac. 265; *Miller v. Sterringer*, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596, and note.

<sup>2</sup> See authorities cited in last preceding note; also *Sievertsen v. Paxton-Eckman Chemical Co.*, 160 Iowa 662, 133 N. W. 744, 142 N. W. 424; *Somers v. Ferris*, 182 Mich. 392, 148 N. W. 782; *Dewitt v. Bowers* (Tex. Civ. App.), 138 S. W. 1147. Cases stating the general rule with some variations in phrasing by different courts, are reviewed in note, 25 L. R. A. (N. S.) 596. Intoxication of a contracting party is not ground for setting aside the contract where he

understood the surrounding circumstances and knew the character and consequences of his act: *Carroll v. Polfus*, 98 Nebr. 657, 154 N. W. 213.

<sup>3</sup> Drunkenness does not render a contract absolutely void, and, though the party who was intoxicated at the time of the making of the contract may rescind on that ground in a proper case, the contract is only voidable, and may be affirmed: *Sellers v. Knight*, 185 Ala. 96, 64 So. 329. A contract executed by a person so intoxicated that he is unable to comprehend its terms, though voidable, is not void: *Matz v. Martinson*, 127 Minn. 262, 149 N. W. 370, L. R. A. 1915B, 1121n. "Contracts of an intoxicated person are avoided in law on the ground of incompetency, but in equity, on the ground of fraud": *Burch v. Scott*, 168 N. Car. 602, 84 S. E. 1035. A person so destitute of

§ 443. **Intoxication coupled with fraud and unfair conduct.**—Where there is fraud, duress or undue influence practiced on an intoxicated party the intoxication has been induced by the other party and unfair advantage taken by the latter, the former may avoid the contract even though his reason may not be wholly overthrown or the intoxication alone might not be sufficient.<sup>4</sup>

§ 444. **Ratification and disaffirmance.**—A voidable contract of a drunken person may be affirmed or ratified by him, and, if, after knowledge and comprehension of its terms, he affirms it, the contract becomes valid and binding.<sup>5</sup>

§ 446. **Habitual drunkards—Effect of adjudication.**—The effect of an adjudication that one is an habitual drunkard is in the main the same as the effect of an adjudication of insanity, and subsequent contracts made while such adjudication is in force are generally absolutely void.<sup>6</sup>

reason as not to understand his act may avoid a contract made by him at such time, although his condition is the result of his own voluntary intoxication: *Straughan v. Cooper*, 41 Okla. 515, 139 Pac. 265.

<sup>4</sup> *Matthis v. O'Brien*, 137 Ky. 651, 126 S. W. 156; *Miller v. Sterringer*, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596n.

<sup>5</sup> *Sellers v. Knight*, 185 Ala. 96, 64

So. 329; *Matz v. Martinson*, 127 Minn. 262, 149 N. W. 370, L. R. A. 1915B, 1125 (so held when defendant executed a promissory note, while intoxicated, for a valid pre-existing debt, and for five years thereafter, with full knowledge of the transaction recognized it as valid); *Bawlf Grain Co. v. Ross*, 5 Can. S. C. 232.

<sup>6</sup> *Anderson v. Hicks*, 150 App. Div. 289, 134 N. Y. S. 1018.

## CHAPTER XV

### AGENTS

§ 451. **Capacity to appoint or be an agent.**<sup>1</sup>—One can not be both principal in a note as maker and also agent for the payee.<sup>2</sup>

§ 452. **Authority of agents—How conferred.**—No particular form of appointment to authorize one to indorse a note as agent is required.<sup>3</sup> An appointment of an agent may sometimes be implied or an agency created by operation of law.<sup>4</sup> But, as a general rule, the appointment must be under seal if the instrument to be executed is required to be under seal.<sup>5</sup>

§ 453. **Authority of agent—Extent.**—The word “agent” is broad enough to mean either a general agent or a special agent with limited authority.<sup>6</sup> There is a general agency rather than a special agency even though the authority is limited to a particular business or employment, if there is a delegation of authority to do all acts connected with such business or employment.<sup>7</sup> And a general agent may bind his principal by acts within the apparent as well as the real scope of his authority.<sup>8</sup> Agency can not be

<sup>1</sup> As to power of married women to appoint agent or act as agent, see ante §§ 417-419.

<sup>2</sup> *Scott v. Cowen (Mo.)*, 195 S. W. 732.

<sup>3</sup> *Quality Car Co. v. Corkill*, 182 Ill. App. 175. But the mere designation of one as an agent does not create the relation of principal and agent: *W. T. Rawleigh Medical Co. v. Holcomb (Ark.)*, 191 S. W. 215. Where a seed company sent out advertisements with a blank coupon to be used in ordering its catalogue, in which there was a blank space for insertion of the name of the local dealer, this did not make the local dealer the agent of such company: *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124.

<sup>4</sup> *Beers v. McNaught*, 175 App. Div.

643, 162 N. Y. S. 514; *Missouri & C. R. Co. v. Luster (Tex. Civ. App.)*, 162 S. W. 11. See also *Swift v. Miller (Ind. App.)*, 113 N. E. 447; also ante § 420.

<sup>5</sup> *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366.

<sup>6</sup> *Queen of Arkansas Ins. Co. v. Malone*, 111 Ark. 229, 163 S. W. 771.

<sup>7</sup> *Kissell v. Pittsburgh & C. R. Co. (Mo. App.)*, 188 S. W. 1118. See also as to general and special agents and authority: *Mitchell v. Hagge (Iowa)*, 160 N. W. 287.

<sup>8</sup> *Beekman v. Sonntag Inv. Co.*, 67 Fla. 293, 64 So. 948; *Ney v. Eastern Iowa Tel. Co.*, 162 Iowa 525, 144 N. W. 383. As to whether agency given to two or more is joint or several, see note in *Ann. Cas.* 1915C, 618.

proved by the mere declarations of the alleged agent,<sup>9</sup> but it may be shown, in a proper case, by the testimony of the agent.<sup>10</sup>

§ 454. **Estoppel.**—A principal may be bound by the acts of one within the apparent authority, which the principal has held him out as having, or knowingly permitted him to exercise, and the doctrine of estoppel finds ready and common application in such cases in favor of one who has dealt with the agent in good faith relying on such authority.<sup>11</sup>

§ 455. **Ratification.**—Ratification may be express<sup>12</sup> or implied,<sup>13</sup> and acquiescence or failure to repudiate the agent's act

<sup>9</sup> Roullard v. Gray, 30 Cal. App. 757, 159 Pac. 457; Conley v. Mayo, 157 Ky. 445, 163 S. W. 243; Rolfe v. Tufts, 216 Mass. 563, 104 N. E. 341 (when not brought home to the principal); Renick v. Brooke (Mo. App.), 190 S. W. 641; Western Carolina Realty Co. v. Rumbough, 172 N. Car. 741, 90 S. E. 931; Whitcomb v. Oller, 41 Okla. 331, 137 Pac. 709; Bray & Co. v. Woolen Mills v. Walker (Tex. Civ. App.), 165 S. W. 107; First Nat. Bank v. Bertoli, 87 Vt. 297, 89 Atl. 359, Ann. Cas. 1917B, 590n; Lemcke v. Funk, 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D, 23n (but may be admissible if prima facie case of agency already established). And to same effect as last case: Sherrod v. Springfield Baptist Church (Ga. App.), 93 S. E. 1009.

<sup>10</sup> Roberts v. Williams (Ala.), 73 So. 502; Daly v. Arkadelphia Milling Co. (Ark.), 189 S. W. 1053; Thompson v. Michigan Mut. Life Ins. Co., 56 Ind. App. 502, 105 N. E. 780. Compare also Watkins v. Atlantic Coast Line R. Co., 97 S. Car. 148, 81 S. E. 426. But see Larkin Co. v. Commonwealth, 172 Ky. 106, 189 S. W. 3.

<sup>11</sup> St. Louis & C. R. Co. v. Hall, 186 Ala. 353, 65 So. 33; Roberts v. Williams (Ala.), 73 So. 502; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 Pac. 121; Germain Co. v. Bank of Camden, 14 Ga. App. 88, 80 S. E. 302; King v. Edward Thompson Co., 56 Ind. App. 274, 104 N. E. 106; Ney v. Eastern Iowa Tel. Co. 162 Iowa 525, 144 N. W. 383; Brager v. Levy, 122 Md. 554, 90 Atl. 102; Sinclair v. Investors' Syndicate, 125 Minn. 311, 146

N. W. 1109. But see for cases in which it was held there was no estoppel: In re Collins, 235 Fed. 937 (fraud perpetrated on company); Cargile v. Union State Bank, 40 Okla. 506, 139 Pac. 701 (other party had knowledge of limitations on agents' authority); Woodworth v. School Dist. No. 2, 92 Wash. 456, 159 Pac. 757 (estoppel extends only to so much of act as is affected by conduct which works estoppel).

<sup>12</sup> Radford v. Practical Premium Co., 125 Ark. 199, 188 S. W. 562; Texas Moline Plow Co. v. Klapproth (Tex. Civ. App.), 164 S. W. 399. See also B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 Pac. 624.

<sup>13</sup> Tidewater & C. R. Co. v. Harney, 32 Cal. App. 253, 162 Pac. 664; Rusk v. Leavitt, 99 Kans. 498, 162 Pac. 310; Johnson v. New York & C. R. Co., 217 Mass. 203, 104 N. E. 445; Whitcomb v. Oller, 41 Okla. 331, 137 Pac. 709; Antrim Lumber Co. v. Oklahoma State Bank (Okla.), 162 Pac. 723; Winston v. Gordon, 115 Va. 899, 80 S. E. 756. See also Hartsell v. Roberts, 185 Ala. 201, 64 So. 90; Roberts v. Bank of Enfaula (Ga. App.), 92 S. E. 1015; Block v. Duluth Log Co., 134 Minn. 313, 159 N. W. 760; Jones v. Blair (Minn.), 163 N. W. 523. For what is insufficient to show ratification, see: Hall v. Paine, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737 (retention of check); Doran v. First Nat. Bank (N. Mex.), 160 Pac. 770; Cargile v. Union State Bank, 40 Okla. 506, 139 Pac. 701; Borschow v. Wilson (Tex. Civ. App.), 190 S. W. 202.

within a reasonable time may amount to ratification.<sup>14</sup> Ratification and estoppel are not equivalent terms, for ratification is retroactive and validates all of the act in question, while estoppel extends to only so much of the act as is affected by the conduct which works the estoppel.<sup>15</sup>

§ 457. **Ratification — What acts may be ratified.** — Although a ratification must be in toto as to a particular act and person, a principal may generally ratify an unauthorized transaction in one case and not necessarily in another.<sup>16</sup> An act not intended either by the agent or the other party to be on behalf of the principal can not, ordinarily at least, be ratified by the principal.<sup>17</sup>

§ 459. **Implied ratification.**<sup>18</sup>

§ 461. **Revocation by act of parties.**<sup>19</sup> — A contract of agency which leaves the agent free to terminate it at will, should be construed as giving the principal the same right.<sup>20</sup> And an agent's employment to do a particular work may usually be terminated at any time at the will of the principal.<sup>21</sup> Agency to sell goods on commission, where no length of time is specified, may usually be terminated by the principal, acting in good faith, at any time.<sup>22</sup> An exclusive agency is not necessarily irrevocable merely

<sup>14</sup> *Brooke v. Cunningham* (Ga. App.), 90 S. E. 1037; *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756.

<sup>15</sup> *Woodworth v. School Dist. No. 2*, 92 Wash. 456, 159 Pac. 757. See also for definition of ratification: *Amazon Fire Ins. Co. v. Bond* (Okla.), 165 Pac. 414.

<sup>16</sup> *O'Dell v. American Box Ball Co.*, 182 Ill. App. 292.

<sup>17</sup> *Blackwell v. Kercheval*, 29 Idaho 473, 160 Pac. 741.

<sup>18</sup> For cases as to what is and is not sufficient to constitute an implied ratification, see: *Calhoun v. McCrory Piano & Co.*, 129 Tenn. 651, 168 S. W. 149, 52 L. R. A. (N. S.) 571 and note, *Ann. Cas.* 1916A, 183n; *Reversion Fund & Co. v. Maison Cosway, Limited*, L. R. (1913) 1 K. B. 364, *Ann. Cas.* 1913E, 1106 and note; also ante § 455.

<sup>19</sup> As to what is a power coupled with an interest rendering it irrev-

ocable, see: *Jacksonville Terminal Co. v. Smith*, 67 Fla. 10, 64 So. 354 (not where the interest can accrue only from exercise of the power); *Byers v. Chatfield* (Tex. Civ. App.), 164 S. W. 415; *Baker v. Heney* (Tex. Civ. App.), 166 S. W. 19; *Browne v. King* (Tex. Civ. App.), 196 S. W. 884. As to notice of termination, see note in 41 L. R. A. (N. S.) 663. As to revocation or termination by becoming alien enemy, see note in *Ann-Cas.* 1917C, 197.

<sup>20</sup> *Garlock v. Motz Tire & Co.*, 192 Mich. 665, 159 N. W. 344.

<sup>21</sup> *Fass v. Atlantic Life Ins. Co.*, 105 S. Car. 107, 89 S. E. 558.

<sup>22</sup> *Greenspan v. Miller*, 111 Ark. 190, 163 S. W. 776; *Jackson v. Stephens*, 83 Misc. 232, 145 N. Y. S. 827; *Glockner v. Jacobs*, 40 Okla. 641, 140 Pac. 142 (employment of traveling salesman may be arbitrarily terminated by employer where, no time specified).

because it is exclusive.<sup>23</sup> Although death of the principal may terminate an agency, under the civil code of Porto Rico evidence that one of several mortgagors died before the mortgage was executed by the agent, without evidence that the agent or mortgagee knew or was chargeable with knowledge thereof, is not sufficient to avoid the mortgage.<sup>24</sup>

**§ 462. Liability of principal.**—The principal is generally liable for the acts of his agent within the real or apparent scope of his authority, and where a general agency has been established those who have dealt with the agent may generally assume that his authority continues, until they have express or implied notice to the contrary.<sup>25</sup> But, according to the weight of authority, at least in the case of a special agent, the taking of usury by the agent with whom the principal has left money to be loaned, where the principal has no knowledge thereof and does not receive any of its fruits, does not charge the principal with the effects of such misconduct.<sup>26</sup>

**§ 463. Liability of agent.**—As a general rule, where the principal is disclosed, and the agent acts within his authority, the agent is not personally liable,<sup>27</sup> and this has been held even though he signed the contract in his own name, where he was known to be acting as agent.<sup>28</sup>

**§ 464. Where personally liable.**—Although it is the general rule that one assuming to act as agent impliedly represents that his principal exists and that he has authority to act for such principal, and the agent will usually be personally liable if this is not true, this rule does not obtain where the agent discloses all the facts in regard to such authority.<sup>29</sup> Where the agent does not

<sup>23</sup> Goetz v. Ochala, 180 Ill. App. 458; Browne v. King (Tex. Civ. App.), 196 S. W. 884.

<sup>24</sup> Santiago v. Roses, 242 Fed. 209. But compare Larson v. Anderson (Wash.), 166 Pac. 774.

<sup>25</sup> Union Bank & Co. v. Long Pole Lumber Co., 70 W. Va. 558, 74 S. E. 674, 41 L. R. A. (N. S.) 663 and note.

<sup>26</sup> Brown v. Johnson, 43 Utah 1, 134 Pac. 590, 46 L. R. A. (N. S.) 1157n, Ann. Cas. 1916C, 321, and note.

<sup>27</sup> Echols v. Howard, 17 Ga. App. 49, 86 S. E. 91; Chicago & C. R. Co.

v. Floyd (Tex. Civ. App.), 161 S. W. 954; Buffalo Pitts Co. v. Alderdice (Tex. Civ. App.), 177 S. W. 1044. Compare also Farley v. Dean, 196 Ill. App. 389. But see Calman v. Kreipke, 40 Okla. 516, 139 Pac. 698.

<sup>28</sup> Royal Indemnity Co. v. Corn, 162 N. Y. S. 659. But compare Scantlebury v. Tallcott, 84 Misc. 400, 146 N. Y. S. 184.

<sup>29</sup> Little Rock Furniture Mfg. Co. v. Kavanaugh, 111 Ark. 575, 164 S. W. 289, 51 L. R. A. (N. S.) 406n, Ann. Cas. 1916A, 848n. See also Mathews v. Globe & C. Realty Co.

disclose his principal the agent is personally liable as a general rule.<sup>30</sup>

§ 465. Rights and liabilities of parties where principal is named.<sup>31</sup>

§ 466. Rights and liabilities of parties where principal is not disclosed—Rights of principal.—As a general rule the fact that the principal is undisclosed does not enlarge his rights over his own as against the other party to the contract nor deprive the latter of any defense that he would have had against the agent.<sup>32</sup> A contract not under seal may be sued on by the undisclosed principal.<sup>33</sup>

§ 467. Rights and liabilities of parties where principal is not disclosed—Liability of agent.—The agent is usually liable personally where he does not disclose his principal.<sup>34</sup> And in such a case he may enforce the contract himself.<sup>35</sup> The other party to a contract, where the principal is not disclosed, may and

(Tex. Civ. App.), 167 S. W. 764; *Gibson v. Baskett* (Mo. App.), 178 S. W. 237. See as to liability of agent acting without or beyond authority, whether for false representation or on implied warranty of authority or on the contract: *Williams v. De Soto Oil Co.*, 213 Fed. 194, 129 C. C. A. 538; *Chieppo v. Chieppo*, 88 Conn. 233, 90 Atl. 940; *Reeb v. Bronson*, 196 Ill. App. 518; *Peoples' Nat. Bank v. Dixwell*, 217 Mass. 436; 105 N. E. 435, Ann. Cas. 1915D, 722n.

<sup>30</sup> *Cornelius v. Central Ga. R. Co.*, 13 Ala. App. 533, 69 So. 331; *Limousine & C. Mfg. Co. v. Shadburne*, 185 Ill. App. 403; *Harmon v. Parker* (Mich.), 160 N. W. 380.

<sup>31</sup> *Midkiff v. Colton*, 242 Fed. 373; *Lovejoy v. Lamar* (Ga. App.), 93 S. E. 153; *Beckwith v. Massillon Rolling Mill Co.*, 190 Mo. App. 21, 175 S. W. 253; *Williams v. Philadelphia Life Ins. Co.* (S. Car.), 89 S. E. 675.

<sup>32</sup> *Lane v. Leiter*, 237 Fed. 149, 150 C. C. A. 295. See also *Sydney v. Mugford Printing & C. Co.*, 214 Fed. 841; *Colquhoun v. Pack*, 32 Cal. App. 97, 161 Pac. 1168; *Turney v. Coventry*, 184 Ill. App. 187.

<sup>33</sup> *Eldridge v. Mowry*, 24 Cal. App. 183, 140 Pac. 978; *Kelly Asphalt & C. Co. v. Barber Asphalt & C. Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256; *Woodard v. Stieff*, 171 N. Car. 82, 87 S. E. 955; *Levy v. Nevada & C. Ry.*, 81 Ore. 673, 160 Pac. 808, L. R. A. 1917B, 564. But see where under seal *O'Brien v. Clement*, 160 N. Y. S. 975. Where contract was exclusively with the agent personally alleged undisclosed principal can not sue on it: *Sydney v. Mugford Printing & C. Co.*, 214 Fed. 841.

<sup>34</sup> *Cincinnati & C. R. Co. v. Vredenburg Sawmill Co.*, 13 Ala. App. 442, 69 So. 228; *Harmon v. Parker* (Mich.), 160 N. W. 380; *Kelly Asphalt & C. Co. v. Barber Asphalt & C. Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256; *Beebe v. Worth*, 146 N. Y. S. 146; *Dallame County v. S. H. Supply Co.* (Tex. Civ. App.), 176 S. W. 798; *Curtis v. Miller*, 73 W. Va. 481, 80 S. E. 774, 50 L. R. A. (N. S.) 601; ante § 464.

<sup>35</sup> *Holliston v. Ernston*, 124 Minn. 49, 144 N. W. 415; *Kelly Asphalt & C. Co. v. Barber Asphalt & C. Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256.

must usually elect whether to proceed against the agent or against the principal when the latter has been discovered.<sup>36</sup>

**§ 468. Rights and liabilities of parties when principal not disclosed—Rights of third persons.**—In the case of contracts other than negotiable instruments or those under seal, parol evidence is admissible to charge the real principal notwithstanding the contract is signed by the agent and nothing appears on its face to indicate that the agent is not the real principal.<sup>37</sup>

**§ 470. Rights and remedies of agent.**—Where the contract is made with the agent in his own name he may usually sue upon it even though it is in fact made for an undisclosed principal; and this is the general rule where he has a special right or interest in the contract.<sup>38</sup> But an agreement undertaking to bind the agent to do something antagonistic to the interest of his principal can not, ordinarily, be enforced by the agent nor against him by one who knew of its fraudulent character and shared in its wrongful purpose.<sup>39</sup>

<sup>36</sup> *Beatrice Creamery Co. v. Garner*, 119 Ark. 558, 179 S. W. 160; *Limousine &c. Co. v. Shadburne*, 185 Ill. App. 403; *Horton v. Southern R. Co.*, 170 N. Car. 383, 86 S. E. 1020. Compare *Auction Warehouse Co. v. Mead* (Mo. App.), 181 S. W. 1057; *Dameron v. Quick*, 116 Va. 614, 82 S. E. 709. And see where contract is under seal: *Tribune Co. v. Wendell*, 192 Ill. App. 639.

<sup>37</sup> *Boren v. Schweitzer* (Ind. App.), 117 N. E. 526. See also generally to effect that undisclosed principal is liable and may be sued: *Geary v. Taylor*, 166 Ky. 501, 179 S. W. 426;

*Carolina Hardw. Co. v. Raleigh Banking &c. Co.*, 169 N. Car. 744, 86 S. E. 706.

<sup>38</sup> *Namquit Worsted Co. v. Whitman*, 221 Fed. 49, 136 C. C. A. 575; *Camp v. Barber*, 87 Vt. 235, 88 Atl. 812, Ann. Cas. 1917A, 451n. See also *Stack v. Gudgel* (Okla.), 158 Pac. 1144; *Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 67 S. E. 281; *Harper v. Vigers*, L. R. (1909) 2 K. B. 549, 78 L. J. (N. S.) K. B. 867, 100 L. T. (N. S.) 887.

<sup>39</sup> *Isenbeck v. Burroughs*, 217 Mass. 537, 105 N. E. 595. See also *Crocker v. United States*, 49 Ct. Cl. 85.



## CHAPTER XVI

### PARTNERS

§ 476. Definition and nature of partnership.<sup>1</sup>

§ 479. Modified statement of profit-sharing test.<sup>2</sup>

§ 480. Question of law or fact—Intention.<sup>3</sup>—There must be an agreement to share the profits and losses and an intent of the parties to form a partnership for that purpose.<sup>4</sup>

§ 481. Profit sharing as evidence of partnership.—Profit sharing may not be of itself sufficient to establish a partnership, but it is an essential element and is evidence tending to show it.<sup>5</sup>

§ 482. Limited partnership.—Statutes governing the formation of limited partnerships should be fairly and reasonably construed, but they must be at least substantially complied with.<sup>6</sup>

<sup>1</sup> [Main section quoted in Rowley's Mod. Law of Partnership, § 25.]

Bacon v. Christian, 184 Ind. 517, 111 N. E. 628; Grantham v. Conner, 97 Kans. 150, 154 Pac. 246; Arnold v. Maxwell, 223 Mass. 47, 111 N. E. 687; Meagher v. Fogarty, 129 Minn. 417, 152 N. W. 833; Dixon v. Dixon (Mo.), 181 S. W. 84; Avery v. Llano Cotton &c. Ass'n (Tex. Civ. App.), 196 S. W. 351.

<sup>2</sup> Bankers' Surety Co. v. Maxwell, 222 Fed. 797, 13 C. C. A. 345; Westcott v. Gilman, 170 Cal. 562, 150 Pac. 777, Ann. Cas. 1916E, 437n; Municipal Pav. Co. v. Herring (Okla.), 150 Pac. 1067; In re De Haven's Estate, 248 Pa. 271, 93 Atl. 1013; Avery v. Llano Cotton Seed &c. Ass'n (Tex. Civ. App.), 196 S. W. 351.

<sup>3</sup> [Main section cited in Matthews v. Myers (Ind. App.), 115 N. E. 959, 961.]

<sup>4</sup> Bacon v. Christian, 184 Ind. 517, 111 N. E. 628; Dixon v. Dixon (Mo.), 181 S. W. 84; note in Ann.

Cas. 1916E, 440-442. But agreement to share loss may be implied: Lutz v. Billick, 172 Iowa 543, 154 N. W. 884. And the intent may sometimes be gathered from conduct and nature of the agreement without being expressly stated: Morgan v. Child, 47 Utah 417, 155 Pac. 451; note in Ann. Cas. 1916E, 443. It is generally a question of fact: Aylesworth v. Aylesworth, 184 Ind. 80, 109 N. E. 750.

<sup>5</sup> Wescott v. Gilman, 170 Cal. 562, 150 Pac. 777, Ann. Cas. 1916E, 437n. See also Lutz v. Billick, 172 Iowa 543, 154 N. W. 884; Moning Dry Goods Co. v. Wiseman (Okla.), 159 Pac. 259; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1195n.

<sup>6</sup> R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672, Ann. Cas. 1913B, 913 and note. For a full and recent treatment of limited partnership, see 2 Rowley's Mod. Law of Partnership, Chap. XXXI.

§ 483. **Who may be partners.**—A corporation can not, ordinarily, become a member of a partnership,<sup>7</sup> but it may be empowered to do so by its charter or the governing statute.<sup>8</sup>

§ 484. **How relation is formed.**—The partnership relation is founded in voluntary contract, and usually depends, at least as between the parties thereto, on their intention; but an express agreement is not always required, and it is the substance and effect of the agreement or transaction, rather than what the parties call it, that generally controls.<sup>9</sup>

§ 485. **Illustrative cases of partnership.**<sup>10</sup>

§ 486. **Cases in which relation was not created.**<sup>11</sup>

§ 487. **Scope of partnership—Purposes and subject-matter generally.**—A partnership may be formed or exist for a general business or series of transactions or for a single transaction.<sup>12</sup>

§ 488. **Dealing in real estate—Verbal agreement—Statute of frauds.**—According to the weight of authority a part-

<sup>7</sup> Salem-Fairfield Tel. Ass'n v. McMahan, 78 Ore. 477, 153 Pac. 788 (but may become liable on account of fiduciary relation assumed in transacting business with others within the scope of its powers); Southern Oil & Co. v. Mexia Oil & Co. (Tex. Civ. App.), 186 S. W. 446. Corporation can not become partner but may be held liable as co-adventurer in promoting proposed corporation: Quitman Oil Co. v. McRee, 18 Ga. App. 128, 88 S. E. 921.

<sup>8</sup> Morgan v. Child, 47 Utah 417, 155 Pac. 451; News-Register Co. v. Rockingham Pub. Co., 118 Va. 140, 86 S. E. 874. It is so under Uniform Partnership Act, § 2, cl. 3; § 6, cl. 1.

<sup>9</sup> Morgan v. Child, 47 Utah 417, 155 Pac. 451. See also Watson v. Hamilton, 180 Ala. 3, 60 So. 63; Aylesworth v. Aylesworth, 184 Ind. 80, 109 N. E. 750; In re Whitlow's Estate, 184 Mo. App. 229, 167 S. W. 463; Municipal Pav. Co. v. Herring (Okla.), 150 Pac. 1067; note in Ann. Cas. 1916E, 443. It need not ordinarily be in writing: Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1195, and note.

<sup>10</sup> Campbell v. Northwest Eckington Imp. Co., 229 U. S. 561, 57 L. ed. 1330, 33 Sup. Ct. 796; McPhaul v. Curry (Ga.), 91 S. E. 89; Keller v. Keller, 193 Ill. App. 423; Hemsley v. Hollingsworth, 119 Md. 431, 87 Atl. 506; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Edwards v. Zuck, 171 Mich. 29, 136 N. W. 1122; Moore v. Thorpe, 133 Minn. 244, 158 N. W. 235; Smith v. Imhoff, 89 Wash. 418, 154 Pac. 793 (special partnership); Krebs v. Blankenship, 73 W. Va. 539, 80 S. E. 948.

<sup>11</sup> The Mettacommet, 233 Fed. 261, 147 C. C. A. 267; Harrison v. Walker, 124 Ark. 555, 188 S. W. 17; Fee v. McPhee Co., 31 Cal. App. 295, 160 Pac. 397; Wade v. Hornaday, 92 Kans. 293, 140 Pac. 870; Studebaker Corp. v. Dodds, 161 Ky. 542, 171 S. W. 167; Williams v. Knibbs, 213 Mass. 534, 100 N. E. 666; Miller v. Pepperling, 185 Mo. App. 222, 170 S. W. 328; Cole v. Rome Sav. Bank, 96 Misc. 188, 161 N. Y. S. 15; Driskill v. Boyd (Tex. Civ. App.), 181 S. W. 715.

<sup>12</sup> Morgan v. Child, 47 Utah 417, 155 Pac. 451. Scope of partnership

nership may be created by oral agreement to deal in real estate, as such a contract is not usually regarded as within the statute of frauds.<sup>13</sup>

§ 489. **Illegal purpose of business.**—A partnership formed to carry on a business contrary to public policy, or otherwise illegal, is void, at least to that extent.<sup>14</sup> And a partner has no implied authority to make an unlawful contract.<sup>15</sup>

§ 490. **Scope of partnership and authority of partners.**—Valid contracts entered into for the partnership by one partner within the scope of his authority are binding upon all the partners as such,<sup>16</sup> and as to third persons, acting in good faith in reliance on the apparent scope of his authority the contract is usually binding upon the partnership regardless of any secret agreement or arrangement between the partners.<sup>17</sup> But it is otherwise where the transaction is an independent one not connected with the firm business or within its apparent scope.<sup>18</sup> As between themselves, however, partners sustain a relation of trust and confidence and each must adhere to the partnership agreement and confine his acts to the real scope of the partnership business.<sup>19</sup>

business may be expanded by mutual assent: *Smith v. Smith* (Iowa), 160 N. W. 756.

<sup>13</sup> *Beebe v. Olentine*, 97 Ark. 390, 134 S. W. 936; *Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478; *Maguire v. Kiesel*, 86 Conn. 453, 85 Atl. 689; *Thompson v. McKee*, 43 Okla. 243, 142 Pac. 755, L. R. A. 1915A, 521, and note; *Moran v. McDevitt* (R. I.), 83 Atl. 1013; *Hardin v. Hardin*, 26 S. Dak. 601, 129 N. W. 108. But compare *Wiley v. Wiley*, 115 Md. 646, 81 Atl. 180, Ann. Cas. 1913A, 789n; *Burgwyn v. Jones*, 113 Va. 511, 75 S. E. 188, 41 L. R. A. (N. S.) 120, Ann. Cas. 1913E, 564n; *Huntington v. Burdeau*, 149 Wis. 263, 135 N. W. 845.

<sup>14</sup> *Berns v. Shaw*, 65 W. Va. 667, 64 S. E. 930, 23 L. R. A. (N. S.) 522, and note (gambling); *Kennedy v. Lonabaugh*, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133, and note.

<sup>15</sup> *Minthorn v. Haines*, 169 Mich. 169, 134 N. W. 1113.

<sup>16</sup> *Lingenfelter v. St. Clair* (Iowa), 161 N. W. 87. See also *Little v. Britton*, 189 Ala. 10, 66 So. 694; *Craig v. Warner*, 216 Mass. 386, 103 N. E. 1032; *Chapin v. Cherry*, 243 Mo. 375,

147 S. W. 1084; *William L. Blanchard Co. v. Hilton*, 83 N. J. L. 780, 85 Atl. 456; *Reirden v. Stephenson*, 87 Vt. 430, 89 Atl. 465, Ann. Cas. 1916C, 109n. Where an underwriting agreement made the members of a firm managers of the syndicate, a guaranty signed by one of them in his own name as partner and in the names of the others was held binding: *Union Land Co. v. Gwynn*, 216 N. Y. 664, 110 N. E. 162. See also *Hill v. First State Bank* (Tex. Civ. App.), 189 S. W. 984. But compare *Lewis v. Isbell Nat. Bank* (Ala.), 73 So. 655; *In re Farmers & C. Bank* (Mich.), 160 N. W. 601.

<sup>17</sup> *Williams v. Carson* (Ark.), 191 S. W. 401; *Sakelos v. Hutchinson Bros.*, 129 Md. 300, 99 Atl. 357.

<sup>18</sup> *Samstag & C. Bros. v. Ottenheimer*, 90 Conn. 475, 97 Atl. 865; *Gimbel Bros. v. Martinson*, 157 N. Y. S. 458. See also *Reed Coal Co. v. Fain*, 171 N. Car. 646, 89 S. E. 29.

<sup>19</sup> *Coady v. Igo*, 91 Conn. 54, 98 Atl. 328; *Arnold v. Maxwell*, 223 Mass. 47, 111 N. E. 687; *Heck v. Voelkle*, 95 Misc. 692, 160 N. Y. S. 903; *Stem v. Warren*, 96 Misc. 362, 161 N. Y. S. 247.

## CHAPTER XVII

### FIDUCIARIES

#### § 501. Trustees generally.<sup>1</sup>

§ 502. **Creation of trusts.**—Any contract in writing by the person having the power of disposition of property agreeing or directing that a certain fund or parcel of it be held or dealt with for the benefit of another person is, in general, sufficient to create or raise a trust in favor of such other person.<sup>2</sup> Precatory words may be sufficient to create a precatory trust.<sup>3</sup> But a person can not be at the same time both beneficiary and trustee for himself under a trust deed.<sup>4</sup>

§ 503. **When trust must be in writing.**—An express trust concerning land must, under the statutes of most states, be created in writing,<sup>5</sup> but this requirement does not extend or apply to trusts in personalty.<sup>6</sup>

<sup>1</sup> For definitions of "trust" and "trustee," see: *Burns v. Hammel*, 32 Cal. App. 214, 162 Pac. 669; *Keplinger v. Keplinger* (Ind.), 113 N. E. 292; *Thompson v. Thompson* (Iowa), 160 N. W. 922.

<sup>2</sup> *Richards v. Wilson* (Ind.), 112 N. E. 780. See *Beidler v. Dehner* (Iowa), 161 N. W. 32. See also generally for evidence held sufficient to show an express trust: *Glazier v. Everett*, 224 Mass. 184, 112 N. E. 1009; *Ward v. Buchanan* (N. Mex.), 160 Pac. 356. But see *Brindley v. Brindley* (Ala.), 72 So. 497; *Corbett v. Gallagher*, 225 Mass. 480, 114 N. E. 751; *Northrup v. Burge*, 255 Mo. 641, 164 S. W. 584. A trust by implication is created only where an inference arises from the whole transaction, including the words used, that it was the intent of the parties to create it: *Ellis v. Flannigan* (Ill.), 116 N. E. 618.

<sup>3</sup> *Keplinger v. Keplinger* (Ind.), 113 N. E. 292. But see *Carter v. Strickland*, 165 N. Car. 69, 80 S. E.

961, Ann. Cas. 1915D, 416, and note.

<sup>4</sup> *Shope v. Unknown Claimants*, 174 Iowa 662, 156 N. W. 850.

<sup>5</sup> *Chapman v. Whitsett*, 236 Fed. 873, 150 C. C. A. 135; *Terry v. Davenport* (Ind.), 112 N. E. 998. Contra *Clary v. Spain*, 119 Va. 58, 89 S. E. 130. Statute does not apply where agreement has been performed as to part within statute: *Robertson v. Howerton* (Okla.), 156 Pac. 329; *Shippey v. Bearman* (Okla.), 157 Pac. 302. See also note in Ann. Cas. 1913A, 954. The written evidence to satisfy the statute may ordinarily come from the grantor or the trustee, but not from the cestui que trust: *Richards v. Wilson* (Ind.), 112 N. E. 780. And see generally as to proof of express trust by written declaration of trustee: *Chance v. Graham*, 76 Ore. 199, 148 Pac. 63, and note in Ann. Cas. 1913B, 1023.

<sup>6</sup> *Richards v. Wilson* (Ind.), 112 N. E. 780; *Marshall v. Marshall*, 156 Ky. 20, 160 S. W. 775, 51 L. R. A. (N.

§ 504. **Constructive implied trust.**<sup>7</sup>—A constructive trust is not within the statute of frauds and may, therefore, rest in parol even as to land.<sup>8</sup>

§ 505. **Resulting trusts.**<sup>9</sup>

§ 506. **Rights, powers and liabilities of trustees.**—A trustee can not buy his own property for purposes of the trust;<sup>10</sup> nor has he any right, as against the beneficiary, to obtain the trust property for himself.<sup>11</sup>

§ 508. **Trustees entitled to recover money advanced and to reasonable compensation.**—At common law, in England, the general rule, in the absence of any provision in the trust instrument or contract, is that the trustee is not entitled to compensation; but, in this country, it is the custom in most jurisdictions to allow commissions and reasonable compensation even though there is no provision to that effect in the trust instrument and no statute so providing.<sup>12</sup> The trustee may, of course, waive his right to commissions or other compensation, and such waiver is binding on his legal representatives.<sup>13</sup>

§ 509. **Powers of trustee.**—A trustee's powers and duties other at least than the ordinary general powers and duties incident to the office or relation, depend largely upon the provisions of the trust instrument or declaration, and, in some instances, upon the order of court.<sup>14</sup> As a general rule where there are joint trustees,

S.) 1208, and note; *Isenberg v. Huntington & Lumber Co.*, 62 Pa. Super. Ct. 491.

<sup>7</sup> As to what is necessary or sufficient to establish a constructive or resulting trust, see note in *Ann. Cas.* 1916D, 1194.

<sup>8</sup> *Westphal v. Heckman* (Ind.), 113 N. E. 299; *O'Day v. Annex Realty Co.* (Mo.), 191 S. W. 41.

<sup>9</sup> *American Min. Co. v. Trask*, 28 Idaho 642, 156 Pac. 1136; *Belcher v. Young*, 90 Wash. 303, 155 Pac. 1060.

<sup>10</sup> *Cornet v. Cornet*, 269 Mo. 298, 190 S. W. 333.

<sup>11</sup> *Sunny Brook Zinc & Co. v. Metzler*, 231 Fed. 304.

<sup>12</sup> *Leach v. Cowan*, 125 Tenn. 182, 140 S. W. 1070, *Ann. Cas.* 1913C,

188, and note, showing in what states this rule obtains, either by custom or under statute, and in what states a trustee is not entitled to compensation. See also *Sartor v. Newberry Land & Co.*, 104 S. Car. 184, 88 S. E. 467 (entitled to commission but not for other compensation except under order of court).

<sup>13</sup> *Cook v. Stockwell*, 206 N. Y. 481, 100 N. E. 131, *Ann. Cas.* 1914B, 491, and note.

<sup>14</sup> *Merchants' Loan & Co. v. Northern Trust Co.*, 250 Ill. 86, 95 N. E. 59, 45 L. R. A. (N. S.) 411, and note (investment in real estate and in foreign jurisdictions); *Kelly v. Anderson*, 173 Ky. 298, 190 S. W. 1101; *True Real Estate Co. v. True*

all must usually unite in the execution of a contract or power under the trust.<sup>15</sup>

**§ 510. Personal liability of trustee.**—A trustee must act in good faith and exercise reasonable care and diligence, but when he has done this, and his act is within his authority as trustee, he is not ordinarily liable personally for any loss<sup>16</sup> although he may be personally liable where he has used or invested the property individually or contrary to statute, improperly surrendered control of it, or deposited it in his own name or the like.<sup>17</sup> So, as will be shown in another section, he may be personally liable on contracts made in his own name or without and beyond the scope of his authority as trustee.<sup>18</sup>

**§ 510a. When trustee's contract binds estate or cestui que trust.**<sup>19</sup>

**§ 511. When trustee is personally liable.**—As a general rule, where a contrary intention is not clearly manifested, a trustee is personally liable on contracts made in his own name.<sup>20</sup> This general rule applies to a covenant in a deed executed by a trustee. According to the weight of authority he is personally liable thereon even though he describes himself as trustee or the like, but is not personally liable where he has authority and it clearly appears that it was not intended to bind him personally.<sup>21</sup> A contract made by a trustee with himself, in violation of the trust, is

(Maine), 99 Atl. 627; *Hill v. Moors*, 224 Mass. 163, 112 N. E. 641; *Ogden v. Allen*, 225 Mass. 595, 114 N. E. 862; *In re Frost's Estate*, 96 Misc. 122, 159 N. Y. S. 613; *In re Keane*, 95 Misc. 25, 160 N. Y. S. 200; *Lesesne v. Cheves* (S. Car.), 90 S. E. 37; *International Trust Co. v. Preston* (Wyo.), 156 Pac. 1128.

<sup>15</sup> *Hoosier Min. Co. v. Union Trust Co.*, 173 Ky. 505, 191 S. W. 305; *Striker v. Daly*, 175 App. Div. 620, 162 N. Y. S. 527; *Andrews v. Kirk*, 160 N. Y. S. 434. See also *Page v. Gillett*, 26 Colo. App. 204, 141 Pac. 866.

<sup>16</sup> *Willis v. Braucher*, 79 Ohio St. 290, 87 N. E. 185, 44 L. R. A. (N. S.) 873, and note, 16 Ann. Cas. 66; note in Ann. Cas. 1915C, 50.

<sup>17</sup> *Chancellor v. Chancellor*, 177

Ala. 44, 58 So. 423, 45 L. R. A. (N. S.) 1n, Ann. Cas. 1915C, 47 and note on pages 51-54. See also *Cornet v. Cornet*, 269 Mo. 298, 190 S. W. 333.

<sup>18</sup> *Philip Carey Co. v. Pingree*, 223 Mass. 352, 111 N. E. 857; *Feldman v. Preston* (Mich.), 160 N. W. 655. See also post, § 511.

<sup>19</sup> *Holden v. Circleville & Co.*, 216 Fed. 490, 132 C. C. A. 550, Ann. Cas. 1916D, 443n; *Cathcart v. Matthews*, 105 S. Car. 328, 89 S. E. 1021; *In re Mendel's Will*, 164 Wis. 136, 159 N. W. 806 (ratification by cestui que trust).

<sup>20</sup> *Parr v. Leahy*, 217 Mass. 438, 105 N. E. 445; *Feldman v. Preston* (Mich.), 160 N. W. 655.

<sup>21</sup> *Ivey v. Vaughan*, 93 S. Car. 203, 76 S. E. 464, 43 L. R. A. (N. S.) 377 and note, Ann. Cas. 1914D, 900n.

enforcible against him.<sup>22</sup> A trustee may also be personally liable for losses caused by negligence or lack of authority in making investments, and where he deposits money in his own name, but not ordinarily where the deposit is temporary and to the credit of the trust estate and he uses reasonable and ordinary care under the circumstances.<sup>23</sup> So, an order of court may sometimes protect him.<sup>24</sup>

**§ 512. Executors and administrators — Authority generally.**—Neither a corporation nor an individual can be and act as executor except by appointment, and in such relation, either one is governed by the laws of the state and orders of the state court.<sup>25</sup> The powers and obligations of an executor or administrator are determined or defined and limited by the will or statute, and he has, in general, no implied powers beyond such as are necessary to effectuate the powers expressly conferred.<sup>26</sup>

**§ 513. Power to bind estate by contract—Illustrative cases.**—An executor or administrator, in the absence of authority by will or statute, can not bind the estate to pay an attorney a certain sum or a contingent fee to prosecute an action or assist in settling the estate,<sup>27</sup> but the courts will usually allow a reasonable sum for necessary attorney's fees.<sup>28</sup> Reasonable funeral expenses are usually made payable out of the estate by statute,<sup>29</sup> and such reasonable expenditures for a tombstone or monument are usually classed as funeral expenses.<sup>30</sup> A me-

<sup>22</sup> *Ennis v. New World Life Ins. Co.* (Wash.), 165 Pac. 1091.

<sup>23</sup> *Chancellor v. Chancellor*, 177 Ala. 44, 58 So. 423, 45 L. R. A. (N. S.) 1, and note, Ann. Cas. 1915C, 47, and note; *Willis v. Braucher*, 79 Ohio St. 290, 87 N. E. 185, 44 L. R. A. (N. S.) 873, and elaborate note, 16 Ann. Cas. 66. See also *American Bonding Co. v. Richardson*, 214 Fed. 897, 131 C. C. A. 565.

<sup>24</sup> Note in 44 L. R. A. (N. S.) 940, et seq.

<sup>25</sup> *Fellows v. First Nat. Bank* (Mich.), 159 N. W. 335.

<sup>26</sup> *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447, Ann. Cas. 1917B, 213n. See also *Jahp v. Bradley*, 185 Ill. App. 215; *Rosenberg v. Jefferson*, 98 Misc. 616, 163 N. Y. S. 157. In Georgia administrators may in good faith and with proper prudence sub-

mit to arbitration matters in controversy relative to the estate: *Murray v. Hawkins*, 144 Ga. 613, 87 S. E. 1068. He has no authority to waive rights of beneficiaries to unpaid portions of a claim in favor of estate: *Tustin v. Philadelphia &c. Iron Co.*, 250 Pa. 425, 95 Atl. 595.

<sup>27</sup> *In re Munger's Estate*, 168 Iowa 372, 150 N. W. 447, Ann. Cas. 1917B, 213, and note.

<sup>28</sup> *Evan's Admr. v. McVey*, 172 Ky. 1, 188 S. W. 1075; *In re Nocton's Estate*, 162 N. Y. S. 215.

<sup>29</sup> *Golden Gate Undertaking Co. v. Taylor*, 168 Cal. 94, 141 Pac. 922, 52 L. R. A. (N. S.) 1152 and note, Ann. Cas. 1915D, 742n.

<sup>30</sup> *In re Lester's Estate*, 169 Iowa 15, 150 N. W. 1033, Ann. Cas. 1917B, 255, and note.

chanic's lien can not be taken and enforced for materials furnished under a contract with an administrator to finish a building begun by his intestate, where the statute authorizes such a lien only for materials furnished under contract with the owner or proprietor or his agent.<sup>31</sup>

§ 517. **Powers given by will.**—An executor may be given power under a will to sell real estate;<sup>32</sup> and this power will be implied when the duties imposed on the executor can not be performed without making a sale.<sup>33</sup> While it can not ordinarily be delegated when it is not mandatory and special confidence appears to be placed in the person named, the power of sale given executors in a will, even if not mandatory, is deemed to have been so coupled with an interest, where the active and continuing duty of managing the property and making disposition of it, is invested in the executors, that the survivor may exercise such power of sale.<sup>34</sup>

§ 518. **Liability when estate is benefited.**—Contracts of executors or administrators, although made in the interest or for the benefit of the estate, if made upon a new and independent consideration between their promisee and themselves, are their personal contracts and do not bind the estate even when they are designated as such representatives.<sup>35</sup>

§ 519. **Personal liability.**—An administrator may render himself personally liable when he contracts in his own name, even though he describes himself as administrator or executor.<sup>36</sup> And an administrator or executor may be personally liable on his cov-

<sup>31</sup> *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S. W. 327, 52 L. R. A. (N. S.) 870n. As to power to borrow money and mortgage or pledge assets of the estate as security, see: *Solomon v. Altenborough*, L. R. (1912) 1 Ch. Div. 451, Ann. Cas. 1912C, 975, and note.

<sup>32</sup> *Haggin v. Straus*, 148 Ky. 140, 146 S. W. 391, 50 L. R. A. (N. S.) 642, and note.

<sup>33</sup> *Hilles v. Hilles* (Del. Ch.), 98 Atl. 296. See also *Broadhurst v. Mewborn*, 171 N. Car. 400, 88 S. E. 628; *Sherwood v. McLaurin*, 103 S. Car. 370, 88 S. E. 363.

<sup>34</sup> *Wilson v. Snow*, 228 U. S. 217, 57 L. ed. 807, 33 Sup. Ct. 487, 50 L. R. A. (N. S.) 604, and note. See

also *Atzinger v. Berger*, 151 Ky. 800, 152 S. W. 971, 50 L. R. A. (N. S.) 622. And this is so where it is attached to the office rather than conferred in personal confidence: *Wallace v. Foxwell*, 250 Ill. 616, 95 N. E. 985, 50 L. R. A. (N. S.) 632n. But compare *Aldred v. Sylvester*, 184 Ind. 542, 111 N. E. 914.

<sup>35</sup> *Jahp v. Bradley*, 185 Ill. App. 215. See also *Golden Gate Undertaking Co. v. Taylor*, 168 Cal. 94, 141 Pac. 922, 52 L. R. A. (N. S.) 1152 and note, Ann. Cas. 1915D, 742n; *O'Kelly v. McGinnis*, 141 Ga. 379, 81 S. E. 197 (no authority to bind estate for money borrowed for its benefit).

<sup>36</sup> Post § 2835.



enants in a deed, unless the intent to exclude it clearly appears.<sup>37</sup> So, he has, ordinarily at least, no authority to carry on the business of the deceased, for this right or authority does not pass to him under the law; and, where he does so without authority he is personally liable.<sup>38</sup> But merely completing a contract for assumption of a mortgage by exchange of deeds under authority of court after death of the grantee does not make the administrator personally liable.<sup>39</sup>

§ 522. **Guardians—Authority generally.**—A guardian can not sell his ward's land except under order of court;<sup>40</sup> nor can he, ordinarily, without such order, create a lien thereon by contract for labor and improvements.<sup>41</sup> It seems that a guardian may lease his ward's real estate without an order of court unless it is required by statute, during the existence of the guardianship and, perhaps, for so long as the ward remains an infant, but not longer.<sup>42</sup> Under some statutes, especially in the case of oil and gas leases, the lease by the guardian may extend even beyond the minority of his ward.<sup>43</sup>

§ 524. **Personal liability of guardian.**—A guardian is liable, in general, for the ward's estate so far as it comes into his hands or could have been recovered by him by ordinary care and diligence.<sup>44</sup> Equity requires the utmost good faith on the part of the guardian in transactions with his ward.<sup>45</sup>

<sup>37</sup> Ivey v. Vaughan, 93 S. Car. 203, 76 S. E. 464, 43 L. R. A. (N. S.) 377, and note, Ann. Cas. 1914D, 900, and note.

<sup>38</sup> Western Newspaper Union v. Thurmond, 27 Okla. 261, 111 Pac. 204, Ann. Cas. 1912B, 727, and note. See also Succession of Hawkins, 139 La. 228, 71 So. 492. See as to liability for payment of inheritance or succession tax: In re Meyer, 209 N. Y. 386, 103 N. E. 713, L. R. A. 1915C, 615, and note, Ann. Cas. 1915A, 263, and note.

<sup>39</sup> Clarke v. Johnson, 164 Wis. 461, 160 N. W. 180.

<sup>40</sup> Drennan v. Harris (Okla.), 161 Pac. 781.

<sup>41</sup> Lee v. Tonsor (Okla.), 161 Pac. 804. See also Little v. West, 145 Ga. 563, 89 S. E. 682.

<sup>42</sup> Bettes v. Brower, 184 Fed. 342. See also Rogers v. Harris (Tex. Civ. App.), 171 S. W. 809.

<sup>43</sup> Mallen v. Ruth Oil Co., 230 Fed. 497; Cabin Valley Min. Co. v. Hall (Okla.), 155 Pac. 570, L. R. A. 1916F, 493. See also McCreary v. Billing, 176 Ala. 314, 58 So. 311, Ann. Cas. 1915A, 561n. But order of court is held necessary in Daniels v. Charles, 172 Ky. 238, 189 S. W. 192.

<sup>44</sup> Dunleavy v. Mayfield (Okla.), 155 Pac. 1145; Brewer v. Perryman (Okla.), 162 Pac. 791. As to liability for losses from investments or deposits, see note in 44 L. R. A. (N. S.) 873.

<sup>45</sup> Pevchouse v. Adams (Okla.), 153 Pac. 65. See also Daniel v. Tolon (Okla.), 157 Pac. 756.

§ 527. **Receivers—Authority generally.**—A receiver represents all interests and, under direction of the court, has charge of the property for the benefit of all concerned.<sup>46</sup> As a general rule, he is not bound to perform existing executory contracts of the owner of the estate for which he is appointed, and subject to the order of the court, he may usually elect whether to perform or repudiate, but the court may order performance in a proper case.<sup>47</sup> So, where cars were purchased by persons who, without authority, assumed to act as receivers, it was held that a receiver who took possession of the railroad under a valid appointment was bound to elect within a reasonable time and could not retain them thereafter without paying the contract price remaining unpaid.<sup>48</sup> A corporate receiver, unless authorized by the court, usually has no authority to make any binding agreement modifying or abrogating contracts between the corporation and a third person.<sup>49</sup>

§ 528. **Receiver's contracts under order of court.**—An agreement made with receivers, approved by the court, is regarded as an agreement with the court and the court may order it complied with by summary process without an independent suit brought by a party to enforce it.<sup>50</sup> An order authorizing a receiver to borrow certain sums of money to carry on the business does not entitle him to purchase goods on credit.<sup>51</sup>

§ 529. **Receivers' certificates.**<sup>52</sup>

§ 530. **Personal liability of receiver.**—A receiver may render himself personally liable by contracting in his own name,

<sup>46</sup> *Marcovich v. O'Brien* (Ind. App.), 114 N. E. 100; *Bull v. International Power Co.* (N. J. Ch.), 98 Atl. 382. A receiver of a corporation derives his authority and possessory rights in its property from the court and not from the corporation: *Underhill v. Rutland R. Co.* (Vt.), 98 Atl. 1017. See as to his title and rights acquired: *Black v. Manhattan Trust Co.*, 213 Fed. 692; *In re Farmers' & C. Bank* (Mich.), 160 N. W. 601; *Payne Hardware Co. v. International Harvester Co.* 110 Miss. 783, 70 So. 892. And see as to right to take possession from property of stranger, note in 47 L. R. A. (N. S.) 744-758.

<sup>47</sup> *In re Newdigate Colliery,*

*Limited*, L. R. (1912) 1 Ch. Div. 468, Ann. Cas. 1912C, 945, and note.

<sup>48</sup> *Crawford v. Gordon*, 88 Wash. 553, 153 Pac. 363, L. R. A. 1916C, 516, and note.

<sup>49</sup> *St. Joseph Gas Co. v. Barker*, 243 Fed. 206.

<sup>50</sup> *In re Hollingsworth & Whitney Co.*, 242 Fed. 753, citing *Walton v. Johnson*, 15 Sim. 397; *American & Co. v. Baltimore & C. Co.*, 124 Fed. 866, 877, 62 C. C. A. 397.

<sup>51</sup> *Haines v. Buckeye Wheel Co.*, 224 Fed. 289, 139 C. C. A. 525.

<sup>52</sup> *Title Ins. & C. Co. v. California Development Co.*, 171 Cal. 227, 152 Pac. 564; *Hewitt v. Walters*, 21 Idaho 1, 119 Pac. 705, Ann. Cas. 1913C, 35, and note; *Stacy v. Mc-*



even though he describes himself as receiver.<sup>53</sup> But it is held that he does not become personally liable on a note given without authority, in the absence of fraud or concealment, where there is no agreement or intention to assume such liability.<sup>54</sup> And he is not, ordinarily, at least where the employment is authorized by order of court, personally liable for attorney's fees, and the attorney must look for his compensation to the allowance which may be made by the court.<sup>55</sup>

**§ 532. Other persons occupying fiduciary relations—Promoters.**<sup>56</sup>

**§ 533. Personal liability of promoter—Right to compensation.**<sup>57</sup>

**§ 534. Other persons occupying fiduciary relations—Directors of corporations.**—Many recent cases illustrate and enforce the general rule that directors occupy a fiduciary relation to their corporation and stockholders, and must use the utmost good faith in dealing with them.<sup>58</sup> But the weight of authority is to the effect that, in the absence of special trust and confidence, directors do not sustain such a fiduciary relation to a stockholder in purchasing stock from him as to require a voluntary disclosure of information.<sup>59</sup>

Nicholas, 76 Ore. 167, 144 Pac. 96, 148 Pac. 67.

<sup>53</sup> Guimarin v. Southern Life & Co. (S. Car.), 90 S. E. 319.

<sup>54</sup> In re Wilson's Estate, 252 Pa. 372, 97 Atl. 453.

<sup>55</sup> Willett v. Janecke, 85 Wash. 654, 149 Pac. 17, Ann. Cas. 1917B, 351n. As to liability for loss of money deposited, see note in 45 L. R. A. (N. S.) 17. As to liability for rent, see note in Ann. Cas. 1916E, 818.

<sup>56</sup> Tanner v. Sinaloa Land & Co., 43 Utah 14, 134 Pac. 586, Ann. Cas. 1916C, 100, and note.

<sup>57</sup> [Main section quoted in Jarvis v. Great Bend Oil Co. (Okla.), 168 Pac. 450, 454.]

<sup>58</sup> Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227; In re Allen-Foster-

Willett Co. (Mass.), 116 N. E. 875; H. B. Cartwright & Bro. v. United States Bank & Co. (N. Mex.), 167 Pac. 436; Thomas v. Matthews (Ohio St.), 113 N. E. 669, L. R. A. 1917A, 1068, and note; Timme v. Kopmeier, 162 Wis. 571, 156 N. W. 961, L. R. A. 1916D, 1114. See also H. C. Girard Co. v. Lamoureux (Mass.), 116 N. E. 572; Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014, L. R. A. 1917A, 1174, Ann. Cas. 1913A, 366n; Corry v. Barre Granite & Co. (Vt.), 101 Atl. 38. See also Steinfeld v. Nielsen, 15 Ariz. 424, 444, 139 Pac. 879, 888; Allen v. Hyatt, (1914) 17 D. L. R. (Eng.) 7, 30 L. T. 444.

<sup>59</sup> Shaw v. Cole Mfg. Co., 132 Tenn. 210, 177 S. W. 479, L. R. A. 1916B, 706, and note.

## CHAPTER XVIII

### PRIVATE CORPORATIONS

#### § 540. Power of private corporation to contract generally.

—The power of a corporation to contract is usually restricted to or by the purposes for which it is created, but it generally has all the reasonably necessary, or ordinary and usual, powers required to carry out or further such purposes, whether expressly given or not, in the absence of prohibition, express or implied.<sup>1</sup>

§ 542. **Incidental and implied powers.**—As a general rule corporations have all powers, within the fair intent and purpose of their creation, which are reasonably necessary or suitable and proper to give effect to the powers expressly granted, so long as they do not violate the charter, statute or public policy of the state.<sup>2</sup> “Implied powers, in corporations, are presumed to exist only to the extent that may be necessary to enable such bodies to carry out the express powers granted, and to accomplish the

<sup>1</sup> *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368, 130 S. W. 162; *Gregg v. Little Rock Chamber of Commerce*, 120 Ark. 426, 179 S. W. 658, L. R. A. 1916B, 1006, Ann. Cas. 1917C, 784 (Chamber of Commerce may grant subsidy); *National Union v. Keefe*, 263 Ill. 453, 105 N. E. 319, Ann. Cas. 1915C, 271; *Eastern Ill. State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573; *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 149 Iowa 141, 126 N. W. 190; *Doty v. American Tel. & Co.*, 123 Tenn. 329, 130 S. W. 1053, Ann. Cas. 1912C, 167n; *State v. Vanderbilt University*, 129 Tenn. 279, 164 S. W. 1151; *American Mfg. Co. v. O. C. Frey Hardware Co.* (Tex. Civ. App.), 180 S. W. 956 (hardware company may contract for advertising scheme in furtherance of usual business); *Jacobs v. Wisconsin Nat. Life Ins. Co.*, 162 Wis. 318, 156 N. W. 159. While a corporation may not exceed the rights and powers it might have under the statute providing for incorporation, its authority may be restricted by adopting articles of incorporation curtailing such powers: *Seamless Pressed Steel & Co. v.*

*Monroe*, 57 Ind. App. 136, 106 N. E. 538.

<sup>2</sup> *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368, 130 S. W. 162; *S. O. & C. Co. v. Ansonia Water Co.*, 83 Conn. 611, 78 Atl. 432; *McAdow v. Kansas City & C. R. Co.*, 96 Kans. 423, 151 Pac. 1113, L. R. A. 1917B, 1158n; *German Corp. v. Neogaunee German Aid Soc.*, 172 Mich. 650, 138 N. W. 343; *State v. Vanderbilt University*, 129 Tenn. 279, 164 S. W. 1151; *National Mercantile Co. v. Mattson*, 45 Utah 141, 143 Pac. 223. See, for instances: *Young v. United Zinc Co.*, 194 Fed. 461; *La Salle & Coal Co. v. Sanitary Dist.*, 260 Ill. 423, 103 N. E. 175; *Cox v. Baltimore & C. R. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453n; *Mutual Life Ins. Co. v. Board*, 115 Va. 836, 80 S. E. 565, L. R. A. 1915F, 979n. For powers not implied or incidental, see: *Calumet & Dock Co. v. Conkling*, 273 Ill. 318, 112 N. E. 982, L. R. A. 1917B, 814n; *Planters & Oil Co. v. Guaranty State Bank* (Tex. Civ. App.), 188 S. W. 38; *National Car Advertising Co. v. Louisville & C. R. Co.*, 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010, and note.

purpose of their creation; and an incidental power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it.”<sup>3</sup>

#### § 543. Implied contracts.<sup>4</sup>

§ 544. **Seal.**—Although the corporate seal is not essential to the validity of a chattel mortgage executed by a corporation it is not presumed to be the act of the corporation where there is no seal, and the party relying on it must show that the executing officer was authorized; hence it is inadmissible in evidence against the corporation without such preliminary proof.<sup>5</sup>

#### § 545. Power to take and hold land.<sup>6</sup>

§ 546. **Power to take by a mortgage and to mortgage real estate.**—It is usually within the power of a corporation to borrow money to carry out the purposes for which it is organized,<sup>7</sup> and, where this power exists, the corporation also has power, as a general rule, to mortgage its real estate to secure the same or other indebtedness which it is authorized to incur.<sup>8</sup>

§ 547. **Power to hold and convey personal and real property.**<sup>9</sup>—In the absence of any prohibition or injury to creditors, a corporation may purchase its own stock.<sup>10</sup>

<sup>3</sup> Robert Gair Co. v. Columbia Rice Packing Co., 124 La. 193, 50 So. 8.

<sup>4</sup> A business corporation may be bound by an implied contract the same, in general, as a natural person: Apsey v. Chattel Loan Co., 216 Mass. 364, 103 N. E. 899. But compare Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. (N. S.) 979n. As to action on implied contract to return property or place parties in statu quo where contract is ultra vires, see: Crowder State Bank v. Aetna Powder Co., 41 Okla. 394, 138 Pac. 392, L. R. A. 1917A, 1021, and extended note.

<sup>5</sup> First Nat. Bank v. Clifton Armory Co., 14 Ariz. 360, 128 Pac. 810, Ann. Cas. 1915A, 1061n. See also West Penn Chemical & Co. v. Prentice, 236 Fed. 891, 150 C. C. A. 153; Stauffer v. Koch, 225 Mass. 525, 114 N. E. 750 (authority presumed when instrument bears president's signature and corporate seal). As to what is a sufficient corporate seal,

see: Cannon v. Gorham, 136 Ga. 167, 71 S. E. 142, Ann. Cas. 1912C, 39, and note.

<sup>6</sup> Cross v. Seaboard Air Line R. Co. (N. Car.), 90 S. E. 14 (may take an estate in fee); Clarksburg & Land Co. v. Davis (W. Va.), 86 S. E. 929.

<sup>7</sup> Welliver v. Coate (Ind. App.), 114 N. E. 775.

<sup>8</sup> In re Federal Contracting Co., 212 Fed. 696, 129 C. C. A. 232; Osborn v. Detroit Kraut Co. (Mich.), 160 N. W. 442.

<sup>9</sup> See post, §§ 2832, 2833. As to who may question the power to take or hold property, see: Kohlruess v. Zachery, 139 Ga. 625, 77 S. E. 812, 46 L. R. A. (N. S.) 72, and note. And as to who may object to sale of property as ultra vires, see: Golconda Northern Ry. v. Gulf Lines & Railroad, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833, and note.

<sup>10</sup> West Penn. Chemical & Co. v. Prentice, 236 Fed. 891, 150 C. C. A.

§ 548. **Power of one corporation to purchase and hold stock in another.**—As a general rule a national bank has no power to purchase stock in another corporation.<sup>11</sup> But there are exceptional cases in which it may take the stock of another corporation,<sup>12</sup> and it has been held that it may subscribe to stock in another corporation in order to secure a desirable banking home.<sup>13</sup>

§ 550. **Power to appoint agent—Ratification.**<sup>14</sup>

§ 551. **Power to act as agent.**—A corporation can not practice law and is not authorized by a statute providing that a corporation may be organized for any lawful business.<sup>15</sup> A cor-

153; *Farmers' Union Mercantile Co. v. Ricketts* (Ark.), 195 S. W. 381; *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, and note, Ann. Cas. 1914B, 1013n; *In re International Radiator Co.* (Del. Ch.), 92 Atl. 255; *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329; *W. R. Case & Co. Cutlery Co. v. Folsom* (Tex. Civ. App.), 170 S. W. 1066; *Rowan v. Texas Orchard Development Co.* (Tex. Civ. App.), 181 S. W. 871. *Contra*, *Steele v. Farmers & Co. Tel. Assn.*, 95 Kans. 580, 148 Pac. 661; *Bear Creek Lumber Co. v. Second Nat. Bank*, 120 Md. 566, 87 Atl. 1084; *Stringfellow v. Rosebrough Monument Co.* (Mo. App.), 196 S. W. 1050; *Korn v. Cody Detective Agency*, 76 Wash. 540, 136 Pac. 1155, 50 L. R. A. (N. S.) 1073 (contrary to public policy and also to statute). National bank can not do so unless necessary to save a debt to it: *First Nat. Bank v. Armstrong* (Ky.), 198 S. W. 226. As to right of company to purchase its own stock and limitations of the doctrine, see: *Lefker v. Harner*, 123 Ark. 575, 186 S. W. 75, L. R. A. 1916F, 281 and note. See also, *Bowditch v. Jackson Co.*, 76 N. H. 351, 82 Atl. 1014, L. R. A. 1917A, 1174, and note, Ann. Cas. 1913A, 366n.

<sup>11</sup> *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306; *James McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. ed. 328, 27 Sup. Ct. 782; *Barron v. McKinnon*, 196 Fed. 933, 116 C. C. A. 483. See also *First Nat. Bank v. Jenkins*, 73 Misc. 277, 130 N.

Y. S. 947, 151 App. Div. 893, 135 N. Y. S. 1111.

<sup>12</sup> *McBoyle v. Union Nat. Bank*, 162 Cal. 277, 122 Pac. 458 (may take stock and bonds in compromise of disputed claim); note in L. R. A. 1916A, 585, 586.

<sup>13</sup> *Fourth Nat. Bank v. Stahlman*, 132 Tenn. 367, 178 S. W. 942, L. R. A. 1916A, 568n.

<sup>14</sup> For instances of ratification and estoppel, see: *Doerr v. Fandango Lumber Co.*, 31 Cal. App. 318, 160 Pac. 406; *Indiana Die & Co. v. Newcomb*, 184 Ind. 250, 111 N. E. 16; *Lindeke v. Scott County & Co.*, 126 Minn. 464, 148 N. W. 459; *Browning v. North Missouri Cent. R. Co.* (Mo.), 188 S. W. 143; *Miller v. Sealy Oil Mill & Co.* (Tex. Civ. App.), 166 S. W. 1182. For instances in which there was held to be no ratification or estoppel, see: *In re Charles R. Partridge Lumber Co.*, 215 Fed. 973; *Watkins Salt Co. v. Mulkey*, 225 Fed. 739, 141 C. C. A. 11; *Blair v. Brownstone Oil & Co.*, 168 Cal. 632, 143 Pac. 1022; *Lawrence v. Washington & Co. Theatre Co.*, 190 Mich. 44, 155 N. W. 738; *Beach v. Palisade Realty & Co.*, 86 N. J. L. 238, 90 Atl. 1118; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210. See also as to ratification of unauthorized loan made by agent: *Calhoun v. McCrory Piano & Co.*, 129 Tenn. 651, 168 S. W. 149, 52 L. R. A. (N. S.) 571, and note, Ann. Cas. 1916A, 183n.

<sup>15</sup> *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55n, 139 Am. St. 839, 19

poration can not, ordinarily, become a partner, but it may, along with others, transact business within the scope of its powers and thereby become liable on account of the fiduciary relation thus assumed;<sup>16</sup> and it may be authorized by its charter to become a partner, so that the question as to whether it may form a partnership ordinarily depends on whether it is given capacity by charter or statute.<sup>17</sup>

### § 552. Power to make extra-territorial contracts.<sup>18</sup>

§ 553. Extra-territorial contracts—What law governs.—The method of transferring corporate stock is governed by the law of the state of incorporation even where the transfer is made in another state.<sup>19</sup>

§ 554. Foreign corporation subject to laws of state in which it seeks to do business.<sup>20</sup>

§ 555. Contracts made before incorporation.<sup>21</sup>—A corporation is not bound, in the absence of ratification or adoption, or charter or statutory liability therefor, by contracts made by its promoters before it is created.<sup>22</sup> But if a corporation adopts a

Ann. Cas. 879. Compare, however, *Creditor's Nat. Clearing House v. Bannwart* (Mass.), 116 N. E. 886.

<sup>16</sup> *Salem-Fairfield Tel. Ass'n v. McMahan*, 78 Ore. 477, 153 Pac. 788.

<sup>17</sup> *Morgan v. Child*, 47 Utah 417, 155 Pac. 451; *News-Register Co. v. Rockingham Pub. Co.*, 118 Va. 140, 86 S. E. 874.

<sup>18</sup> Such contracts do not necessarily constitute "doing business" in the foreign state and are not unenforceable by reason of not complying with its statutes in regard to corporations doing business therein: *Mitchell Wagon Co. v. Poole*, 235 Fed. 817, 149 C. C. A. 129; *Puffer Mfg. Co. v. Kelly* (Ala.), 73 So. 403; *W. T. Rawleigh Medical Co. v. Holcomb* (Ark.), 191 S. W. 215; *M. E. Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133. Compare *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82, 72 So. 1019.

<sup>19</sup> *Husband v. Linchan*, 168 Ky. 304, 181 S. W. 1089.

<sup>20</sup> *Dalton Adding Mach. Co. v. State Corp. Com.*, 213 Fed. 889; *Lasswell Land & Lumber Co. v. Lee Wil-*

*son & Co.*, 236 Fed. 322; *Donaldson v. Thousand Springs Power Co.*, 29 Idaho 735, 162 Pac. 334; *Ross v. New South Farm & Co.*, 191 Ill. App. 353; *Warren v. Interstate Realty Co.*, 192 Ill. App. 438. See generally as to the effect of non-compliance with domestic statutes on its contracts: *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. ed. 1177, 32 Sup. Ct. 711, Ann. Cas. 1914B, 699 and note; also, *Commercial Nat. Bank v. Jordan*, 71 Fla. 566, 71 So. 760; *Thomas Cusack Co. v. Ford*, 138 La. 1096, 71 So. 196; *Morgan Bros. v. Dayton Coal & Co.*, 134 Tenn. 228, 183 S. W. 1019.

<sup>21</sup> [Main section quoted in *Moriarity v. Meyer*, 21 N. Mex. 521, 157 Pac. 652, L. R. A. 1916E, 1165, 1167.]

<sup>22</sup> *Sumner-May Hardw. Co. v. Scally* (Fla.), 62 So. 900; *Atlantic City R. Co. v. Wood*, 78 N. J. Eq. 298, 81 Atl. 1132; *Moriarity v. Meyer*, 21 N. Mex. 521, 157 Pac. 652, L. R. A. 1916E, 1165; *Weathersby v. Texas & Co. Lumber Co.* (Tex. Civ. App.), 146 S. W. 243, 180 S. W. 735; *Tanner v. Sinaloa Land & Co.*, 43 Utah 14,

contract made by its promoters for it and obtains the benefit thereof, it assumes also the obligations and burdens.<sup>23</sup>

§ 556. **Ultra vires—Different meanings of term.**—Ultra vires contracts include those within the purposes contemplated by the articles of incorporation when they are beyond the limitation of the charter powers as well as those entirely without the general scope and purpose of the charter privileges and objects.<sup>24</sup>

§ 557. **Recovery where ultra vires contract has been performed by parties.**—Nearly all the authorities agree in holding that as long as an ultra vires contract remains executory on both sides it can not be enforced.<sup>25</sup> But there is considerable conflict among the authorities as to the rule where the contract has been executed by one of the parties, especially the plaintiff or party contracting with the corporation.<sup>26</sup> Where the contract has been fully executed, the court will usually leave the parties where it found them.<sup>27</sup>

134 Pac. 586, Ann. Cas. 1916C, 100, and note.

<sup>23</sup> *Belfast v. Belfast Water Co.*, 115 Maine 234, 98 Atl. 738, L. R. A. 1917B, 908. See also *Maryland Apartment House Co. v. Glenn*, 108 Maine 377, 70 Atl. 216; *Bond v. Pike*, 101 Minn. 127, 111 N. W. 916; *Quinn v. American Bankers' Assur. Co.* (Mo. App.), 165 S. W. 823; *Van Zandt v. St. Louis Wholesale Grocery Co.* (Mo. App.), 190 S. W. 1050; *Girard v. Case Bros. Cutlery Co.*, 225 Pa. 327, 74 Atl. 201; *Commonwealth Bonding & Ins. Co. v. Curry* (Tex. Civ. App.), 183 S. W. 1. Such contracts are not void, but voidable and in so far as they are not ultra vires they may become binding upon the corporation by ratification either express or implied: *Cushion Heel Shoe Co. v. Hartt*, 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. (N. S.) 979, and note. See also *Royal Casualty Co. v. Puller*, 194 Mo. App. 588, 186 S. W. 1099.

<sup>24</sup> *American Southern Nat. Bank v. Smith*, 170 Ky. 512, 186 S. W. 482. To same effect is *Seamless Pressed Steel & Co. v. Monroe*, 57 Ind. App. 136, 106 N. E. 538. See also for other definitions and explanations of the term "ultra vires": *Alabama & C. R.*

*Co. v. Loveman Compress Co.* (Ala.), 72 So. 311; *Mercantile Trust Co. v. Kastor*, 273 Ill. 332, 112 N. E. 988; *Lincoln Court Realty Co. v. Kentucky Title & Co.*, 169 Ky. 840, 185 S. W. 156; *Pennsylvania R. Co. v. Minis*, 120 Md. 461, 87 Atl. 1062. By some courts the term is given a broad enough meaning to include contracts that are not absolutely void: *Cop-pard v. Farmers & C. Bank* (Tex. Civ. App.), 184 S. W. 551. But the better rule seems to be that a contract that is truly ultra vires in the strict sense is absolutely void: *Metropolitan Trust Co. v. McKinnon*, 172 Fed. 846, 97 C. C. A. 194; *Mercantile Trust Co. v. Kastor*, 273 Ill. 332, 112 N. E. 988; *National Car Advertising Co. v. Louisville & C. Co.*, 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010n.

<sup>25</sup> Note in L. R. A. 1917A, 752.

<sup>26</sup> See notes in L. R. A. 1917A, 753; L. R. A. 1917B, 821; L. R. A. 1917C, 813; post §§ 558-562.

<sup>27</sup> *Alabama Consol. Coal & C. Co. v. Baltimore Trust Co.*, 197 Fed. 347; *Chase & C. Co. v. National Trust & Co.*, 215 Fed. 633; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, 138 Pac. 392, L. R. A. 1917A, 1021n. But see for distinctions, ex-



§ 558. **Ultra vires contracts—Performance by one party.**—It is the doctrine of a number of the courts that the defense of ultra vires can not be interposed where the contract has been executed by one of the parties and to allow it to be interposed would work injustice.<sup>28</sup>

§ 559. **Executed contracts—Rule criticised.**<sup>29</sup>

§ 560. **Contracts ultra vires—Estoppel.**<sup>30</sup>

§ 564. **State as proper party to raise question of ultra vires.**—It is held in a number of jurisdictions that no one but the state or sovereign can raise the question of ultra vires, ordinarily at least.<sup>31</sup> But the right of the corporation and even stockholders and creditors to do so has been held to exist in many cases.<sup>32</sup>

ceptions or limitations of this rule: *Santa Cruz v. Wykes*, 202 Fed. 357, 120 C. C. A. 485; *Wilson v. Torchon Lace & Co.*, 167 Mo. App. 305, 149 S. W. 1156.

<sup>28</sup> *St. Avit v. Kettle River Co.*, 216 Fed. 872, 133 C. C. A. 76; *Leon v. Citizens' Bldg. & Co. Assn.*, 14 Ariz. 294, 127 Pac. 721, Ann. Cas. 1914D, 1151n. See also *Kelly v. Central & Co. Fire Ins. Co. (Kans.)*, 165 Pac. 806; *Mut. Life Ins. Co. v. Stephens*, 214 N. Y. 488, 108 N. E. 856, L. R. A. 1917C, 809n.

<sup>29</sup> *Merchants Nat. Bank v. Wehrman*, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. 613; *Citizens' Cent. Nat. Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. 364; *Calumet & Canal Co. v. Conkling*, 273 Ill. 318, 112 N. E. 982, L. R. A. 1917B, 814, and note; *State v. Bankers' Trust Co.*, 157 Mo. App. 557, 138 S. W. 669.

<sup>30</sup> This whole subject is elaborately treated, and the rule in each jurisdiction is stated in notes in L. R. A. 1917A, 737, 740, 1021, 1026; L. R. A. 1917B, 821. See also *West Penn Chemical & Co. v. Prentice*, 236 Fed. 891. As to the remedies of a party where the contract is ultra vires, other than an action on the contract, see elaborate note in L. R. A. 1917A, 1026, et seq. Cases showing what contracts have been held to be ultra vires and when the doctrine of

estoppel has been applied and when not are reviewed in the note in L. R. A. 1917A, 813, et seq.

<sup>31</sup> *Kerfoot v. Farmer's & Co. Bank*, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. 14; *Kohlruss v. Zachery*, 139 Ga. 625, 77 S. E. 812, 46 L. R. A. (N. S.) 72 and note; *Fairview Inv. Co. v. Lamberson*, 25 Idaho 72, 136 Pac. 606; *Golconda Northern Ry. v. Gulf Lines Connecting R. R.*, 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833; *Southern Lumber Co. v. Holt*, 129 La. 273, 55 So. 986; *Cross v. Seaboard Air Line R. Co. (N. Car.)*, 90 S. E. 14; *Prenatt v. Messenger Printing Co.*, 241 Pa. 267, 88 Atl. 439; *Westbrook v. Missouri & Co. Land & Irrigation Co. (Tex. Civ. App.)*, 195 S. W. 1154; *Mansfield v. Neff*, 43 Utah 258, 134 Pac. 1160.

<sup>32</sup> *Westerlund v. Black Bear Min. Co.*, 203 Fed. 599, 121 C. C. A. 627; *Savannah Ice Co. v. Canal & Co. Trust Co.*, 12 Ga. App. 818, 79 S. E. 45; *Wilson v. Torchon Lace & Co.*, 167 Mo. App. 305, 149 S. W. 1156; *Mitchell v. Hydraulic Bldg. Stone Co.*, 61 Tex. Civ. App. 131, 129 S. W. 148. See also *Kipp v. Miller*, 47 Colo. 598, 108 Pac. 164, 135 Am. St. 236; *New Hartford Water Co. v. Village Water Co.*, 87 Conn. 183, 87 Atl. 358, and note in Ann. Cas. 1916A, 839-846.

## CHAPTER XIX

### PUBLIC SERVICE CORPORATIONS

#### § 570. Introductory.<sup>1</sup>

§ 572. **Necessity for a consideration—Necessity for capacity to contract.**—Lack or invalidity of a special or secondary franchise is no defense to an action by a public service corporation for service rentals.<sup>2</sup>

§ 573. **Parties bound to take notice of charter provision.**—A court will not take judicial notice of the charter provisions of a private public service corporation.<sup>3</sup>

§ 575. **Corporations can not contract so as to escape public duties.**—A public service corporation can not by its regulations or contract shift its own public duties or burdens on to consumers.<sup>4</sup> Courts have power, in a proper case, to enforce the performance of the duties of a public service corporation to continue service in an adequate manner and the like.<sup>5</sup>

#### § 576. Attempt to transfer franchise.<sup>6</sup>

<sup>1</sup> To the effect that public service corporations, being affected with a public interest, are quasi-public corporations, and for examples and rulings as to their general and peculiar nature, rights and duties, see: *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. 612, L. R. A. 1915C, 1189n; *Attorney-General v. Haverhill Gaslight Co.*, 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266; *State v. Consumers' Power Co.*, 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914B, 19, and notes; *Johnson v. United R. Co.*, 227 Mo. 423, 127 S. W. 63; *McCarter v. Firemen's Ins. Co.* (N. J. L.), 73 Atl. 80; notes in Ann. Cas. 1915D, 846; 1916D, 899. See also *Roach v. Danciger & Co.*, P. U. R. 1917C, 144. See as to right of public service commission, or other proper public authority to require connections, control issuance of securities, fix or change rates and the like, notes in 50 L. R. A. (N. S.) 652; L. R. A. 1916E, 759, and Ann.

Cas. 1915C, 850 (connections, etc.); 45 L. R. A. (N. S.) 629, and 47 L. R. A. (N. S.) 1167 (issuance of securities); Ann. Cas. 1916A, 933, and Ann. Cas. 1917C, 57 (rates); Ann. Cas. 1914B, 366 (switching charges); Ann. Cas. 1916E, 299; 8 *Thomp. Corp.*, §§ 441 467.

<sup>2</sup> *Union Telegraph Co. v. Ingersoll*, 178 Mich. 187, 144 N. W. 560, 52 L. R. A. (N. S.) 713, and note.

<sup>3</sup> *Western Union Tel. Co. v. Burlington Traction Co.* (Vt.), 99 Atl. 4.

<sup>4</sup> *State v. Water Supply Co.*, 19 N. Mex. 27, 140 Pac. 1056, L. R. A. 1915A, 242. It can not, without the state's consent, relieve itself, by contract, from public duties required of it under its charter: *Rooker v. Lake Erie &c. R. Co.* (Ind. App.), 114 N. E. 988.

<sup>5</sup> *Gainsville v. Gainsville Gas &c. Power Co.*, 65 Fla. 404, 62 So. 919, 46 L. R. A. (N. S.) 1119n; *State v. Missouri Pac. R. Co.*, 81 Nebr. 174, 115 N. W. 757.

<sup>6</sup> *Attorney-General v. Haverhill Gaslight Co.*, 215 Mass. 394, 101 N. E.

§ 577. **Attempt to transfer franchises—Transfer of property essential to operation.**—Although a public service corporation can not without legislative authority, sell or dispose of its franchise, property and privileges essential to the performance of its public duties,<sup>7</sup> there are many cases in which it has been held that such a corporation may sell or dispose of a secondary franchise or other property, at least when this is not in violation of its charter or governing statute and does not prevent it from performing its public duties.<sup>8</sup>

§ 578. **Contracts suppressing competition or monopoly.**—A contract between competing companies engaged in transferring both passengers and freight in a city, whereby one is to surrender the transfer of passengers and the other the transfer of freight, is invalid under the Kentucky constitution and probably at common law.<sup>9</sup> So, a contract between a local telephone company and a long distance telephone company for the exclusive interchange of long distance business to and between the place where the local company operates is invalid as against public policy.<sup>10</sup> But an exclusive contract between a railroad company and a private corporation to load logs of private shippers along the right of way, such service not being one which the railroad company is under any duty to undertake, is not invalid, as creating a monopoly or

1061, Ann. Cas. 1914C, 1266 and note; post § 577.

<sup>7</sup> A public service corporation can not, without legislative authority, sell or dispose of its franchise and property in such a way as to take away its power to perform its duties, and the legislature may prohibit a gas company from selling its property devoted to public use: *Attorney-General v. Haverhill Gaslight Co.*, 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266n. See also *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778; *Kavanaugh v. St. Louis*, 220 Mo. 496, 119 S. W. 552.

<sup>8</sup> *Owensboro v. Cumberland Tel. &c. Co.*, 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. 988; *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829; *Cooper v. Utah Light &c. Co.*, 35 Utah 570, 102 Pac. 202. See also *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

<sup>9</sup> *Fields v. Holland*, 158 Ky. 544, 165 S. W. 699, L. R. A. 1915C, 865n.

<sup>10</sup> *United States Tel. Co. v. Central Union Tel. Co.*, 202 Fed. 66, 122 C. C. A. 86; *Union Trust &c. Bank v. Kinloch Long Distance Tel. Co.*, 258 Ill. 202, 101 N. E. 535, 45 L. R. A. (N. S.) 465n, Ann. Cas. 1914B, 258n. But it seems that this is not necessarily so where it appears that it is beneficial to the public: *Home Tel. Co. v. Sarcoux Light & Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124, and note; *McKinley Tel. Co. v. Cumberland Tel. Co.*, 152 Wis. 359, 140 N. W. 38. See also *Cumberland Tel. &c. Co. v. State*, 100 Miss. 102, 54 So. 670, 39 L. R. A. (N. S.) 277. For other contracts and combinations held to be illegal under the Sherman Anti-Trust Act or other statutes, see: *United States v. Union Pac. R. Co.*, 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. 53; *United States v.*

granting special privileges to such corporation.<sup>11</sup> One who complains of an order of the public utilities commission permitting one telephone company to purchase a controlling interest in another can not raise the question as to whether such purchase violates the federal anti-trust law when he shows no special damage to himself.<sup>12</sup>

**§ 580. Different methods of fixing rates—Discrimination in favor of public.**—It is a general rule that public service corporations must serve all who apply on equal terms without partiality or discrimination.<sup>13</sup> But discrimination in favor of the public has been upheld as beneficial and not contrary to public policy.<sup>14</sup>

**§ 580a. Right to impose penalty or discriminate in case of delay in paying bills.**—Public service corporations may make and enforce reasonable regulations for the conduct of their business and impose penalties in the form of a different rate for delay in paying for service or refusal of service for non-payment, so long as they do not discriminate between different patrons under like circumstances.<sup>15</sup> Enforcement of the rule in some instances and failure to enforce it as against others in like instances may

Terminal R. R. Assn., 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. 507; State v. Assurance Co., 251 Mo. 278, 158 S. W. 640, 46 L. R. A. (N. S.) 955n, Ann. Cas. 1915A, 247n.

<sup>11</sup> Yazoo &c. R. Co. v. Crawford, 107 Miss. 355, 65 So. 462, L. R. A. 1915C, 250, and note.

<sup>12</sup> State Public Utilities Com. v. Romberg, 275 Ill. 432, 114 N. E. 191.

<sup>13</sup> Cloverdale Homes v. Cloverdale, 182 Ala. 419, 62 So. 712, 47 L. R. A. (N. S.) 607n; Montgomery v. Southwest Arkansas Tel. Co., 110 Ark. 480, 161 S. W. 1060; Colorado Tel. Co. v. Wilmore, 53 Colo. 585, 129 Pac. 204; People v. Forest Home Cemetery, 258 Ill. 36, 101 N. E. 219, L. R. A. 1917B, 946n, Ann. Cas. 1914B, 277n; Hine v. Wadlington, 33 Okla. 173, 124 Pac. 299; Vaught v. East Tennessee Tel. Co., 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315, Ann. Cas. 1912C, 132, and notes.

<sup>14</sup> Belfast v. Belfast Water Co., 115 Maine 234, 98 Atl. 738, L. R. A.

1917B, 908. See also Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Brown v. Birmingham Waterworks Co., 169 Ala. 230, 52 So. 915; Chicago v. University of Chicago, 131 Ill. App. 361. See as to validity of regulation fixing minimum rates, Ann. Cas. 1916A, 933.

<sup>15</sup> Southwestern Tel. &c. Co. v. Danaher, 238 U. S. 482, 59 L. ed. 1419, 35 Sup. Ct. 886, L. R. A. 1916A, 1208; State v. Water Supply Co., 19 N. Mex. 36, 140 Pac. 1059, L. R. A. 1915A, 246n, Ann. Cas. 1916E, 1290n; Aldrach v. South Carolina Light &c. Co., 101 S. Car. 32, 85 S. E. 164; Southwestern Tel. &c. Co. v. Dallas (Tex. Civ. App.), 131 S. W. 80; State v. Independent Tel. Co., 59 Wash. 156, 109 Pac. 366, 31 L. R. A. (N. S.) 329, and note; State v. Seattle Light Co., 60 Wash. 81, 110 Pac. 799, 30 L. R. A. (N. S.) 492n. Contra, Ford v. Vicksburg Waterworks Co., 102

amount to unlawful discrimination, but it has been held that the fact that rules are not enforced in all cases is not always fatal.<sup>16</sup>

**§ 581. Contracts as to location of stations and route.**—A contract by a railroad company to establish a depot or station at a certain place is not invalid as contrary to public policy where it does not interfere in any way with the company's duties to the public.<sup>17</sup> But an exclusive contract attempting to limit the power of the company to locate and relocate its stations, or one otherwise interfering with its duties to the public, is against public policy and void,<sup>18</sup> and an agreement in a right of way deed to an electric railway company requiring it to stop all regular passenger trains at a crossing on the grantor's farm was held contrary to public policy and invalid in a comparatively recent case because it might tend to injure the public.<sup>19</sup>

**§ 582. Ultra vires contracts.**—A railroad company has no power to guarantee contracts of others unless expressly authorized by charter or statute, except where the power to do so is implied as necessary or proper in the furtherance of its legitimate business; but where it has statutory authority to purchase stock in another railroad company and has, in good faith, for the protection of its interest as such a stockholder, acquired bonds of such other company, it has implied power, in order to sell such bonds, to guarantee their payment.<sup>20</sup>

Miss. 717, 59 So. 880, 43 L. R. A. (N. S.) 63n. But tender of amount due before it enforces provision authorizing a discontinuance for delay may prevent such enforcement: *Little Rock R. &c. Co. v. Leader Co.*, 125 Ark. 418, 188 S. W. 1182, L. R. A. 1917C, 374n.

<sup>16</sup> *Vaught v. East Tennessee Tel. Co.*, 123 Tenn. 318, 130 S. W. 1050, 31 L. R. A. (N. S.) 315n, Ann. Cas. 1912C, 132, and note.

<sup>17</sup> *Atlanta &c. R. Co. v. Thomas*, 60 Fla. 412, 53 So. 510; *Latham v. Illinois Cent. R. Co.*, 253 Ill. 93, 97 N. E. 254; *Maryland &c. R. Co. v. Silver*, 110 Md. 510, 73 Atl. 297; *Whalen v. Baltimore &c. R. Co.*, 112 Md. 187, 76 Atl. 166; *Grimes v. Minneapolis &c. Elec. Trac. Co.*, 133 Minn. 442, 158 N. W. 719, L. R. A. 1916F, 687, and note; *Parrott v. Atlantic &c. R. Co.*, 165 N. Car. 295, 81 S. E. 348

Ann. Cas. 1915D, 265, and note; *Mosel v. San Antonio &c. R. Co.* (Tex. Civ. App.), 177 S. W. 1048.

<sup>18</sup> *Minnesota &c. R. Co. v. Way*, 34 S. Dak. 435, 148 N. W. 858. See also *Lexington &c. R. Co. v. Moore*, 140 Ky. 514, 131 S. W. 257 (recognizing this rule but holding it unapplicable in the particular case because the contract was not such that the public could be injured).

<sup>19</sup> *Ford v. Oregon Elec. R. Co.*, 60 Ore. 278, 117 Pac. 809, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 280n.

<sup>20</sup> *Pollitz v. Public Utilities Com.* (Ohio), 117 N. E. 149 (citing 1 Elliott on Railroads (2d ed.), § 481, and other authorities). As to right of public service corporation to challenge powers and privileges of rival, see *Baxter Tel. Co. v. Cherokee Mut. Tel. Assn.*, 94 Kans. 159, 146 Pac. 324, L. R. A. 1916B, 1083n.

§ 583. **Leases generally.**—A street railway company can not relieve itself from its franchise obligations to the public by a lease or traffic arrangement with another company.<sup>21</sup> Statutes authorizing railroad companies to lease or make traffic arrangements with another company for joint use of tracks are strictly construed.<sup>22</sup> But while a lease of a railroad company's franchise and property required for the performance of its public duties, can not be made without charter or statutory authority, it has been held that such a company may lease part of its right of way for coal sheds and elevators where this does not interfere with the discharge of its public duties.<sup>23</sup>

§ 584. **Mortgages generally.**—Under a statute authorizing a public service corporation to mortgage such real estate and personal property as the purposes of the corporation shall require, it may include a secondary franchise in its mortgage, at least with the consent of the local authorities granting such franchise.<sup>24</sup>

§ 585. **Traffic agreements.**<sup>25</sup>

§ 586. **Right to engage in collateral business.**—A railroad company has power to own and operate a telephone line in furtherance of its business,<sup>26</sup> and to maintain eating-houses and dining-cars for the accommodation of its passengers.<sup>27</sup>

§ 587. **When a carrier may refuse to perform its public duty.**—As a general rule a railroad company can not abandon its road, or a branch, even when operated at a loss; but there are some cases in which the abandonment of a branch has

<sup>21</sup> Quigley v. Toledo R. & Co., 89 Ohio St. 68, 105 N. E. 185, Ann. Cas. 1915D, 992n.

<sup>22</sup> Quigley v. Toledo R. & Co., 89 Ohio St. 68, 105 N. E. 185, Ann. Cas. 1915D, 992n.

<sup>23</sup> Bacon v. Boston & C. R. Co., 83 Vt. 421, 76 Atl. 128.

<sup>24</sup> Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552.

<sup>25</sup> See for agreements held valid, Pacific Tel. & Co. v. Anderson, 196 Fed. 699 (telephone agreement valid); Continental Securities Co. v. Interborough & C. Transit Co., 207

Fed. 467; State v. Chicago & C. R. Co., 95 Ark. 114, 128 S. W. 555 (agreement as to rates held valid). See for agreements and combinations held invalid, United States v. Pacific & C. R. Co., 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. 443; United States Tel. Co. v. Central Union Tel. Co., 202 Fed. 66; United States v. Great Lakes Towing Co., 208 Fed. 733.

<sup>26</sup> Logansport v. Smith, 47 Ind. App. 64, 93 N. E. 883.

<sup>27</sup> State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814.

been permitted under special circumstances,<sup>28</sup> and such companies have often been held entitled to abandon a spur or switch track.<sup>29</sup>

§ 588. **Ultra vires contracts—Street railway companies.**<sup>30</sup>—A railroad company, although it is expressly authorized to develop electric current for motive power, has no incidental or implied power to develop and sell an excess of such current, especially to an independent coal company in competition with an electric company having an exclusive franchise for the township in which such coal company operates.<sup>31</sup>

§ 589. **Ultra vires contracts—Gas and water companies.**—A lighting company may be given power to operate outside of the limits of the municipality by which a lighting franchise was granted.<sup>32</sup> It has also been held that a city may grant such a franchise with power to combine with an existing company in the same business,<sup>33</sup> and that such companies may, in a proper case, make valid agreements to prevent duplication of plants and service.<sup>34</sup> So, like similar companies, gas and water companies may make reasonable rules and regulations not unlawfully discrimina-

<sup>28</sup> *State v. Old Colony Trust Co.*, 215 Fed. 307, 131 C. C. A. 581, L. R. A. 1915A, 549n (abandonment permitted); *Colorado & C. R. Co. v. State R. Com.*, 54 Colo. 64, 129 Pac. 506 (abandonment of unremunerative branch not permitted). For other cases on both sides see note to federal case above cited, in L. R. 1915A, 549, 555.

<sup>29</sup> *Durden v. Southern R. Co.*, 2 Ga. App. 66, 58 S. E. 299; *Detroit v. Michigan Cent. R. Co.*, 156 Mich. 121, 120 N. W. 593; *New York & C. R. Co. v. General Elec. Co.*, 83 Misc. 529, 146 N. Y. S. 322. But compare *Graham v. Jonesboro & C. R. Co.*, 111 Ark. 598, 164 S. W. 729 (where there was a contract and interests of the public did not require a change in tracks).

<sup>30</sup> See generally as to franchises and rights and powers of street railway companies, *Evansville & C. R. Co. v. Evansville & C. R. Co.*, 50 Ind. App. 502, 98 N. E. 649 (may make operating agreement); *Pittsburg v. Pittsburg & C. R. Co.*, 230 Pa. 189, 79 Atl. 235 (may lease and operate cars of another company). As to the life

and termination of franchise, see: *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. 118; *State v. Des Moines City R. Co.*, 159 Iowa 259, 140 N. W. 437; *Detroit v. Detroit United Rys.*, 172 Mich. 136, 137 N. W. 645. There is generally no right to abandon the enterprise to the injury of the public: *Day v. Tacoma R. & C. Co.*, 80 Wash. 161, 141 Pac. 347, L. R. A. 1915B, 547.

<sup>31</sup> *Citizens' Elec. Illuminating Co. v. Lackawanna & C. Val. Power Co.*, 255 Pa. 176, 99 Atl. 465. See also *Citizens' Elec. Illuminating Co. v. Lackawanna & C. Val. Power Co.*, 255 Pa. 145, 99 Atl. 462. But compare *Spear v. Bremerton*, 90 Wash. 507, 156 Pac. 825.

<sup>32</sup> *Oakland Elec. Co. v. Union Gas & C. Co.*, 107 Maine 279, 78 Atl. 288; *Millville Imp. Co. v. Pitman & C. Gas Co.*, 76 N. J. L. 826, 71 Atl. 1134; *Seattle Light Co. v. Seattle*, 54 Wash. 9, 102 Pac. 767, 18 Ann. Cas. 1117 (in additions to city).

<sup>33</sup> *Theis v. Spokane Falls Gaslight Co.*, 49 Wash. 477, 95 Pac. 1074.

<sup>34</sup> *Weld v. Gas & C. Comrs.*, 197 Mass. 556, 84 N. E. 101.

tory or beyond or in violation of their charter or franchise;<sup>35</sup> but a rule of an electric light company that its patrons can use no other form of light is unreasonable and invalid as tending to create a monopoly.<sup>36</sup> Such a company can not so contract and burden its franchises or property devoted to public use as to prevent it from performing its public duties and impair the public interest.<sup>37</sup>

§ 590. Illustrative cases of application of doctrine to telegraph and telephone companies.<sup>38</sup>—In Michigan a telegraph or telephone company may sell, mortgage or lease its franchises, privileges and property to another company.<sup>39</sup> But this may depend upon the particular charter, franchise, or statute, if any involved, and can not well be the case, at least without legislative authority, where it would prejudice the public and prevent the company from performing its public duties.<sup>40</sup> Where there is no statute or contract requiring connection to be maintained between the lines of two telephone companies at a common point, either company may sever such connection.<sup>41</sup> Where a telephone company installs both private and pay telephones in a person's place of business under a contract to share with him the pay telephone receipts, a rule restricting the use of the private telephone to plaintiff is reasonable and valid, at least as against its promiscuous use by others.<sup>42</sup>

<sup>35</sup> Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025n, 138 Am. St. 299; Scott v. Dedham Water Co., 224 Mass. 398, 113 N. E. 282; State v. Butte Elec. & Co., 43 Mont. 118, 115 Pac. 44; Pond v. New Rochelle Water Co., 143 App. Div. 69, 127 N. Y. S. 582; Poole v. Paris Mountain Water Co., 81 S. Car. 438, 62 S. E. 874, 128 Am. St. 923.

<sup>36</sup> Nacogdoches Light & Co. v. Thomas (Tex. Civ. App.), 138 S. W. 1080. See also Carmichael v. Greenville, 112 Miss. 426, 73 So. 278.

<sup>37</sup> Southern Pac. Co. v. Spring Valley Water Co., 173 Cal. 291, 159 Pac. 865.

<sup>38</sup> Such companies serve without unlawful discrimination: Western Union Tel. Co. v. Foster, 224 Mass.

365, 113 N. E. 192. Can not be required to furnish service to subscriber for illegal purposes: People v. New York Tel. Co., 173 App. Div. 132, 159 N. Y. S. 369.

<sup>39</sup> Michigan Independent Tel. & C. Assn. v. Michigan R. R. Com., 190 Mich. 337, 157 N. W. 52.

<sup>40</sup> See ante §§ 575-577, 583.

<sup>41</sup> Memphis Tel. Co. v. Cumberland Tel. & Co., 231 Fed. 835, 146 C. C. A. 31.

<sup>42</sup> Johnson v. Mountain States Tel. & Co. (Utah), 159 Pac. 526. Office hours are subject to reasonable regulation of telegraph company: Jordan v. Western Union Tel. Co. (Ala.), 72 So. 339; Harbaugh v. Citizens' Tel. Co., 190 Mich. 421, 157 N. W. 32 (party held not in arrears so as to justify removal of telephone).



## CHAPTER XX

### MUNICIPAL AND OTHER PUBLIC CORPORATIONS

#### § 600. Introductory.<sup>1</sup>

#### § 601. Powers of municipal or other public corporations.

—As a general rule a municipal corporation's powers cease at its boundaries, and can not, without express or necessarily implied legislative authority, be exercised beyond its limits; so that, although it has charter authority to acquire, and does acquire, a supply of water outside of the city limits, it is *ultra vires* for it to engage in supplying water outside of the city to persons along the route of its mains laid from the city to the source of supply.<sup>2</sup>

§ 602. Municipal contracts—By whom made—Extent of power—Parties chargeable with notice.—Charter or other statutory provisions in regard to the manner of contracting by a municipal or other public corporation are usually mandatory, and

<sup>1</sup> *Indian Cove Irr. Dist. v. Priedeaux*, 25 Idaho 112, 136 Pac. 618, Ann. Cas. 1916A, 1218n (irrigation district a public corporation); *Wilson v. King's Lake Drainage &c. Dist.*, 257 Mo. 266, 165 S. W. 734 (drainage district a municipal corporation); *Wittkowski v. Jackson County*, 150 N. Car. 90, 63 S. E. 275 (county a public corporation); *Board of Directors &c. v. Peterson*, 64 Ore. 46, 128 Pac. 837, 129 Pac. 123 (road and school district a public corporation).

<sup>2</sup> *Gainesville v. Dunlap* (Ga.), 94 S. E. 247 (distinguishing *Hall v. Calhoun*, 140 Ga. 611, 79 S. E. 533, and further holding that there was no estoppel of the corporation from discontinuing such outside service, and that it could dispose of the pipes or convert them to another use). See as to nature and characteristics of such corporations: *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960, 45 L. R. A. (N. S.) 1167, Ann. Cas. 1914B, 339n (twofold character); *Higginson v. Boston*, 212 Mass. 583, 99 N. E. 523,

42 L. R. A. (N. S.) 215 (twofold character); *Booten v. Pinson* (W. Va.), 89 S. E. 985, L. R. A. 1917A, 1244, 1250 (nature of municipal corporation as political subdivision of state and power of legislature over). See in support of general rule stated in original section as to powers: *Merrill v. Van Buren*, 125 Ark. 248, 188 S. W. 537; *Wyeth v. Whitman* (Fla.), 72 So. 472; *State v. Frederic*, 28 Idaho 709, 155 Pac. 977; *Windle v. Valparaiso* (Ind. App.), 113 N. E. 429; *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122; *State v. Temple*, 99 Nebr. 505, 156 N. W. 1063; *Cole v. Seaside*, 80 Ore. 73, 156 Pac. 569. See also *Barrett v. Atlanta*, 145 Ga. 678, 89 S. E. 781 (on power to contract). Power to construct or purchase lighting plant or the like, when implied or incidental to express power, see: *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519, and note; and compare *Livermore v. Millville*, 85 N. J. L. 655, 90 Atl. 380.

the mode prescribed is the measure of their power.<sup>3</sup> Persons dealing with the corporation are chargeable with notice of the statutory provisions in regard to such powers, the mode of exercising them, and, in general, the special or limited authority of officers and agents.<sup>4</sup>

§ 603. **Contracts extending beyond term of board.**—The question as to whether a municipal council or board has power to make a contract extending beyond the term of its members depends either upon the charter or statute or upon the nature of the contract, or both. As a general rule, where the contract relates to governmental or legislative functions, especially if it involves the exercise of discretion in that regard, a municipal board has no power to make a contract extending beyond its own term so as to bind its successors and prevent them from exercising such functions whenever necessary or advisable.<sup>5</sup> But where the contract relates to ordinary business affairs within the power of the municipality and authority of the board, such, for instance, as a contract for lighting or water supply, the board may make a valid contract for a period extending beyond the term of its members.<sup>6</sup> It has been held, however, that retiring members of a municipal council can not, pending the induction of their successors into office, make a binding contract by the year for the sprinkling of streets, where the statute gives the council the exclusive control of streets, although power is also given to appoint agents from time to time.<sup>7</sup>

<sup>3</sup> *Hoosier Construction Co. v. Seibert* (Ind. App.), 114 N. E. 981; *Atkinson v. Webster City* (Iowa), 158 N. W. 473; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193; *Philadelphia Co. v. Pittsburgh*, 253 Pa. 147, 97 Atl. 1083.

<sup>4</sup> *Pearson v. Duncan* (Ala.), 73 So. 406; *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122; *Enid v. Warner-Quinlan Asphalt Co.* (Okla.), 161 Pac. 1092. When a power is conferred on a municipal corporation by the legislature without any designation of the officer or person to exercise it, the common council is usually the proper and only authority by which it can be exercised; *Crouch v. Commonwealth*, 172 Ky. 463, 189 S. W. 698.

<sup>5</sup> *McCormick v. Hanover*, 246 Pa. 169, 92 Atl. 195; *Sanders v. Belue*, 78 S. Car. 171, 58 S. E. 762. See also *San Francisco &c. Term. Rys. v. Alameda*, 226 Fed. 889; *Robbins v. Boulder County*, 50 Colo. 610, 115 Pac. 526 (tax levy). But compare *Moon v. South Bend*, 50 Ind. App. 251, 98 N. E. 153; *Davis v. Public Schools*, 175 Mich. 105, 140 N. W. 1001; *Manley v. Scott*, 108 Minn. 142, 121 N. W. 628, 29 L. R. A. (N. S.) 652n.

<sup>6</sup> *Omaha v. Omaha Water Co.*, 171 Fed. 647, 96 C. C. A. 419; *Biddeford v. Yates*, 104 Maine 506, 72 Atl. 335, 15 Ann. Cas. 1091; *Belfast v. Belfast Water Co.*, 115 Maine 234, 98 Atl. 738, L. R. A. 1917B, 908.

<sup>7</sup> *Tempe v. Corbell*, 17 Ariz. 1, 147 Pac. 745, L. R. A. 1915E, 581.

A contract for a longer period than that authorized is generally held unenforceable even for the period authorized.<sup>8</sup>

§ 605. **Municipal contracts—Implied contracts.**—A city or other public corporation may be liable on an implied contract, in general the same as an individual, where the necessary elements to constitute an implied contract are present and it would have had power to make an express contract to the same effect.<sup>9</sup> But, as a general rule at least, it is otherwise where the municipality had no power to enter into such a contract or the mode prescribed is mandatory and the measure of its power.<sup>10</sup> Where a city informed an electric company that such company was bound to comply with an ordinance in regard to the furnishing of electric current and that the city would not pay for current not so furnished, the electric company could not recover for electric current used in city street lamps in the daytime on the theory that its use created an implication that it was furnished at the request of the city.<sup>11</sup>

§ 606. **When no implied liability arises.**—It is generally held that there is no implied liability where a statute prescribing the sole mode of contracting in regard to the matter involved,

<sup>8</sup> Spengler v. Sonnenberg, 88 Ohio St. 192, 102 N. E. 737, 52 L. R. A. (N. S.) 510, and note on pages 512, 513, Ann. Cas. 1914D, 1083n.

<sup>9</sup> Martin-Strelau Co. v. Dubuque, 149 Iowa 1, 127 N. W. 1013; Watkins v. School Dist. No. 104, 85 Kans. 760, 118 Pac. 1069; Laird Norton Yards v. Rochester, 117 Minn. 114, 134 N. W. 644, 41 L. R. A. (N. S.) 473, and note (where contract was informal and not good as an express contract, but city had received benefit); First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599, 43 L. R. A. (N. S.) 84; Minneapolis v. Canterbury (Minn.), 142 N. W. 812 (contract by officer with himself but municipality received benefit); Bourgeois v. Atlantic County, 82 N. J. L. 82, 81 Atl. 358; Pocasset Ice Co. v. Burton (R. I.), 85 Atl. 277; Keenan v. Trenton, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519n; New Haven v. Weston, 87 Vt. 7, 86 Atl. 996, 46 L. R. A. (N. S.) 921n (where treasurer making agreement had no

authority). See also Montgomery County v. Pruett, 175 Ala. 391, 57 So. 823.

<sup>10</sup> Reams v. Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260n; Vito v. Sunbury, 87 Conn. 261, 87 Atl. 722; Louisville v. Parsons (Ky.), 150 S. W. 498; Montague Compressed Air Co. v. Fulton, 166 Mo. App. 11, 148 S. W. 422; Niland v. Bowron, 193 N. Y. 180, 85 N. E. 1012; Norbeck & Co. v. State, 32 S. Dak. 189, 142 N. W. 847, Ann. Cas. 1916A, 229n. See also Princeton v. Princeton Elec. Light & Co., 166 Ky. 730, 179 S. W. 1074; Perry Water & Co. v. Perry, 29 Okla. 593, 120 Pac. 582, 39 L. R. A. (N. S.) 72n. But compare Audit Co. v. Louisville, 185 Fed. 349, 107 C. C. A. 467; Des Moines v. Welsbach Street Lighting Co., 188 Fed. 906, 110 C. C. A. 540; Lucas v. Florence, 103 S. Car. 169, 87 S. F. 996.

<sup>11</sup> Tuolumne County Elec. Power & Co. v. Sonora, 31 Cal. App. 655, 161 Pac. 128.

such as a statute requiring competitive bidding, is not complied with.<sup>12</sup>

§ 607. **Validity of contracts generally.**<sup>13</sup>

§ 608. **Validity of contracts generally—Examples of valid contracts.**—A board of county commissioners under or as incidental to the express powers usually granted, has authority to employ expert accountants to examine the books and accounts of county officers, and, in the absence of any statute requiring it, such a contract is not void because it is not in writing and not spread on the records of the board.<sup>14</sup> An ordinance limiting the collection of garbage or the like in a city to one licensed collector is not unreasonable and is not unconstitutional as granting exclusive privileges.<sup>15</sup>

§ 609. **Validity of contracts generally—Examples of invalid contracts.**—A contract whereby a municipality attempts to enter into partnership or engage jointly with a private individual or corporation in the construction of an improvement

<sup>12</sup> *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260 and note; *Cawker v. Central Bitulithic Pav. Co.*, 140 Wis. 25, 121 N. W. 888. But compare *Nebraska Bitulithic Co. v. Omaha*, 84 Nebr. 375, 121 N. W. 443. As to when and how a patented or monopolistic pavement or article can be contracted for under a provision for competitive bidding, see: *Johns v. Pendleton*, 66 Ore. 182, 133 Pac. 817, 134 Pac. 312, 46 L. R. A. (N. S.) 990, and other authorities there cited in note, Ann. Cas. 1915B, 454n. See also *Rochester v. Guberlett*, 211 N. Y. 309, 105 N. E. 548, L. R. A. 1915D, 209, and note, Ann. Cas. 1915C, 483. In some jurisdictions, in some cases, a city is held liable to a contractor where the city has failed to discharge its duty to make or collect an assessment, and even where it has no power. See 1 *Elliott Rds. & Sts.* (3d ed.) § 657, and 2 *Elliott Rds. & Sts.* (3d ed.) § 765. Compare also *Bates County v. Wills*, 239 Fed. 785, 790, 152 C. C. A. 571.

<sup>13</sup> *Clinton Const. Co. v. Clay* (Cal. App.), 168 Pac. 588. See also *Alabama City & R. Co. v. Gadsden*, 185 Ala. 263, 64 So. 91, Ann. Cas. 1916C, 573n; *Colorado Springs v. Coray*, 25

Colo. App. 460, 139 Pac. 1031; *Creekmore v. Central Const. Co.*, 157 Ky. 336, 163 S. W. 194.

<sup>14</sup> *Lockyear v. Spencer County*, 180 Ind. 464, 103 N. E. 100, Ann. Cas. 1916B, 1033n; *Blades v. Hawkins*, 240 Mo. 187, 112 S. W. 979, 144 S. W. 1198, Ann. Cas. 1913B, 1082n. See also *Braaten v. Olson*, 28 N. Dak. 235, 148 N. W. 829. For other contracts of municipalities held valid, see: *Whigham v. Gulf Refining Co.* (Ga. App.), 93 S. E. 238 (contract for current supplies by appropriate committee, ratified by acceptance of supplies); *Arnhold v. Klug*, 97 Kans. 576, 155 Pac. 805 (contract with electric light company to pump water); *Voelcker v. Schnell*, 166 N. Y. S. 420 (power to rent suitable offices); *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

<sup>15</sup> *Rochester v. Gutherlett*, 211 N. Y. 309, 105 N. E. 548, L. R. A. 1915D, 209 and note, Ann. Cas. 1915C, 483. See also *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. 100; *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. 106. But compare *Landberg v. Chicago*, 237 Ill. 112, 86 N. E. 638, 21 L. R. A. (N. S.) 830n, 127 Am. St. 319.

for joint use is invalid, at least under constitutions or statutes forbidding a loan of municipal credit for private benefit.<sup>16</sup> So, it is generally held that a municipal corporation can not discriminate in favor of union labor.<sup>17</sup> General statutory authority to sell property is confined to property held by the municipality in its proprietary character.<sup>18</sup>

**§ 610. Leasing public property for private purposes.**—Municipal property which has ceased to be used or is of a private character held by the municipality as a private proprietor may generally be sold or leased as the public welfare may demand.<sup>19</sup>

**§ 612. Ratification.**—Where a contract is absolutely void, as, for instance, where it is prohibited by charter or statute, it can not be ratified and no recovery can be had upon it.<sup>20</sup> But where the contract is within the powers granted, but the power is irregularly exercised, or some merely directory formality is not complied with, especially if it be in the exercise of a business

<sup>16</sup> *Lord v. City & County of Denver*, 58 Colo. 1, 143 Pac. 284, L. R. A. 1915B, 306n, Ann. Cas. 1916C, 893, and note. See also *Atkinson v. Ada County*, 18 Idaho 282, 108 Pac. 1046, 28 L. R. A. (N. S.) 412n; *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 104n (but contract was here upheld as a lease); *Brodie v. Philadelphia*, 230 Pa. 434, 79 Atl. 659.

<sup>17</sup> *Miller v. Des Moines*, 143 Iowa 409, 122 N. W. 226, 23 L. R. A. (N. S.) 815, and note, 21 Ann. Cas. 207; *Wright v. Hocter*, 95 Nebr. 342, 145 N. W. 704, 146 N. W. 997, 52 L. R. A. (N. S.) 728, and note, Ann. Cas. 1915D, 967n.

<sup>18</sup> *State v. Jefferson County*, 91 Wash. 454, 157 Pac. 1097. For contracts of municipalities held invalid, see also: *Indiana R. & Co. v. Kokomo*, 183 Ind. 543, 108 N. E. 771; *Mogul v. Garvey*, 54 Ind. App. 547, 103 N. E. 118; *Wichita Water Co. v. Wichita*, 98 Kans. 256, 158 Pac. 49 (city commissioner can not bind city for services and materials); *Seamen v. New York*, 172 App. Div. 740, 159 N. Y. S. 563 (contract with employé of highway department to do extra work as architect of municipal building invalid).

<sup>19</sup> *Palmer v. Albuquerque*, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106. See also *Gainesville v. Dunlap* (Ga.), 94 S. E. 247; *Biddeford v. Yates*, 104 Maine 506, 72 Atl. 335, 15 Ann. Cas. 1091; *Gottlieb-Knabe Co. v. Macklin*, 109 Md. 429, 71 Atl. 949, 31 L. R. A. (N. S.) 580, and note, 16 Ann. Cas. 1092. And see as to lease and agreement with a private or quasi public corporation for construction and operation of subway held valid: *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054n. Municipalities can not lease space on their streets or sidewalks for private purposes: *Chapman v. Lincoln*, 84 Nebr. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400, and note. And a board of education, or school board, can not lease a school house lot for production of oil and gas: *Herald v. Board of Education*, 65 W. Va. 765, 65 S. E. 102, 31 L. R. A. (N. S.) 588, and note.

<sup>20</sup> *Ferle v. Lansing*, 189 Mich. 501, 155 N. W. 591, L. R. A. 1917C, 1096 (contract with officer in violation of charter void). See also *Coffee Springs v. Glover*, 10 Ala. App. 475, 65 So. 440; *Likes v. Rolla*, 184 Mo. App. 296, 167 S. W. 645.

rather than a governmental function, it may be ratified.<sup>21</sup> If the contract is strictly *ultra vires*, beyond the scope of the powers of the corporation, it can not be ratified.<sup>22</sup> It may be ratified, in a proper case, under a subsequently acquired power.<sup>23</sup>

### § 613. Rescission.<sup>24</sup>

§ 614. *Ultra vires*.—As a general rule, a municipality has no power to engage in an enterprise of a purely private character, such as the establishment and maintenance of a moving picture theater,<sup>25</sup> the maintenance and operation of a quarry,<sup>26</sup> or the like.<sup>27</sup> But some of such things may sometimes be within the power of the municipality as fairly and necessarily implied in or incidental to its express powers,<sup>28</sup> and the operation of an ice plant in connection with an electric light and waterworks plant, for the purpose of furnishing the inhabitants of a city with ice, has

<sup>21</sup> First Nat. Bank v. Whisenhunt, 94 Ark. 583, 127 S. W. 968; People v. Spring Lake Drainage &c. Dist., 253 Ill. 479, 97 N. E. 1042; First Nat. Bank v. Emmetsburg, 157 Iowa 555, 138 N. W. 451, L. R. A. 1915A, 982n; Darling v. Manistee, 166 Mich. 35, 131 N. W. 450; McKenna v. McHaley, 67 Ore. 443, 136 Pac. 340; New Haven v. Weston, 87 Vt. 7, 86 Atl. 996, 46 L. R. A. (N. S.) 921n.

<sup>22</sup> Reed City v. Reed City Veneer &c. Co., 165 Mich. 599, 131 N. W. 385; Minneapolis &c. Trac. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609, 50 L. R. A. (N. S.) 143n; Smith v. Philadelphia, 227 Pa. 423, 76 Atl. 221; Stratton v. Kinney County (Tex. Civ. App.), 137 S. W. 1170; Glidden State Bank v. School Dist. No. 2, 143 Wis. 617, 128 N. W. 285.

<sup>23</sup> Santa Cruz v. Wykes, 202 Fed. 357, 120 C. C. A. 485; Pilling v. Everett, 67 Wash. 109, 120 Pac. 873. See also Morris v. Adams County, 25 Colo. App. 416, 139 Pac. 582; Wharton v. Greensboro, 149 N. Car. 62, 62 S. E. 740. As to what is sufficient, as a ratification, see: McKenna v. McHaley, 67 Ore. 443, 136 Pac. 340; Gallup v. Liberty County, 57 Tex. Civ. App. 175, 22 S. W. 291; New Haven v. Weston, 87 Vt. 7, 86 Atl. 996, 46 L. R. A. (N. S.) 921n; Ettor v. Tacoma, 77 Wash. 267, 137 Pac. 820. As to what is not a suffi-

cient ratification, see: Colorado Springs v. Coray, 25 Colo. App. 460, 139 Pac. 1031; Wichita Water Co. v. Wichita, 98 Kans. 256, 158 Pac. 49; Niland v. Bowron, 193 N. Y. 180, 85 N. E. 1012; Weil v. Newbern, 126 Tenn. 223, 148 S. W. 680, L. R. A. 1915A, 1009n, Ann. Cas. 1913E, 25n; Osborne v. King County, 76 Wash. 277, 136 Pac. 138. The general subject as to what is necessary, including knowledge on the part of the corporation, and the manner and effect of ratification is elaborately treated in the note in L. R. A. 1915A, 1033-1040.

<sup>24</sup> See as to rescission and modification generally: Atlantic City v. Warren Bros. Co., 226 Fed. 372, 141 C. C. A. 202; Maysville v. Davis, 166 Ky. 555, 179 S. W. 463; Millen v. Boston, 217 Mass. 471, 105 N. E. 453; Moriarty v. Orange, 89 N. J. L. 385, 98 Atl. 465.

<sup>25</sup> State v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N. S.) 720, Ann. Cas. 1914D, 949n.

<sup>26</sup> Radford v. Clark, 113 Va. 199, 73 S. E. 571, 38 L. R. A. (N. S.) 281n.

<sup>27</sup> Gainesville v. Dunlap (Ga.), 94 S. E. 247 (can not engage in supplying water outside the city); Brooks v. Brooklyn, 146 Iowa 136, 124 N. W. 868, 26 L. R. A. (N. S.) 425n (opera house and assembly hall).

<sup>28</sup> Radford v. Clark, 113 Va. 199,

been held legal and not ultra vires.<sup>29</sup> So, a statute authorizing the maintenance of a public yard by a city or town for the sale of fuel to its inhabitants at cost, has been held constitutional and valid.<sup>30</sup>

§ 615. **Estoppel.**—Where a contract is absolutely void, as where it is forbidden by statute or there is an entire lack of power in the municipality to execute or enter into such a contract, a municipality can not be estopped from setting up such invalidity even though it has received the benefit.<sup>31</sup> But where the act is not forbidden and there is not a lack of power, the mere fact that the power was informally or improperly exercised, at least if not in violation of a mandatory statute as to the method, will not prevent the operation of the doctrine of estoppel, and the municipality may be estopped in such cases where it receives and retains the benefits or other sufficient grounds of estoppel exist.<sup>32</sup>

73 S. E. 571, 38 L. R. A. (N. S.) 281n.

<sup>29</sup> *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472, 31 L. R. A. (N. S.) 116n, 20 Ann. Cas. 199. A water company can not avoid its contract to furnish water to a municipality because it is ultra vires as to the latter: *Belfast v. Belfast Water Co.*, 115 Maine 234, 98 Atl. 738, L. R. A. 1917B, 908.

<sup>30</sup> *Laughlin v. Portland*, 111 Maine 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143n, Ann. Cas. 1916C, 734n.

<sup>31</sup> *Wilkes County v. Coler*, 190 U. S. 107, 47 L. ed. 971, 23 Sup. Ct. 738; *Ft. Scott v. W. G. Eads Brokerage Co.*, 117 Fed. 51, 187 U. S. 647, 47 L. ed. 348, 23 Sup. Ct. 846; *Burlingham v. New Bern*, 213 Fed. 1014; *Colorado Springs v. Coray*, 25 Colo. App. 460, 139 Pac. 1031 (failure to let contract on competitive bidding as required by statute); *Horkan v. Moultrie*, 136 Ga. 561, 71 S. E. 785; *Eastern Ill. State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573; *Harrison County v. Ogden*, 165 Iowa 325, 145 N. W. 681; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193; *Likes v. Rolla*, 184 Mo. App. 296, 167 S. W. 645; *Hagerman v. Hagerman*, 19 N. Mex. 118, 141 Pac. 613, L. R. A. 1915A, 904n (so where mandatory statutory requirements

were not complied with); *Hart v. New York*, 201 N. Y. 45, 94 N. E. 219; *Stratton v. Kinney County* (Tex. Civ. App.), 137 S. W. 1170; *Osborne v. King County*, 76 Wash. 277, 136 Pac. 138. But compare *California-Oregon Power Co. v. Medford*, 226 Fed. 957.

<sup>32</sup> *Santa Cruz v. Wykes*, 202 Fed. 357, 120 C. C. A. 485; *Forrest City v. Orgill*, 87 Ark. 389, 112 S. W. 891; *First Nat. Bank v. Emmetsburg*, 157 Iowa 555, 138 N. W. 451, L. R. A. 1915A, 982n; *Moore v. Ramsey County*, 104 Minn. 30, 115 N. W. 750; *Edwards v. Kirkwood*, 147 Mo. App. 599, 127 S. W. 378; *Washington Water Power Co. v. Spokane*, 89 Wash. 149, 154 Pac. 329. "Any municipal or quasi municipal corporation which has the corporate power to make and to perform a contract, which makes it and receives and keeps the benefits of its performance by the other party to it, is thereby estopped from defeating performance on its own part on the ground that it either negligently or fraudulently failed to exercise in a lawful manner the powers it had fully to perform its part of the agreement": *Bates County v. Wills*, 239 Fed. 785, 789, 790, 152 C. C. A. 571, citing *Wilson v. King's Lake Drainage & C. Dist.*, 257 Mo. 266, 289, 290, 165 S. W.

§ 616. **Borrowing of money and issuance of negotiable paper.**—The power to borrow money and issue negotiable paper and bonds does not necessarily belong to a municipal corporation as an incident of its creation,<sup>33</sup> and it is generally held that the power to do so for the construction of public improvements is not implied from the mere authority to make such improvements, or the like.<sup>34</sup> But such power is sometimes implied from the powers expressly granted.<sup>35</sup>

§§ 617, 618. **No right of action on void bonds—Defenses available against bona fide holders.**—Where a municipality has power to issue bonds, but the bonds are invalid because of some irregularity, or the like, they can not, ordinarily at least, be directly sued on, but the municipality may be held liable on the theory of an implied contract,<sup>36</sup> or estoppel, and in some instances, by ratification.<sup>37</sup> But there can be no estoppel or ratification where there is an entire lack of power.<sup>38</sup>

§ 619. **Bona fide holder—Bond containing no recitals.**—One who takes detached coupons for interest when they are past

734, and older cases. See also *Ft. Worth v. Reynolds* (Tex. Civ. App.), 190 S. W. 501.

<sup>33</sup> *Weil v. Newbern*, 126 Tenn. 223, 148 S. W. 680, L. R. A. 1915A, 1009n, Ann. Cas. 1913E, 25, and note; *Stratton v. Kinney County* (Tex. Civ. App.), 137 S. W. 1170. See also *Tate v. Elberton*, 136 Ga. 301, 71 S. E. 420; *McCurdy v. Shiawassee County*, 154 Mich. 550, 118 N. W. 625; *Higginson v. Boston*, 212 Mass. 583, 99 N. E. 523, 42 L. R. A. 215; *Luther v. Wheeler*, 73 S. Car. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746n, 750, 6 Ann. Cas. 754.

<sup>34</sup> *Rushe v. Hyattsville*, 116 Md. 122, 81 Atl. 278, Ann. Cas. 1913D, 73, and note; *State v. King County*, 45 Wash. 519, 88 Pac. 935. See also *Burlingham v. New Bern*, 213 Fed. 1014; *Chartz v. Carson City*, 39 Nev. 285, 156 Pac. 925.

<sup>35</sup> *Bradshaw v. High Point*, 151 N. Car. 517, 66 S. E. 601. See also notes in Ann. Cas. 1913D, 73, and Ann. Cas. 1913E, 25. And compare *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519 (express power to light streets im-

plies power to construct or purchase lighting plant for that purpose).

<sup>36</sup> *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519n.

<sup>37</sup> See notes in L. R. A. 1915A, 904, 917, 1023, ante §§ 612, 615. See also as to estoppel by recitals in the bonds: *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915A, 910 and note. And see generally as to estoppel as against a bona fide purchaser: *Town of Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019.

<sup>38</sup> *Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109 (reversed on other grounds in 142 Pac. 183); *Hagerman v. Hagerman*, 19 N. Mex. 118, 141 Pac. 613, L. R. A. 1915A, 904n (nor liability on implied contract). And see generally as to defenses against bona fide holders: *Burlingham v. New Bern*, 213 Fed. 1014. See also *Wilkes County v. Coler*, 190 U. S. 107, 47 L. ed. 971, 23 Sup. Ct. 738; *Santa Cruz v. Wykes*, 202 Fed. 357, 120 C. C. A. 485; *Wittkowsky v. Jackson County*, 150 N. Car. 90, 63 S. E. 275; *State v. Sapulpa* (Okla.), 160 Pac. 489.



due is not a bona fide purchaser, but takes them subject to defenses, and, where they are wrongfully delivered to the purchaser the municipality is not estopped to deny liability thereon by the fact that a tax had been levied for their payment.<sup>39</sup>

§ 620. Limitation of indebtedness—Limitation on power to create municipal indebtedness.<sup>40</sup>—A contract in violation of a provision of the constitution or statute limiting indebtedness is usually deemed absolutely void,<sup>41</sup> but there are some cases in which a recital on this subject in a bond has been held to estop the municipality.<sup>42</sup>

### § 621. Indebtedness depending on popular vote.<sup>43</sup>

<sup>39</sup> *State v. Sapulpa* (Okla.), 160 Pac. 489. See also *Harrison County v. Ogden*, 165 Iowa 325, 145 N. W. 681. But compare *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019, where holder was bona fide purchaser of bonds. In Kentucky, street improvement bonds are negotiable instruments, protected as such in the hands of a bona fide holder; *Citizens' Trust & Co. v. Hays*, 167 Ky. 560, 180 S. W. 811. As to the effect of recitals in bond as to authority and compliance with statutory provisions, see: *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915A, 910, and elaborate note; *Harmony v. Truman*, 212 Fed. 4; *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019; *Ham v. Grapeland Irr. Dist.*, 172 Cal. 611, 158 Pac. 207.

<sup>40</sup> See generally as to construction and effect of statutory or constitutional provisions limiting indebtedness: *Mesmer v. Board & Co.*, 23 Cal. App. 578, 138 Pac. 935; *Southern Bitulithic Co. v. Detreville*, 156 Ky. 513, 161 S. W. 560; *Lepley v. Ft. Benton*, 51 Mont. 551, 154 Pac. 710; *Bramham v. Durham*, 171 N. Car. 196, 88 S. E. 374. A city even for the purpose of paying a judgment against it can not levy a tax in excess of the statutory limitation: *People v. Cleveland & Co. R. Co.*, 271 Ill. 195, 110 N. E. 1021. And judgments should be included in determining amount of indebtedness, but not unliquidated claims on which the city denies liability: *Schuldice v. Pittsburgh*, 251

Pa. 28, 95 Atl. 938. But in some states the limitation is held to apply only to contractual indebtedness and not one imposed by law. See *Arthur v. Petaluma*, 27 Cal. App. 782, 151 Pac. 183; *German Nat. Bank v. Covington*, 164 Ky. 292, 175 S. W. 330, Ann. Cas. 1917B, 189n, 190. See note in 37 L. R. A. (N. S.) 1086-1096, 1107.

<sup>41</sup> *Superior Mfg. Co. v. School Dist. No. 63*, 28 Okla. 293, 114 Pac. 328, 37 L. R. A. (N. S.) 1054n.

<sup>42</sup> *Gunnison County v. Rollins*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. 390; *Presidio County v. Noel-Young & Co.*, 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. 237; *Beatrice v. Edminson*, 117 Fed. 427, 54 C. C. A. 601; *Fairfield v. Rural Independent School Dist.*, 116 Fed. 838, 54 C. C. A. 342, 187 U. S. 643, 47 L. ed. 346, 23 Sup. Ct. 843. See also as to liability for services necessary to preservation of peace and good order: *Cunningham v. Umatilla County*, 57 Ore. 517, 112 Pac. 437, 37 L. R. A. (N. S.) 1051n.

<sup>43</sup> See generally as to provisions for popular vote on indebtedness and necessity of complying with them and effect of irregularities: *Sanders v. Gainesville*, 141 Ga. 441, 81 S. E. 215; *Shinall v. Cartersville*, 144 Ga. 219, 87 S. E. 290; *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393; *Marion v. Haynes*, 157 Ky. 687, 164 S. W. 79; *Burwell v. Lillingston*, 171 N. Car. 94, 87 S. E. 970; *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998.

§ 622. Indebtedness limited by per cent. of valuation.<sup>44</sup>

§ 624. Aggregate indebtedness—How determined—Refunding and sinking fund bonds.<sup>45</sup>

§ 625. Indebtedness payable annually or monthly.—A contract payable only in monthly or annual instalments or the like, as they are earned, although for a term of years, is generally held not to create an indebtedness for the aggregate amount for the full term or life of the contract within the constitutional or statutory inhibition;<sup>46</sup> but it is otherwise where the liability is complete and fixed and does not depend upon and arise only as the services are performed, although the amount may be payable in instalments.<sup>47</sup>

§ 628. Current expenses not included.<sup>48</sup>

§ 629. Debts payable out of special fund—Special assessment—Optional debts.—Debts payable out of a special fund, where there is no general liability of the city, such, for instance, as street improvement bonds payable wholly out of assessments of abutting property owners, or the like, are not an indebtedness of the municipality within the inhibition in question, nor to be counted in determining the amount of its indebtedness.<sup>49</sup>

<sup>44</sup> *Sidey v. Marceline*, 237 Fed. 168, 150 C. C. A. 314; *Kimbly v. Owensboro* (Ky.), 195 S. W. 1087. As to time and basis of computing valuation and determining indebtedness, see: *Lewis v. Brady*, 17 Idaho 251, 104 Pac. 900, 28 L. R. A. (N. S.) 149, and note; *Chanley v. Zimmer*, 183 Ind. 222, 108 N. E. 769 (gravel road ordered and bonds ordered sold, question of indebtedness relates to date of order).

<sup>45</sup> See note in 37 L. R. A. (N. S.) 1099-1102.

<sup>46</sup> *Toomey v. Bridgeport*, 79 Conn. 229, 64 Atl. 215, 7 Ann. Cas. 148; *Joseph v. Joseph Waterworks Co.*, 57 Ore. 586, 592, 111 Pac. 864, 112 Pac. 1083; *Allison v. Chester*, 69 W. Va. 533, 72 S. E. 472, 37 L. R. A. (N. S.) 1042n, Ann. Cas. 1913B, 1174n. See also *Cohen v. Houston* (Tex. Civ. App.), 176 S. W. 809. But compare *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723.

<sup>47</sup> *Hagan v. Limestone County*, 160

Ala. 544, 49 So. 417, 37 L. R. A. (N. S.) 1027n; *Baltimore & C. R. Co. v. People*, 200 Ill. 541, 66 N. E. 148; *Logansport v. Jordan*, 171 Ind. 121, 85 N. E. 959, 37 L. R. A. (N. S.) 1036n, 17 Ann. Cas. 415. See also *Trask v. Livingston County*, 210 Mo. 582, 109 S. W. 656, 37 L. R. A. (N. S.) 1045n. But compare *Sheridan v. Rothschild*, 181 Ind. 405, 104 N. E. 66; *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410.

<sup>48</sup> *Tate v. Elberton*, 136 Ga. 301, 71 S. E. 420; *Fairbanks Co. v. Sulphur* (Okla.), 161 Pac. 811; *Cleburne v. Gutta Percha & Co.* (Tex. Civ. App.), 127 S. W. 1072. See also *Lawrence County v. Lawrence Fiscal Ct.*, 130 Ky. 587, 113 S. W. 824; *O'Reilly v. Kingston*, 175 App. Div. 207, 161 N. Y. S. 632; *Levy v. McClellan*, 196 N. Y. 178, 89 N. E. 569; *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873; note in 37 L. R. A. (N. S.) 1077-1080, 1086-1096.

<sup>49</sup> *Monk v. Moultrie*, 145 Ga. 843,

§ 631. **Evasion of constitutional limitations.**—The constitutional limitation as to indebtedness can not be evaded by any mere subterfuge.<sup>50</sup>

§ 633. **Construction of constitutional provisions.**<sup>51</sup>

§ 636. **Indebtedness for water and light.**<sup>52</sup>

§ 637. **Effect of exceeding the limit.**—Ordinarily, the effect of exceeding the limit of indebtedness is to render the contract, at least to that extent, absolutely void;<sup>53</sup> but there are some cases in which recitals in bonds have been held to create an estoppel against the municipality in favor of a bona fide holder.<sup>54</sup>

90 S. E. 71; German Nat. Bank v. Covington, 164 Ky. 292, 175 S. W. 330, Ann. Cas. 1917B, 189n (but where street improvement bonds are not payable out of special assessments and the faith and credit of the city are pledged for their payment they constitute an indebtedness within a provision limiting the municipal indebtedness); Wickliffe v. Greenville, 170 Ky. 528, 186 S. W. 476. See also White v. Loughborough, 125 Ark. 57, 188 S. W. 10; Beaumont v. Masterson (Tex. Civ. App.), 142 S. W. 984; Laredo v. Frishmuth (Tex. Civ. App.), 196 S. W. 190. But compare where city is liable for part and it exceeds limit: People v. Chicago & C. R. Co., 253 Ill. 191, 97 N. E. 310, and Kentucky case above cited. After levy is made, payment of taxes is regarded as certain and for the purpose of determining whether an expenditure exceeds debt limit it will be assumed that tax has been paid: State v. Stannard (Ore.), 165 Pac. 571. In Illinois hospital warrants in the nature of bonds can not be issued where they increase the indebtedness beyond the limit, although payable out of a special

fund: Holmgren v. Moline, 269 Ill. 248, 109 N. E. 1031.

<sup>50</sup> Hagan v. Limestone County, 160 Ala. 544, 49 So. 417, 37 L. R. A. (N. S.) 1027n (can not avoid it by stating in the contract that it is no debt when in law and fact it is); Evans v. Holman, 244 Ill. 596, 91 N. E. 723; Logansport v. Jordan, 171 Ind. 121, 85 N. E. 959, 37 L. R. A. (N. S.) 1036n, 17 Ann. Cas. 415. See also Fairbanks-Morse Co. v. Geary (Okla.), 157 Pac. 720.

<sup>51</sup> See note in 37 L. R. A. (N. S.) 1086-1096, 1103, et seq.; ante §§ 620, 621.

<sup>52</sup> See ante § 625.

<sup>53</sup> Superior Mfg. Co. v. School Dist. No. 63, 28 Okla. 293, 114 Pac. 328, 37 L. R. A. (N. S.) 1054n. One dealing with a municipality must take notice of the debt limit provisions: German Nat. Bank v. Covington, 164 Ky. 292, 175 S. W. 330, Ann. Cas. 1917B, 189n.

<sup>54</sup> Presidio County v. Noel-Young & Co., 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. 237; Fairfield v. Rural Independent School Dist., 116 Fed. 838, 54 C. C. A. 342, 187 U. S. 643, 47 L. ed. 346, 23 Sup. Ct. 843.

## CHAPTER XXI

### LEGALITY OF OBJECT

§ 645. **Generally.**<sup>1</sup>—A contract lawful in itself, and not requiring or contemplating the doing of an unlawful act, is not illegal or rendered invalid by the fact that one of the parties may employ improper means or agencies or carry it out in an illegal way.<sup>2</sup>

§ 646. **Means by which contract rendered illegal immaterial.**<sup>3</sup>

§ 647. **Agreement in violation of positive law.**<sup>4</sup>

§ 648. **Contract prohibited by statute generally void.**<sup>5</sup>

<sup>1</sup> [Main section cited in *Dodson v. McCurnin* (Iowa), 160 N. W. 927, 929, L. R. A. 1917C, 1085, 1087; *O'Bannon v. Widick* (Mo. App.), 198 S. W. 432, 433; *Minnesota & C. R. Co. v. Way* (S. Dak.), 148 N. W. 858, 860.]

<sup>2</sup> *Hogston v. Bell* (Ind.), 112 N. E. 883; *Haley v. Hollenback*, 53 Mont. 494, 165 Pac. 459; *Armour & Co. v. Jesmer*, 76 Wash. 475, 136 Pac. 689. But a contract in furtherance of a business conducted in violation of law is usually illegal and unenforceable: *Baker v. Lehman*, 186 Ala. 493, 65 So. 321. And a contract not in itself unlawful may be against public policy if it naturally suggests unlawful means in aid of the contract: *Dodson v. McCurnin* (Iowa), 160 N. W. 927.

<sup>3</sup> [Main section cited in *O'Bannon v. Widick* (Mo. App.), 198 S. W. 432, 433.]

*State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137. An agreement either contrary to public policy or fraudulent as to third persons will not be enforced, even though no injury has resulted: *Palm- baum v. Magulsky*, 217 Mass. 306, 104 N. E. 736, Ann. Cas. 1915D, 799n. An agreement contrary to good morals, or which will if enforced in-

jure the state of the forum, or its citizens, will not be enforced: *Standard Fashion Co. v. Grant*, 165 N. Car. 453, 81 S. E. 606. An agreement for doing of an act forbidden by either common or statutory law is illegal: *Baxter v. Venice*, 194 Ill. App. 62; *Gordon v. Gordon's Admr.*, 168 Ky. 409, 182 S. W. 220.

<sup>4</sup> [Main section cited in *O'Bannon v. Widick* (Mo. App.), 198 S. W. 432, 433.]

"Agreements in violation of positive law, to which courts refuse recognition and enforcement, are those which are expressly or impliedly prohibited, either by some rule of the common law or by some express statutory provision": *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542.

<sup>5</sup> [Main section cited in *O'Bannon v. Widick* (Mo. App.), 198 S. W. 432, 433.]

Contracts specifically prohibited by law or the making or enforcement of which violates laws which were enacted for regulation and protection, are void: *Greil Bros. Co. v. McLain* (Ala.), 72 So. 410. See also *Tallman v. Lewis*, 124 Ark. 6, 186 S. W. 296; *Karen v. Bartholomae & C. Malt- ing Co.*, 195 Ill. App. 21; *Dodson v. McCurnin* (Iowa), 160 N. W. 927, L.

§ 649. **Agreements contrary to public policy—Generally.**—Such contracts are unenforceable even though not expressly prohibited by statute and no injury to the public resulted in the particular instance.<sup>6</sup>

§ 650. **Broad statement of rule concerning public policy criticised.**<sup>7</sup>

§ 651. **Public policy—What determined by.**<sup>8</sup>

§ 652. **Contracts against public policy void.**<sup>9</sup>

§ 654. **Agreements involving commission of crime.**—In most jurisdictions it is the duty of the court to dismiss an action,

R. A. 1917C, 1084 (contract void if it contravenes the policy and spirit of statute); *Bondurant v. Dahnke-Walker Milling Co.*, 175 Ky. 774, 195 S. W. 139 (contract prohibited by statute void though not expressly declared illegal); *Hart v. City Theatres Co.*, 215 N. Y. 322, 109 N. E. 497; *Standard Fashion Co. v. Grant*, 165 N. Car. 453, 81 S. E. 606; *Courtney v. Parker* (N. Car.), 92 S. E. 324; *Wald v. Wheelon*, 27 N. Dak. 624, 147 N. W. 402; *Norbeck & Co. v. State*, 32 S. Dak. 189, 142 N. W. 847, Ann. Cas. 1916A, 229n; *Funkhouser v. Capps* (Tex. Civ. App.), 174 S. W. 897; *Republic Trust Co. v. Taylor* (Tex. Civ. App.), 184 S. W. 772; *Bunch v. Short* (W. Va.), 90 S. E. 810. "A contract founded on an illegal consideration or made for the purpose of furthering any matter or thing prohibited by statute or to aid or assist any party therein is void": *King v. Johnson*, 30 Cal. App. 63, 157 Pac. 531. See also *Western Indemnity Co. v. Crafts*, 240 Fed. 1.

<sup>6</sup> An executory contract contrary to public policy is generally void, although in the particular instance no injury to the public resulted, and no positive statute was violated: *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542. In determining whether a particular contract contravenes public policy, the test is whether its tendency is evil, rather than whether the acts performed or contemplated are evil: *Oliver v. Wilder*, 27 Colo. App. 337, 149 Pac. 275. As to when a contract is against public policy and void, see generally: *Chrest v. Louisville R. Co.*, 167 Ky. 75, 180 S. W. 49, L. R. A. 1917B, 1123n; *Gordon v. Gordon's*

*Admr.*, 168 Ky. 409, 182 S. W. 220; *Lesieur v. Rumford*, 113 Maine 317, 93 Atl. 838. One can not bind himself by contract not to assert a right which is given by statute for reasons of public policy: *Terre Haute Brewing Co. v. Ward*, 56 Ind. App. 155, 102 N. E. 395, 105 N. E. 58. A contract to exempt another from liability for violation of law is contrary to public policy and void: *Cooper v. Northern Pac. R. Co.*, 212 Fed. 533. But a contract which violates a statutory regulation of business is not necessarily void unless made so by the terms of the act: *Lane v. Henry*, 80 Wash. 172, 141 Pac. 365. See also *Lewis v. Creech's Admr.*, 162 Ky. 763, 173 S. W. 133.

<sup>7</sup> *Huber v. Culp*, 46 Okla. 485, 149 Pac. 216; *Cone v. Gilmore*, 79 Ore. 349, 155 Pac. 192; *Patterson v. Chambers' Power Co.*, 81 Ore. 328, 159 Pac. 568; *Eugene v. Chambers' Power Co.*, 81 Ore. 352, 159 Pac. 576.

<sup>8</sup> *Denson v. Alabama Fuel & Iron Co. (Ala.)*, 73 So. 525; *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622; *Lewis v. Harris Trust & Savings Bank*, 188 Ill. App. 544; *Hogston v. Bell* (Ind.), 112 N. E. 883; *Cahill v. Gilman*, 84 Misc. 372, 146 N. Y. S. 224. Where legislature has authorized a certain kind of contract, such a contract is not contrary to public policy: *Westerfield-Bonte Co. v. Burnett* (Ky.), 195 S. W. 477.

<sup>9</sup> *Davis v. Southern Pac. Co.*, 235 Fed. 731; *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542; *Oliver v. Wilder*, 27 Colo. App. 337, 149 Pac. 275; *Kuhn v. Buhl*, 251 Pa. 348, 96 Atl. 977. A contract contrary to public policy will

or to refuse peremptorily to permit recovery based on an illegal agreement, especially if it involves the commission of a crime, even though the illegality is not pleaded as a defense,<sup>10</sup> but in Massachusetts this seems to be discretionary with the court in some cases where the defense is not pleaded.<sup>11</sup>

§ 655. Agreements involving commission of civil wrong.<sup>12</sup>

§ 656. Agreements involving fraud.<sup>13</sup>

§ 661. Conveyance of property to defraud creditors.—Neither the grantor nor his heirs can attack the validity of a conveyance for fraud on his creditors.<sup>14</sup>

§ 664. Agreements mala in se and mala prohibita.<sup>15</sup>

§ 665. Penalties generally import or imply prohibition.<sup>16</sup>

not be enforced: *Walsh v. Hibberd*, 122 Md. 168, 89 Atl. 396, 50 L. R. A. (N. S.) 396n; *Standard Fashion Co. v. Grant*, 165 N. Car. 453, 81 S. E. 606; *The Stratford, Inc. v. Seattle Brewing & Co.*, 94 Wash. 125, 162 Pac. 31, L. R. A. 1917C, 931n.

<sup>10</sup> *Northwestern Salt Co. v. Electrolytic Alkali Co.*, L. R. (1913) 3 K. B. 422, Ann. Cas. 1915B, 228, and note. See also *Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325, 29 L. R. A. (N. S.) 218n; *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714; *Bishop v. Japhet* (Tex. Civ. App.), 171 S. W. 499; *Hall v. Edwards* (Tex. Civ. App.), 194 S. W. 674.

<sup>14</sup> *O'Brien v. Shea*, 208 Mass. 528, 95 N. E. 99, Ann. Cas. 1912A, 1030n.

<sup>12</sup> *Michigan Steel Box Co. v. United States*, 49 Ct. Cl. 421; *Varn v. Gonzales* (Tex. Civ. App.), 193 S. W. 1132.

<sup>13</sup> *Holsberry v. Clark*, 242 Fed. 831; *Norton v. Fleming*, 145 Ga. 475, 89 S. E. 573; *Warner v. Flack*, 278 Ill. 303, 116 N. E. 197; *Flack v. Warner*, 278 Ill. 368, 116 N. E. 202; *St. Louis & Co. v. West* (Tex. Civ. App.), 159 S. W. 142; *Ives v. Culton* (Tex. Civ. App.), 197 S. W. 619. For agreements held not to involve fraud so as to be illegal, see: *Hegnass v. Chilberg*, 224 Fed. 28, 139 C. C. A. 492; *Freese v. Pavloski* (R. I.), 99 Atl. 13.

<sup>14</sup> *Jayne v. Jayne*, 148 Ky. 613, 147 S. W. 41, Ann. Cas. 1913E, 540 and

note; *Rowley v. Rowley* (Mo.), 197 S. W. 152; *Eisenger v. Eisenger* (N. J. Ch.), 100 Atl. 840; *Emery v. Barfield* (Tex. Civ. App.), 156 S. W. 311. See as to when a conveyance is invalid as against subsequent creditors: *Ottawa Wire Vault Co. v. McGuire*, 27 Ont. L. Rep. 319, Ann. Cas. 1914A, 599, 601, and note. See as to reaching property fraudulently conveyed by creditor's bill: *Harris v. Beasley*, 123 Tenn. 605, 133 S. W. 1110, Ann. Cas. 1914B, 942, and note.

<sup>15</sup> It is held that a contract which is illegal because it requires performance of an immoral or unlawful act, is distinguishable from one against public policy alone: *Tallman v. Lewis*, 124 Ark. 6, 186 S. W. 296. Where a contract for property is merely *malum prohibitum*, a recovery may be had on a quantum meruit or of the property in trover: *Hill County v. Shaw & Co.*, 225 Fed. 475, 140 C. C. A. 523.

<sup>16</sup> [Main section cited in *Ferle v. Lansing*, 189 Mich. 501, 155 N. W. 591, L. R. A. 1917C, 1096n, 1098; *O'Bannon v. Widick* (Mo. App.), 198 S. W. 432, 433.]

As a general rule, the imposition of a penalty for doing an act implies or amounts to its express prohibition, and renders a contract for doing such act void: *Albertson & Co. v. Shenton* (N. H.), 98 Atl. 516; *Biggs v. Reliance Life Ins. Co.*,

§ 667. **When penalty does not imply prohibition.**—A penalty does not always necessarily imply a prohibition so as to render the contract void or unenforceable.<sup>17</sup>

§ 669. **Revenue measures—Statutes for protection of public.**<sup>18</sup>—Where the statute is intended merely to raise revenue, it may be, and usually is, interpreted as not prohibiting and rendering void a contract in violation thereof.<sup>19</sup>

§ 673. **Rule where conditions prescribed for conducting business are not complied with.**<sup>20</sup>—A contract in violation of a statute prohibiting the practice of medicine without a license and providing that a physician shall not recover compensation for services where his certificate of qualification has not been recorded, is void and this has been held a good defense to a note given for such services even in the hands of a bona fide purchaser.<sup>21</sup>

§§ 676, 677. **Contracts growing out of or connected with illegal contracts—Modified rule.**<sup>22</sup>

§ 680. **Rule when illegal contract is abandoned or merely collateral.**<sup>23</sup>

§ 681. **Collateral contracts of insurance, surety and loans.**<sup>24</sup>

§ 682. **Contracts containing several distinct undertakings.**<sup>25</sup>

(Tenn.), 195 S. W. 174 (such is the general rule but it is not inflexible). See also *Moser v. Pantages* (Wash.), 164 Pac. 768.

<sup>17</sup> *Reichardt v. Hill*, 236 Fed. 817.

<sup>18</sup> [Main section cited in *O'Bannon v. Widick* (Mo. App.), 198 S. W. 432, 433, 434.]

<sup>19</sup> *Reichardt v. Hill*, 236 Fed. 817; *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254; *Albertson & Co. v. Shenton* (N. H.), 98 Atl. 516. See also *McConnon & Co. v. Haskins* (Mo. App.), 180 S. W. 21.

<sup>20</sup> *Horning v. McGill* (Ind.), 116 N. E. 303.

<sup>21</sup> *Whitehead v. Coker* (Ala. App.), 76 So. 484, distinguishing *Bluthenthal v. Columbia*, 175 Ala. 398, 402, 57 So. 814.

<sup>22</sup> *Tomkins v. Seattle Const. & Co.* (Wash.), 165 Pac. 384; *Haymond v. Hyer* (W. Va.), 92 S. E. 854.

<sup>23</sup> A contract between publishers

for furnishing printed copies of constitutional amendments is not void, as against public policy, merely on account of an illegal agreement with the secretary of state for the publication thereof; *Oliver v. Wilder*, 27 Colo. App. 337, 149 Pac. 275. The fact that a firm has been organized to carry on an illegal business will not necessarily invalidate a cotton contract made by it; *Anderson v. Cavanaugh*, 16 Ga. App. 446, 85 S. E. 606.

<sup>24</sup> The fact that houses on which a loan is made to obtain money for improving them are to be used for illegal purposes does not destroy the consideration of the loan; *Mechanics' Realty & Co. v. Leva*, 16 Ga. App. 73, 84 S. E. 222.

<sup>25</sup> [Main section cited in *Denson v. Alabama Fuel & Co. (Ala.)*, 73 So. 525, 529.]

See also *Lamb v. Tomlinson*, 261 Ill. 388, 103 N. E. 1058; *Stratton*

§ 685. **Repeal of statutes—Impairing obligation of contract.**—Where an act or thing contracted to be done is afterward made unlawful, before performance, the promise is thereby avoided and can not be enforced.<sup>26</sup>

§ 687. **Violation of federal statutes.**<sup>27</sup>

§ 688. **Violation of liquor laws.**<sup>28</sup>

§ 695. **Violation of statutes as to lotteries.**—An agreement between a furniture dealer and a customer providing for the formation of a club, under which the members were to conduct a drawing and the successful person was to obtain an article for less than its value, is illegal as a lottery or gambling contract under the Michigan statute.<sup>29</sup>

§ 697. **Tailor suit clubs—Accumulated funds distributed by chance and the like.**<sup>30</sup>

§ 701. **Giving of trading stamps not a lottery.**—Contracts for the issuance of trading stamps to merchants, which, for the purpose of suppressing competition, prohibit them from using stamps of others and enable the party contracting to issue them to control nearly ninety per cent. of the trading stamp business in the locality, are illegal and void within a statute making every agreement in violation of common law unlawful and void, where they thus tend to create a monopoly in the production or sale of an article or commodity.<sup>31</sup>

v. Wilson, 170 Ky. 61, 185 S. W. 522; Saxton v. North Missouri &c. R. Co. (Mo. App.), 194 S. W. 1082. But compare Western Indemnity Co. v. Crafts, 240 Fed. 1.

<sup>26</sup> Advertiser Co. v. State, 193 Ala. 418, 69 So. 501. See also Dorr v. Chesapeake &c. R. Co. (W. Va.), 88 S. E. 666, L. R. A. 1916E, 622.

<sup>27</sup> Davis v. Southern Pac. Co., 235 Fed. 731.

<sup>28</sup> For illegal contracts under liquor laws, see R. A. Somers & Co. v. Jack Cranston Co. (Ga. App.), 92 S. E. 772; Enos v. Hanff, 95 Nebr. 184, 145 N. W. 244. For contracts not prohibited or illegal, see In re Johnson, 224 Fed. 180; Strebel v. Bligh, 183 Ind. 537, 109 N. E. 45; Halloran v. Jacob Schmidt Brewing Co. (Minn.), 162 N. W. 1082.

<sup>29</sup> La France v. Cullen (Mich.), 163 N. W. 101. For list of statutes making it an offense to advertise a lottery, see note in Ann. Cas. 1916A, 907.

<sup>30</sup> La France v. Cullen (Mich.), 163 N. W. 101 (similar scheme and contract of furniture club held illegal).

<sup>31</sup> Merchants' Legal Stamp Co. v. Murphy, 220 Mass. 281, 107 N. E. 968, L. R. A. 1915D, 520n; Merchants' Legal Stamp Co. v. Scott, 220 Mass. 389, 107 N. E. 969. But compare Sperr &c. Co. v. Fenster, 219 Fed. 755. State courts have generally held anti-trading stamp legislation invalid, but the Supreme Court of the United States has held it valid even where it required a license in effect prohibitive: Rast v. Van Deman &



§ 706. **Agreements tending to official corruption or injury to the public.**—Such agreements are held against public policy and unenforcible in a great variety of cases as shown in the notes to this and following sections.<sup>32</sup>

§§ 707, 708. **Tending to official corruption—Interest of public official.**<sup>33</sup>

§ 709. **Tending to official corruption—Location of public buildings.**<sup>34</sup>

§ 711. **Tending to official corruption—Influencing appointment to office.**<sup>35</sup>

§ 712. **Tending to official corruption—Payment of campaign expenses and the like.**<sup>36</sup>

§ 713. **Tending to official corruption—Contract to take more or less than statutory fee.**<sup>37</sup>

Lewis Co., 240 U. S. 342, 60 L. ed. 679, 36 Sup. Ct. 370, Ann. Cas. 1917B, 455n, L. R. A. 1917A, 421, and note reviewing authorities on both sides; Pitney v. Washington, 240 U. S. 387, 60 L. ed. 703, 36 Sup. Ct. 385, affirming State v. Pitney, 80 Wash. 699, 141 Pac. 883, Ann. Cas. 1916A, 209; Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. 379.

<sup>32</sup> Southern Bell Tel. & Co. v. Mitchell, 145 Ga. 539, 89 S. E. 514 (contract with justice of the peace as to costs held illegal); Moorehead v. Realty Associates, 166 App. Div. 782, 152 N. Y. S. 342 (contract with deputy tax commissioner for commission on sale of property illegal); Powers v. Hamilton, 117 Va. 810, 86 S. E. 98 (contract tending to inducing negligence of deputy treasurer illegal).

<sup>33</sup> Crocker v. United States, 240 U. S. 74, 60 L. ed. 533, 36 Sup. Ct. 245 (employment of superintendent of free delivery service for compensation contingent on success in securing contract with Postmaster General for letter carriers' satchels illegal); New Carlisle v. Tullar (Ind. App.), 110 N. E. 1001 (contract with health officer to treat private patients illegal as conflicting with public duty); Norbeck & Co. v. State, 32 S. Dak. 189, 142 N. W. 847, Ann. Cas. 1916A, 229n (member of legislature prohibited from contract with state by

constitution). As to contract of municipality with firm of which councilman is a member, see: Ensley v. J. E. Hollingsworth & Co., 170 Ala. 396, 54 So. 95, Ann. Cas. 1912D, 652, and note. See also note in 50 L. R. A. (N. S.) 1140.

<sup>34</sup> Davis v. Janeway (Okla.), 155 Pac. 241; Whitaker v. First Nat. Bank (Okla.), 155 Pac. 1175; Davis v. Choctaw County (Okla.), 158 Pac. 294; Cherry v. City State Bank (Okla.), 159 Pac. 253.

<sup>35</sup> An agreement by a candidate to withdraw just before election when too late to fill the vacancy, in consideration of his opponent's agreement to appoint him deputy, and to divide his fee, a fund to secure performance of the agreement being deposited is void as against public policy: Martin v. Francis, 173 Ky. 529, 191 S. W. 259. Agreement by which one named as executor and trustee accepted appointment as trustee only from the circuit court the temporary administrator turning over the bulk of the estate to him and agreeing not to claim commissions as permanent administrator, is not a bargain for an office, or contrary to public policy: In re Lutz Estate, 181 Mo. App. 267, 170 S. W. 334.

<sup>36</sup> See note to Exchange Nat. Bank v. Henderson (139 Ga. 260, 77 S. E. 36), in 51 L. R. A. (N. S.) 549n.

<sup>37</sup> Galpin v. Chicago, 269 Ill. 27,

§ 714. **Agreements tending to corrupt citizens as to public duties.**—Contracts influencing nominations or elections to public offices, voting on public questions and the like have often been held illegal as contrary to public policy.<sup>38</sup> But the fact that the main purpose of a contract between two town-site companies for one to buy the other's land was to eliminate the latter as an aspirant for the county seat and thereby secure influence and votes at the election therefor has been held not to invalidate the contract where there was no stipulation for such influence or vote and none to the effect that the purchase-money should not be paid if the election should turn out unfavorable to the purchaser.<sup>39</sup>

§ 714a. **Other contracts involving injury to public service.**—Many other contracts similar to those already considered have also been held contrary to public policy and illegal as tending to corrupt officials or citizens as to public duties or involving injury to the public service;<sup>40</sup> but contracts are not, ordinarily at least,

109 N. E. 713, L. R. A. 1917B, 176, and note; Metropolitan Trust & Co. Bank v. Perry, 194 Ill. App. 277; Dodson v. McCurnin (Iowa), 160 N. W. 927, L. R. A. 1917C, 1084. See also McRoberts v. Hoar, 28 Idaho 163, 152 Pac. 1046; Rochester v. Campbell, 184 Ind. 421, 111 N. E. 420; Moynihan v. Rockhill (Ind. App.), 113 N. E. 734; Wadsworth v. Livingston County, 217 N. Y. 484, 112 N. E. 161. But compare Pitt v. New York, 216 N. Y. 304, 110 N. E. 612 (acceptance of less than salary does not preclude from recovering arrears); McGonigle v. Kranis, 94 Misc. 323, 158 N. Y. S. 357; Shinn v. Shinn (W. Va.), 88 S. E. 610.

<sup>38</sup> Exchange Nat. Bank v. Henderson, 139 Ga. 260, 77 S. E. 36, 51 L. R. A. (N. S.) 549n; Schneider v. Local Union No. 60, 116 La. 270, 40 So. 700, 5 L. R. A. (N. S.) 891n, 114 Am. St. 549, 7 Ann. Cas. 868, and many earlier decisions reviewed in note in Ann. Cas. 1917C, 350; Gordon v. Doktor, 81 Misc. 214, 142 N. Y. S. 488 (contract illegal where made to influence administrative municipal officer); Logan v. Fidelity-Phoenix Fire Ins. Co., 161 App. Div. 404, 146 N. Y. S. 678; Miller v. Glockner, 1 Ohio App. 149, 35 Ohio C. C. 371 (contract for neutrality of newspaper on question to be voted on

is void); Obenchain v. Ransome-Crummey Co., 69 Ore. 547, 138 Pac. 1078, 139 Pac. 920; Kaufman v. Catzen (W. Va.), 94 S. E. 388.

<sup>39</sup> Lamro Town Site Co. v. Bank of Dallas, 35 S. Dak. 164, 151 N. W. 282, Ann. Cas. 1917C, 346n. And it has been held that there was nothing against public policy in a contract whereby one was to receive a 10 per cent. interest in a concession to a riparian owner of a water power right for assisting in the necessary steps under which he joined in the application to the military governor of Porto Rico for a franchise, and helped to present the matter to the Secretary of War and to the executive council of Porto Rico, where the first franchise granted therefor by the Secretary of War had been lost by failure to comply with its terms: Valdes v. Larrinaga, 233 U. S. 705, 58 L. ed. 1163, 34 Sup. Ct. 750.

<sup>40</sup> Under the Arkansas statute, providing for the granting of railroad charters, a contract by a company in consideration of building of a railroad over its land and hauling of its freight for a certain price, to grant defendant a right of way and join with incorporation of the railroad in efforts to procure a charter, was void as against public policy, as being a purchase of influence of officers and

illegal on any such ground where they have no such tendency.<sup>41</sup>

§ 715. Agreements tending to obstruct or pervert justice—Compounding crimes and the like.<sup>42</sup>

§ 717. Obstructing justice—Compounding offenses—Object must be to stifle prosecution.<sup>43</sup>

interfering with official action: *Bryant Lumber Co. v. Fourche River Lumber Co.*, 124 Ark. 313, 187 S. W. 455. So, where a railroad company about to build a line contracted for a right of way in consideration of giving the landowner advance information as to stations, so that he might plat town sites and divide any profits with the railroad company, such contract was held against public policy and void: *Minnesota & C. R. Co. v. Way*, 34 S. Dak. 435, 148 N. W. 858. But compare *Sholl Bros. v. Peoria & C. R. Co.*, 276 Ill. 267, 114 N. E. 529. Contracts having a tendency to injure public service are in a different class from ordinary gambling contracts, as regards any relief to be afforded thereunder by the courts: *Martin v. Francis*, 173 Ky. 529, 191 S. W. 259. "All agreements for pecuniary considerations to control the business operations of the government are void as against public policy, without reference as to whether improper means are attempted or used in their execution": *Kuhn v. Buhl*, 251 Pa. 348, 96 Atl. 977, Ann. Cas. 1917D, 415n.

<sup>41</sup> A railroad company's contract with an injured employé to employ him as long as he "should live and prove a competent and worthy man," and, if discharged, that he should receive his salary during his life, unless "discharged for neglect of duty or dissipation," is not against public policy as impairing the efficiency of the corporation: *Cox v. Baltimore & C. R. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453n. A purchase by a firm having a member who was also a member of the board of county commissioners, of certificates of indebtedness issued by a contractor for a county highway to his laborers, is not illegal on the ground that public officer can not become interested in any contract tending to influence his

official conduct: *Smiley v. State*, 60 Ind. App. 507, 110 N. E. 222; *Powers v. Maine Cent. R. Co.*, 114 Maine 198, 95 Atl. 879 (contract by railroad company to hire working train to contractor held legal); *Temple v. Brooks*, 165 App. Div. 661, 151 N. Y. S. 490 (contract of legislative stenographer for outside work not against public policy). An agreement in a deed of a right of way to a railroad company that in consideration of the conveyance it will establish a flag station is not against public policy where it will not interfere with the duties the company owes to the public: *Parrott v. Atlantic & C. R. Co.*, 165 N. C. 295, 81 S. E. 348, Ann. Cas. 1915D, 265n.

<sup>42</sup> For agreements held illegal and unenforceable under the rule of this section, see: *Hartseff v. Roberts*, 185 Ala. 201, 64 So. 90; *Shearer v. Farmers' & C. Bank*, 121 Ark. 599, 182 S. W. 262; *Jordan v. Beecher*, 143 Ga. 143, 84 S. E. 549, L. R. A. 1915D, 1122; *Shafer v. Beatrice State Bank*, 99 Nebr. 317, 156 N. W. 632; *Bisbee v. Pulpit Farm Dairy (N. H.)*, 100 Atl. 672; *Strauss Linotyping Co. v. Schwabe*, 159 App. Div. 347, 144 N. Y. S. 549; *Catskill Nat. Bank v. Lasher*, 165 App. Div. 548, 151 N. Y. S. 191; *Alston v. Hill*, 165 N. Car. 255, 81 S. E. 291; *Western Union Tel. Co. v. Smith (Tex. Civ. App.)*, 179 S. W. 548. See also *Sanders v. McKee*, 145 Ga. 507, 89 S. E. 484; *McConnell v. Cherokee Nat. Bank*, 18 Ga. App. 52, 88 S. E. 824. For agreements held not to be within the rule, see: *Godding v. Hall*, 56 Colo. 579, 140 Pac. 165; *Rieman v. Morrison*, 264 Ill. 279, 106 N. E. 215; *Higgins v. Sowards*, 159 Ky. 783, 169 S. W. 554.

<sup>43</sup> *Shuck v. Hawkins (Mo. App.)*, 180 S. W. 1034; *Northfork v. Angel*, 75 W. Va. 747, 84 S. E. 747.

§ 718. Miscellaneous illustrations.<sup>44</sup>

§ 719. **Agreements tending to obstruct or pervert justice—Civil proceedings.**—Agreements to compromise or to forbear made in good faith are generally favored and are not, ordinarily, against public policy.<sup>45</sup> So, a contract not to take a change of venue, made in consideration of an agreement for continuance of the cause of action, has been held binding and not contrary to public policy.<sup>46</sup>

§ 721. **Obstructing justice—Securing evidence.**—An agreement to secure letters in possession of a third person, in order to suppress them and prevent their use against one of the parties thereto in a pending lawsuit is illegal, but it is otherwise if the letters were to be secured merely to prevent their being sent unlawfully to the wife of the party contracting to have them secured.<sup>47</sup>

§ 725. **Ousting jurisdiction or limiting powers.**—A provision in an indemnity bond that vouchers or other proper evidence of payment of loss shall be conclusive against the indemnitor is against public policy and invalid as an attempt to make a party the sole arbiter of the indemnitor's liability and deprive the court of jurisdiction to try any fact in relation thereto.<sup>48</sup>

<sup>44</sup> As to when agreement to use influence in securing pardon is contrary to public policy and when not, see: *Gordon v. Gordon's Admr.*, 168 Ky. 409, 182 S. W. 220, Ann. Cas. 1917D, 886n; *Newbold v. McCrorey*, 103 S. Car. 299, 87 S. E. 542, 1103. "Any contract to impede the due course of public justice is illegal and unenforceable": *Fears v. United Loan & C. Bank*, 172 Ky. 255, 189 S. W. 226.

<sup>45</sup> *Sellers v. Jones*, 164 Ky. 458, 175 S. W. 1002; *Sellers v. Perry*, 191 Mich. 619, 158 N. W. 144; *Brandenburg v. Puller*, 266 Mo. 534, 181 S. W. 1141. See also *Elliott Co. v. Lagonda Mfg. Co.*, 205 Fed. 152.

<sup>46</sup> *Terre Haute Brewing Co. v. Ward*, 56 Ind. App. 155, 102 N. E. 395, 105 N. E. 58. And a stipulation waiving the defense of the statute of limitations has been held not to be contrary to public policy: *Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681n.

For other contracts in regard to civil proceedings or liability held not contrary to public policy, see also: *Roeh v. Business Men's Protective Assn.*, 164 Iowa 199, 145 N. W. 479, 51 L. R. A. (N. S.) 221n, Ann. Cas. 1915C, 813n; *Parker Gordon Cigar Co. v. First Nat. Bank (Okla.)*, 154 Pac. 1153; *Cone v. Gilmore*, 79 Ore. 349, 155 Pac. 192.

<sup>47</sup> *Josephs v. Briant*, 115 Ark. 538, 172 S. W. 1002, Ann. Cas. 1916E, 741n. An agreement between the complaining witness in a prosecution and an attorney to assist the district attorney therein was held void as against public policy in *Rock v. Fkern*, 162 Wis. 291, 156 N. W. 197. See also *Manufacturers & C. Insp. Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847n, Ann. Cas. 1914C, 449, and note (employment of detective to get evidence).

<sup>48</sup> *Guarantee Co. v. Charles*, 92 S. Car. 282, 75 S. E. 387, Ann. Cas.

§ 726. **Ousting jurisdiction—Submission to private individual.**—An agreement in advance to submit all matters involved to final decision of arbitrators and thus oust the jurisdiction of the courts is generally held invalid.<sup>49</sup> But the entire contract is not necessarily illegal, and the right to enforce a contract in the courts is not, ordinarily, affected by an unenforcible stipulation for arbitration.<sup>50</sup>

§ 727. **Ousting jurisdiction—Conditions precedent.**<sup>51</sup>

§ 728. **Ousting jurisdiction—Certificate of architect and the like.**<sup>52</sup>

§ 730. **Ousting jurisdiction—Further illustration.**<sup>53</sup>

§ 731. **Agreements tending to encourage litigation.**<sup>54</sup>

1916B, 687n. To same effect is *Fidelity & Deposit Co. v. Nordmarken*, 32 N. Dak. 19, 155 N. W. 669. See also *Nashua River Paper Co. v. Hammermill Paper Co.*, 223 Mass. 8, 111 N. E. 678; *Voris v. Gage*, 46 Okla. 748, 149 Pac. 150; *Sovereign Camp of Woodmen of the World v. Robinson* (Tex. Civ. App.), 187 S. W. 215; *Zaremba v. International Harvester Corporation*, 162 Wis. 231, 155 N. W. 114. For agreements held not to be illegal under the rule of this section, see: *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525; *Palmer v. Lavers*, 218 Mass. 286, 105 N. E. 1000; *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653. Workmen's Compensation Acts do not violate the rule: *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa 245, 154 N. W. 1037, 157 N. W. 145, note in L. R. A. 1916A, 409, et seq.

<sup>49</sup> *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006; *Sutro v. H. W. Balk, Inc.*, 151 N. Y. S. 764. But compare *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241n; *People v. Craven*, 210 N. Y. 443, 104 N. E. 922.

<sup>50</sup> *Dugger v. Kelly*, 168 Iowa 129, 150 N. W. 27.

<sup>51</sup> *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N. E. 384.

<sup>52</sup> [Main section cited in *Lefler v.*

*C. W. Lane & Co.*, 167 N. Car. 267, 83 S. E. 463, 464.]

Parties to a building contract may provide that disputes as to certain matters shall be submitted for decision to the architect and that his conclusion thereon shall be final: *Reilly v. Rodef Sholem Congregation*, 243 Pa. 528, 90 Atl. 345. See also *Smith v. Copiah County*, 239 Fed. 425. But a provision of a railroad construction contract for decision by the railroad company's engineer of disputes under the contract has been held to provide for a decision of all questions to the exclusion of the court's jurisdiction, and hence against public policy: *Meacham v. Jamestown & C. R. Co.*, 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851.

<sup>53</sup> A stipulation in a contract of sale fixing the venue of any suit growing out of it is valid: *Texas Moline Plow Co. v. Biggerstaff* (Tex. Civ. App.), 185 S. W. 341. But compare *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525; *Terre Haute Brewing Co. v. Ward*, 56 Ind. App. 155, 102 N. E. 395, 105 N. E. 58.

<sup>54</sup> A contract between the principal stockholder of a bank and a depositor, binding the stockholder to pay the depositor interest in the event a judgment against the latter is affirmed, is not void as encouraging litigation: *Cloyne v. Levy*, 26 Cal. App. 637, 148 Pac. 224.

§§ 732, 733. **Encouraging litigation — Champerty and maintenance—Modification of rule.**—An agreement in good faith by a layman to collect or effect the compromise of a promissory note in consideration of a certain percentage of the amount collected or recovered is not per se void on the ground of champerty or public policy.<sup>55</sup> But a provision in an insurance policy that if suit is brought by the insured no interest shall be recovered savors of champerty or maintenance, tends to encourage litigation, and is void as against public policy.<sup>56</sup>

§ 734. **Encouraging litigation — Champerty — Attorney and client.**—The mere fact that an attorney obtains a contract of employment by soliciting business does not render it void and unenforceable as champertous or against public policy.<sup>57</sup>

§ 735. **Encouraging litigation — Champerty — Right to compromise.**—Taking an assignment of a claim for treble damages as a matter of speculation by an attorney, and prosecuting it at his own expense, is champertous, and the attorney can not enforce it against the party otherwise liable on the claim.<sup>58</sup>

§§ 736, 737. **Encouraging litigation — Champerty — Recovery on quantum meruit—Defense of—When available.**<sup>59</sup>

<sup>55</sup> Rohan v. Johnson, 33 N. Dak. 179, 156 N. W. 936, L. R. A. 1916E, 64, and note. See also for other agreements held not to be invalid on the ground of champerty or maintenance: Coffman v. Louisville & C. R. Co., 184 Ala. 474, 63 So. 527; Rieman v. Morrison, 264 Ill. 279, 106 N. E. 215; Vandegrift v. Lanyon Zinc Co., 87 Kans. 376, 124 Pac. 534; Aetna Life Ins. Co. v. Weck, 163 Ky. 37, 173 S. W. 317; Glegg v. Bromley L. R. (1912), 3 K. B. 474, 81 L. J. K. B. (N. S.) 1081; Cole v. Booker (1913), 29 Times L. R. 295; French Gas Sav. Co. v. Desbarats Advertising Agency (Quebec), 1 D. L. R. 136. See also note in L. R. A. 1916E, 68-79 showing modifications of the old common-law doctrine in a number of states.

<sup>56</sup> Modern Brotherhood v. Bailey (Okla.), 150 Pac. 673, L. R. A. 1916A, 551. See also Seward v. Camp Mfg. Co., 112 Va. 479, 71 S. E. 614. See as to conveyances where land is in adverse possession: George T. Stagg Co. v. Quarles, 175 Ky. 330,

194 S. W. 333; St. Patricks & C. Assn. v. Hale (Mass.), 116 N. E. 407; Kiowa Realty Co. v. Molenoer, 165 N. Y. S. 131; Hutchinson v. Brown (Okla.), 167 Pac. 624; Culver v. Diamond (Okla.), 167 Pac. 223; Barker v. Campbell-Ratcliff Land Co. (Okla.), 167 Pac. 468. Compare also Houston Nat. Bank v. J. T. Edmonson Co. (Ala.), 75 So. 568.

<sup>57</sup> Chreste v. Louisville R. Co., 167 Ky. 75, 180 S. W. 49, L. R. A. 1917B, 1123n, Ann. Cas. 1917C, 867n; Johnson v. Great Northern R. Co., 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140.

<sup>58</sup> Sampliner v. Motion Picture & C. Co., 243 Fed. 277. See also Kelley v. Blanchard, 34 R. I. 57, 82 Atl. 728. But compare Bennett v. Tighe, 224 Mass. 159, 112 N. E. 629. See generally as to invalidity of contract prohibiting compromise without consent of attorney: Burho v. Carmichael, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305 and note.

<sup>59</sup> As to right to recover reasonable

§ 738. **Agreements tending to corrupt morals.**—Where an absolute sale is made of goods although the vendor knows they are to be used in a house of ill fame or the like, this does not prevent him from recovering the purchase-price when he does not participate in the unlawful business or do anything in furtherance of it.<sup>60</sup> But some courts hold that where the goods are sold under a retention of title contract the vendor with knowledge should be considered as participating or aiding in the venture and can not recover.<sup>61</sup>

§§ 739, 740. **Corrupting morals — Letting house for brothel.**<sup>62</sup>

§ 744. **Immoral consideration—Contracts to act as house-keeper.**—Contracts based on the immoral consideration of future illicit intercourse are illegal and unenforcible, whether express or implied,<sup>63</sup> but it is held in a recent case that a woman deceived into marriage with a man having a wife living may recover from his estate the value of services rendered to him during his life as upon an implied contract.<sup>64</sup>

§ 747. **Agreements tending to corrupt morals—Miscellaneous.**<sup>65</sup>

value of services, see *Roller v. Murray*, 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N. S.) 1202n, Ann. Cas. 1913B, 1091 and note citing cases on both sides. As to their being no right of recovery by champertous assignee, see *Sampliner v. Motion Picture & Co.*, 243 Fed. 277. But compare *French Gas. Sav. Co. v. Desbarats Advertising Agency* (Quebec), 1 D. L. R. 136. And see generally as to who may take advantage of champerty, note in 35 L. R. A. (N. S.) 512.

<sup>60</sup> *Loose v. Larsen* (Nev.), 161 Pac. 514, L. R. A. 1917B, 1166 and note (so held when vendor sells liquors for resale to one having a license notwithstanding the resale may incidentally encourage the business of a house of ill-fame); *Fine-man v. Faulkner* (N. Car.), 93 S. E. 384 (so held where plaintiff sold an Edison machine and records to a public prostitute and reserved a lien for the unpaid purchase-money) But

see *Anderson v. Freeman* (Tex. Civ. App.), 100 S. W. 350.

<sup>61</sup> *Hayes v. G. A. Stowers Furniture Co.* (Tex. Civ. App.), 180 S. W. 149 (and cases cited in original text). But see *Hollenberg Music Co. v. Berry*, 85 Ark. 9, 106 S. W. 1172, 122 Am. St. 17; *Belmont v. Jones House Furnishing Co.*, 94 Ark. 96, 125 S. W. 651, 140 Am. St. 112.

<sup>62</sup> See as to sale of goods to keeper of brothel and insurance on furniture therein, notes in 1917B, 257, 1168.

<sup>63</sup> *Gjurich v. Fieg*, 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916B, 111, and note. See also as to agreement for resumption of marital rights: *McKay v. McKay* (Tex. Civ. App.), 189 S. W. 520.

<sup>64</sup> *Sanders v. Ragan*, 172 N. Car. 612, 90 S. E. 777, L. R. A. 1917B, 681n.

<sup>65</sup> An advertising popularity contest, based on deceitful methods in making nominations and counting votes and the like, is fraudulent, and

§ 748. **Agreements tending to induce fraud or breach of trust.**<sup>66</sup>

§ 749. **Inducing breach of trust—Officers of corporation.**—Public policy forbids the enforcement of a contract by which a stockholder undertakes to bargain away his right to vote for directors according to his best judgment and in the interest of the corporation.<sup>67</sup>

§ 750. **Inducing breach of trust—Public service corporations.**<sup>68</sup>

§§ 753, 755, 756. **Agreements in derogation of marriage.**—A promise made by a man to an unmarried woman that if she continues in his employment and takes care of him until his death, and does not marry before that occurs, his executor will pay her a certain sum of money, is void as being in restraint of marriage.<sup>69</sup> So, an agreement, in settlement of a breach of con-

a contract therefore is against public policy: *American Mfg. Co. v. Crittenden Record-Press*, 166 Ky. 548, 179 S. W. 456. So, a contract by which plaintiff undertook to and did sell for another letters between a national association and numerous persons which such other party, an employé of the association, had secured and retained, and which tended to show its corrupt political campaign to prevent tariff legislation, and furnished material for a great journalistic sensation, was immoral and unenforceable in *Barry v. Mulhall*, 162 App. Div. 749, 147 N. Y. S. 996. See also *Smith v. Rose*, 192 Mo. App. 580, 184 S. W. 910.

<sup>66</sup> *Michigan Steel Box Co. v. United States*, 49 Ct. Cl. 421 (contract not enforced where consideration involved violation of duty of party as agent); *Douglas State Bank v. Lewinsohn*, 192 Ill. App. 364 (contract to pay money in consideration of making a temporary deposit in a bank for the purpose "of showing a substantial increase in business," in order to effect a sale or consolidation with another bank, illegal); *Lesieur v. Rumford*, 113 Maine 317, 93 Atl. 838 (fiduciary); *Palmbaum v. Magulsky*, 217 Mass. 306, 104 N. E. 746, Ann. Cas. 1915D, 799n (agreement

between stockholders to vote to dispose of assets). Contract of partnership to bid for mail contract is not invalid for fraud in providing that the bid shall be made and the contract taken in the name of one partner: *Hegnness v. Chilberg*, 224 Fed. 28, 139 C. C. A. 492.

<sup>67</sup> *Haldeman v. Haldeman* (Ky.), 197 S. W. 376, 382, distinguishing *Ecker v. Kentucky Refining Co.*, 144 Ky. 264, 138 S. W. 264. Contract between stockholders, whereby they agreed that for five years all of the parties should be elected directors, that their stock should be voted as a unit on all propositions, that each should have an option on the others' stock, and that as directors they would secure one another salaried official positions, is against public policy: *Teich v. Kaufman*, 174 Ill. App. 306. See also *Thomas v. Matthews*, 94 Ohio St. 32, 113 N. E. 669, L. R. A. 1917A, 1068 and note as to individual contracts of directors to pay dividends or the like being invalid.

<sup>68</sup> [Main section cited in *Minnesota &c. R. Co. v. Way*, 34 S. Dak. 435, 148 N. W. 858, 859.]

<sup>69</sup> *Lowe v. Doremus*, 84 N. J. L. 658, 87 Atl. 459, 49 L. R. A. (N. S.) 632n.



tract to marry, to pay a certain sum in three years, in addition to a cash payment, if the woman is not then married, is invalid as to such future agreement as in restraint of marriage.<sup>70</sup> But, where there is no collusion, a contract settling disputed property rights, or agreeing on the amount of alimony in a pending divorce proceeding, is not ordinarily regarded as contrary to public policy.<sup>71</sup>

**§ 757. Derogation of marriage—Facilitating divorce.**—Contracts facilitating divorce are contrary to public policy and void.<sup>72</sup> But where a father agreed to pay his daughter a certain sum if she would waive her claim for alimony against her husband and keep house for the father, which agreement was fully performed at the time of the latter's death, it was held that such agreement was not void as against public policy.<sup>73</sup>

**§ 758. Agreements suppressing competition at sales or public lettings.**<sup>74</sup>

**§ 760. Bidders may combine resources.**<sup>75</sup>

**§ 761. One may bid for benefit of all.**<sup>76</sup>

<sup>70</sup> *McCoy v. Flynn*, 169 Iowa 622, 151 N. W. 465, L. R. A. 1915D, 1064.

<sup>71</sup> *Stoff v. Erken*, 25 Cal. App. 528, 144 Pac. 312; *Maisch v. Maisch*, 87 Conn. 377, 87 Atl. 729; *Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033.

<sup>72</sup> *Rowe v. Young*, 123 Ark. 303, 185 S. W. 438; *Wolkovisky v. Rapaport*, 216 Mass. 48, 102 N. E. 910, Ann. Cas. 1915A, 809n; *Klampe v. Klampe* (Minn.), 163 N. W. 295; *McDonald v. McDonald*, 175 Mo. App. 513, 161 S. W. 850; *Huber v. Culp*, 46 Okla. 570; 149 Pac. 216; *In re Mathiot's Estate*, 243 Pa. 375, 90 Atl. 139.

<sup>73</sup> *Spalding v. White*, 184 Ill. App. 217.

<sup>74</sup> [Main section cited in *Shaw v. Elijah*, 54 Ind. App. 234, 238, 102 N. E. 885.]

Agreement of administratrix to convey on stipulated terms, and go through the form of a public sale to consummate a previous agreement is contrary to public policy and unenforceable: *Brown v. Madden*, 141 Ga. 419, 81 S. E. 196. Agreement by the holder of a mortgage to give the

holder of a subsequent mortgage an interest in the premises if he would not compete in the bidding on foreclosure of a prior mortgage was held not void as against public policy in *Goldman v. Cohen*, 167 App. Div. 666, 153 N. Y. S. 41.

<sup>75</sup> [Main section cited in *Shaw v. Elijah*, 54 Ind. App. 234, 238, 102 N. E. 885; *Taylor v. Lafavers*, (Tex. Civ. App.), 198 S. W. 651, 653.]

An agreement between plaintiffs and a corporation to buy jointly the fixtures and stock of an insolvent at public sale where made for the legitimate purpose of combining the parties' resources and not to chill or suppress bidding is not invalid as against public policy: *Stack v. Roth Bros. Co.*, 162 Wis. 281, 156 N. W. 148.

<sup>76</sup> [Main section cited in *Shaw v. Elijah*, 54 Ind. App. 234, 238, 102 N. E. 885; *Taylor v. Lafavers*, (Tex. Civ. App.), 198 S. W. 652, 653.]

An agreement that one of the parties thereto should purchase property at a judicial sale and sell it to the other, when not intended to stifle competition or prevent the property

§ 762. Bids on proposals for government work and the like.—“Where a public right is to be disposed of by government officers or agents, public policy forbids that one competing applicant shall contract for the extinguishment of another’s competition, and invalidates all contracts made for that purpose.”<sup>77</sup>

§ 764. Honest cooperation permitted.—A contract of partnership to bid for mail contracts and to divide the net profits is not illegal, where neither its purpose nor its effect is to prevent or lessen competition in bidding.<sup>78</sup>

§§ 765, 766. Agreements exempting from liability for negligence—Contracts with carrier—Reason for rule.<sup>79</sup>

§§ 772, 773, 774. Stipulation exempting carrier from liability to passenger for negligence—Passes.—Most of the recent cases upon the subject hold that, while a railroad company can not contract so as to relieve itself from liability for its negligence in the case of a passenger for hire or reward, where the carriage is wholly gratuitous, as in the case of a free pass, the railroad company may make such stipulation against liability for negligence.<sup>80</sup> But where a pass is issued to an employé as part

bringing a fair price does not invalidate the sale: *Evans v. Carter* (Tex. Civ. App.), 176 S. W. 749.

<sup>77</sup> *Kuhn v. Buhl*, 251 Pa. 348, 96 Atl. 977, Ann. Cas. 1917D, 415n.

<sup>78</sup> *Hegness v. Chilberg*, 224 Fed. 28, 139 C. C. A. 492.

<sup>79</sup> *Swift v. Louisville &c. R. Co.*, 180 Ill. App. 104; *Chesapeake &c. R. Co. v. Jordan* (Ind. App.), 114 N. E. 461; *George W. Lardie & Son v. Manistee &c. R. Co.*, 192 Mich. 77, 158 N. W. 31; *Lyon v. Atlantic Coast Line R. Co.*, 165 N. Car. 143, 81 S. E. 1; *Gulf &c. R. Co. v. Boger* (Tex. Civ. App.), 169 S. W. 1093. See also post §§ 3214, 3219. See as to rule under *Carmack and Cummins Amendments Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257 and note; *Atchison &c. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. 556; *Cincinnati &c. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A, 265, and note; *Wabash R. Co. v. Priddy*, 179 Ind. 483, 101 N. E. 724; *Stubblefield v. St. Louis &c. R. Co.*, 194 Mo. App. 396, 184 S. W.

149; *Enderstein v. Atchison &c. R. Co.*, 21 N. Mex. 548, 157 Pac. 670; *Erie R. Co. v. Steinberg*, 94 Ohio St. 189, 113 N. E. 814, L. R. A. 1917B, 787; *Piper v. Boston &c. R. Co.*, 90 Vt. 176, 97 Atl. 508; also notes in 50 L. R. A. (N. S.) 819; Ann. Cas. 1912B, 672; and Ann. Cas. 1915D, 612.

<sup>80</sup> *Charleston &c. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. 964; *Smith v. Atchison &c. R. Co.*, 194 Fed. 79, 114 C. C. A. 157; *Dodson v. Clark County Lumber Co.*, 123 Ark. 50, 184 S. W. 417; *Wright v. Central of Ga. R. Co.*, 18 Ga. App. 290, 89 S. E. 457; *Buckley v. Bangor &c. R. Co.*, 113 Maine 164, 93 Atl. 65, L. R. A. 1916A, 617n; *Atchison &c. R. Co. v. Smith*, 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C, 620 and note; *Nevill v. Gulf &c. R. Co.* (Tex. Civ. App.), 187 S. W. 388. But compare *Walthers v. Southern Pac. Co.*, 159 Cal. 769, 116 Pac. 51, 37 L. R. A. (N. S.) 235n; *Wentz v. Chicago &c. R. Co.*, 259 Mo. 450, 168 S. W. 1166, Ann. Cas. 1916B, 317n. See post §§ 3326, 3327 and § 3337 as to baggage.

of the consideration of the employment it is not gratuitous and such a stipulation will not relieve it from liability in a proper case.<sup>81</sup>

### § 776. Who is a passenger.<sup>82</sup>

§ 777. **Agreements exempting employer from liability for negligence.**—Public policy, even in the absence of a statute, forbids the master from contracting with an employé in advance for freedom from liability for injuries caused by the master's negligence and imposing upon the employé a risk which the law imposes on the master.<sup>83</sup>

§ 782. **Unclassified illegal agreements — Miscellaneous cases.**—A contract by an officer of a corporation to assist others in gaining control of the company by buying in the stock is illegal and unenforceable.<sup>84</sup>

<sup>81</sup> *Klinck v. Chicago &c. R. Co.*, 177 Ill. App. 165; *Indianapolis Trac. &c. Co. v. Isgrig*, 181 Ind. 211, 104 N. E. 60; *Powell v. Union Pac. R. Co.*, 255 Mo. 420, 164 S. W. 628; *Gill v. Erie R. Co.*, 151 App. Div. 131, 135 N. Y. S. 355, and see post § 3326. See also in case of drover or caretaker: *Chicago &c. R. Co. v. Williams*, 200 Fed. 207, 118 C. C. A. 393; *Pittsburg &c. R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; *Buckley v. Bangor &c. R. Co.*, 113 Maine 164, 93 Atl. 65, L. R. A. 1916A, 623 and note.

<sup>82</sup> *Coleman v. Pennsylvania R. Co.*, 242 Pa. 304, 89 Atl. 87, 50 L. R. A. (N. S.) 432n, Ann. Cas. 1915B, 529 (liability to sleeping car porter); *Nevill v. Gulf &c. R. Co.* (Tex. Civ. App.), 187 S. W. 388 (news agent not). See also *Ingram v. Kansas City &c. R. Co.*, 134 La. 377, 64 So. 146, 50 L. R. A. (N. S.) 688n (newsboy); note in 50 L. R. A. (N. S.) 432. See as to persons traveling on passes or contracts contrary to statute or constitution: *Southern Pac. R. Co. v. Schuyler*, 227 U. S. 601, 57 L. ed. 663, 33 Sup. Ct. 277, 43 L. R. A. (N. S.) 901n.

<sup>83</sup> *Campbell v. Chicago &c. R. Co.*,

243 Ill. 620, 90 N. E. 1106; *Chicago &c. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768; *Jewell v. Kansas City Bolt &c. Co.*, 231 Mo. 176; 132 S. W. 703; *Olson v. Nebraska Tel. Co.*, 83 Nebr. 735, 120 N. W. 421; *Twaiats v. Pennsylvania R. Co.*, 77 N. J. Eq. 103, 75 Atl. 1010; *Valjago v. Carnegie Steel Co.*, 226 Pa. 514, 75 Atl. 728. See as to effect of Federal Employers' Liability Act on such agreements: *Rief v. Great Northern R. Co.*, 126 Minn. 430, 148 N. W. 309; note in 47 L. R. A. (N. S.) 50. See also *Wells v. Vandalia R. Co.*, 56 Ind. App. 211, 103 N. E. 360 (void under state statute); *Shohoney v. Quincy &c. R. Co.*, 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143 and note.

<sup>84</sup> *Carlisle v. Smith*, 234 Fed. 759. See also *McMullen v. Hoffman*, 174 U. S. 639, 645, 43 L. ed. 1117, 19 Sup. Ct. 839, 845. For other cases of contracts held illegal, see: *Holsherry v. Clark*, 242 Fed. 831; *Kennedy v. Stimming*, 192 Mich. 600, 159 N. W. 374 (relating to prohibitive traffic or transactions); *Simmer v. Cutter's Estate* (Mich.), 160 N. W. 605 (same); *Morgan Munitions Supply Co. v. Studebaker*, 166 N. Y. S. 645.

## CHAPTER XXII

### CONTRACTS IN RESTRAINT OF TRADE

§ 792. Distinction between general restrictions as to place and as to time.<sup>1</sup>

§ 795. Unreasonable restraint—Injury to the public.—Contracts, even though fair and reasonable as between the parties, may be void or unenforceable if so unlimited as to injuriously affect public interests.<sup>2</sup>

§ 796. Restraint reasonably necessary.<sup>3</sup>

§ 798. Broad statement of rule criticized.<sup>4</sup>

§ 799. Reasonable and partial restraint allowed.<sup>5</sup>

§§ 800, 801. Rule illustrated—Application to various callings.—A contract not to engage in a certain business as an inducement to buy it, is valid and enforceable where there are specific and reasonable limitations as to space and time,<sup>6</sup> and con-

<sup>1</sup>Madon v. Johnson, 164 Wis. 612, 160 N. W. 1085 (limited to city but unlimited as to time held valid).

<sup>2</sup>Tarr v. Stearman, 264 Ill. 110, 105 N. E. 957; Klaff v. Pratt, 117 Va. 739, 86 S. E. 74. See also Pearson v. Duncan (Ala.), 73 So. 406; Sivley v. Cramer, 105 Miss. 13, 61 So. 653. But compare Styles v. Lyon, 87 Conn. 23, 86 Atl. 564; Home Pattern Co. v. Mascho, 46 Okla. 55, 148 Pac. 131; Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 Atl. 988.

<sup>3</sup>[Main section cited in Boggs v. Friend (W. Va.), 87 S. E. 873, 875.]

See also Hall Mfg. Co. v. Western Steel & Works, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620, and note; Bradshaw v. Millikin (N. Car.), 92 S. E. 161. Agreement of solicitor for laundry orders not to solicit such orders or engage in such business in any capacity in the county where the employer was operating within two years after termination of such employment, is reasonably neces-

sary for the protection of the employer's business and not illegal: Owl Laundry Co. v. Banks (N. J. Ch.), 89 Atl. 1055; Owl Laundry Co. v. Dilger (N. J. Ch.), 89 Atl. 1056.

<sup>4</sup>American Laundry Co. v. E. & W. Dry-Cleaning Co. (Ala.), 74 So. 58. Agreements in unreasonable restraint of trade are contrary to public policy and void, because they tend to the creation of a monopoly, and they must not only be reasonable as protecting the interests of a party but also not be so broad as to interfere with the public interests: Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542.

<sup>5</sup>Ripy v. Art Wall Paper Mills, 41 Okla. 20, 136 Pac. 1080, 51 L. R. A. (N. S.) 33; Madson v. Johnson, 164 Wis. 612, 160 N. W. 1085. See also Bradshaw v. Millikin (N. Car.), 92 S. E. 161.

<sup>6</sup>Telford v. Smith, 186 Ill. App. 631.

tracts by one upon the sale of his business not to engage in the same business in the same city or county for a number of years have often been upheld.<sup>7</sup> So, where the restriction of a negative covenant is not unlimited, but partial and reasonable and calculated to foster the business of the covenantee rather than to prevent competition, it is not ordinarily illegal as against any statute or public policy.<sup>8</sup>

**§ 802. Agreements by partners and employes not to compete.<sup>9</sup>**

**§ 803. Agreement by vendor or vendee of property not to conduct a designated business.<sup>10</sup>**

<sup>7</sup> *Busk v. F. Wolf & Co.*, 143 Ga. 18, 84 S. E. 63 (three years); *Holliston v. Ernston*, 124 Minn. 49, 144 N. W. 415 (covenant in a bill of sale by a bus and baggage company not to engage in the same business in a certain city); *Morehead Sea Food Co. v. Way*, 169 N. Car. 679, 86 S. E. 603 (agreement upon sale of fish business not to engage in similar business for ten years within 100 miles); *Kuhns v. Loetzbie*, 58 Pa. Super. Ct. 148 (ten years); *Loutzenhiser v. Peck*, 89 Wash. 435, 154 Pac. 814 (two years). A contract between two publishers of newspapers, both published in the evening in the same city, providing that in consideration of a specified sum of money, to be paid in due course, one of them should be changed from an evening to a morning paper, and that for a period named its publisher would not again enter the evening newspaper field in that city, is not illegal as a contract in restraint of trade: *Age Pub. Co. v. Times Pub. Co.*, 4 Ohio App. 13, 35 Ohio C. C. 421.

<sup>8</sup> *American Sand &c. Co. v. Chicago Gravel Co.*, 184 Ill. App. 509 (also holding that a contract granting the exclusive right to excavate and remove sand and gravel from a tract of land for a certain period, the grantee agreeing to make certain payments in money, to deliver to the grantor not to exceed 25 car loads of the product per day, and not to sell during the contract term any products from any of its pits for use in the

county, except to the grantor, is not in unreasonable restraint of trade). A retailer's agreement to buy a particular line of goods exclusively from a certain manufacturer for a reasonably limited period in a particular locality is not invalid as in restraint of trade: *Ripy v. Art Wall Paper Mills*, 41 Okla. 20, 136 Pac. 1080, 51 L. R. A. (N. S.) 33. See also as to agreement to patronize particular concern exclusively: *Mitchell-Taylor Ice Co. v. Whitaker*, 158 Ky. 651, 166 S. W. 193, and *Peerless Pattern Co. v. Gauntlett Dry Goods Co.* (Mich.), 136 N. W. 1113, 42 L. R. A. (N. S.) 843.

<sup>9</sup> Agreement by retiring president of a bank not to enter into employment of any other bank or trust company in the same city for a term of less than a year is not invalid as against public policy: *Heinz v. National Bank*, 237 Fed. 942, 150 C. C. A. 592. See also *Robertson v. Willmott* (1909), 25 Times L. R. 681, 53 Sol. J. 631; *Dayer-Smith v. Hadsley* (1913), 108 L. (N. S.) 897, 57 Sol. J. 555; notes 24 L. R. A. (N. S.) 933; and 40 L. R. A. (N. S.) 473.

<sup>10</sup> A provision that property shall revert to the grantors, if any livery business be conducted on the premises, is lawful: *Seeck v. Jakel*, 71 Ore. 35, 141 Pac. 211, L. R. A. 1915A, 679n. Covenant in a lease for three years that lessee would sell only the lessor's beer, being limited as to time, space, and extent of trade, is valid at common law and under Wisconsin

§ 804. **Exclusive agencies.**—Contracts for an exclusive agency or to buy from a certain concern are generally upheld, at least when reasonably limited as to place and time and not injurious to the public interests.<sup>11</sup> But an agreement by a corporation owning a controlling interest in the stock of a manufacturing company with another corporation of which it owned all the stock, undertaking to make the latter corporation the exclusive agent for the manufacturing company's products, has been held contrary to public policy and void.<sup>12</sup>

§ 805. **Sales by stockholders.**<sup>13</sup>

§§ 807, 808. **Abandonment of arbitrary geographical limits—Illustrations of modern rule.**—The validity of a covenant by the seller of an interstate business not to re-engage in such business is to be determined by the federal courts according to general law, and such a covenant is valid and enforceable in a proper case, even though it is unlimited either as to time or space.<sup>14</sup>

§§ 809, 810, 811. **Limitations as to time.**—In some instances contracts unlimited as to time have been sustained,<sup>15</sup> and

statute; *Rose v. Gordon*, 158 Wis. 414, 149 N. W. 158. But see *Torian v. Fuqua*, 175 Ky. 428, 194 S. W. 359.

<sup>11</sup> *W. T. Rawleigh Medical Co. v. Osborne*, 177 Iowa 208, 158 N. W. 566; *Mitchell-Taylor Tie Co. v. Whitaker*, 158 Ky. 651, 166 S. W. 193; *Hoban v. Dempsey*, 217 Mass. 166, 104 N. E. 717, L. R. A. 1915A, 1217; *Home Pattern Co. v. Mascho*, 46 Okla. 55, 148 Pac. 131. See also *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 57 L. ed. 393, 33 Sup. Ct. 202. But compare *Henschke v. Moore (Pa.)*, 101 Atl. 308.

<sup>12</sup> *Whitridge v. Mt. Vernon Woodberry Cotton Duck Co.*, 210 Fed. 302.

<sup>13</sup> *Holtman v. Knowles*, 141 Ga. 613, 81 S. E. 852; *Georgia Granite R. Co. v. Miller*, 144 Ga. 665, 87 S. E. 897; *Alden v. Wright*, 175 App. Div. 692, 162 N. Y. S. 668. But see *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479.

<sup>14</sup> *Hall Mfg. Co. v. Western Steel & C. Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620 (citing many cases and showing extension

and development of modern rule). See also as to extension of modern rule as to space: *Prame v. Ferrell*, 166 Fed. 702, 92 C. C. A. 374, 215 U. S. 605, 54 L. ed. 345, 30 Sup. Ct. 406; *A. B. Dick Co. v. Fuller*, 213 Fed. 98; *Cropper v. Davis*, 243 Fed. 310; *Mills v. Cleveland*, 87 Kans. 549, 125 Pac. 58; *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 533, 74 Atl. 680; *Harbison-Walder Refractories Co. v. Stanton*, 227 Pa. 55, 75 Atl. 988; *Washington Charcrete Co. v. Campbell*, 72 Wash. 566, 131 Pac. 208, Ann. Cas. 1914D, 630n. But see contra: *Floding v. Floding*, 137 Ga. 531, 73 S. E. 729; *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74 S. E. 772, 40 L. R. A. (N. S.) 473n; *Linneman v. Allison*, 142 Ky. 309, 134 S. W. 134; *Goldsohl v. Goldman*, L. R. (1914) 2 Ch. Div. 603, 59 Sol. J. 43. See also *Public Opinion Pub. Co. v. Ransom*, 34 S. Dak. 381, 148 N. W. 838, Ann. Cas. 1917A, 1010n (under statute).

<sup>15</sup> *Hall Mfg. Co. v. Western Steel & C. Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620, and note;

in many instances contracts with the time limit running as long as ten years have been upheld.<sup>10</sup>

§ 812. **Contracts unlimited as to time.**—In particular instances restrictive covenants without any definite limitation as to time have been upheld and enforced.<sup>17</sup>

§ 813. **Contracts between employer and employe.**—The rule is stricter, in some jurisdictions at least, against restraints upon employés in contracts of employment than it is in the case of ordinary contracts in the sale of a business or profession.<sup>18</sup>

§ 814. **Must be incidental or ancillary to be valid.**<sup>19</sup>

§§ 815, 816. **May be invalid though for sale of property or business—Illustrations of invalid contracts.**<sup>20</sup>

§§ 817, 822. **Invalid contracts—Contracts of common carriers—Corporations affected with public interest.**<sup>21</sup>

Madson v. Johnson, 164 Wis. 612, 160 N. W. 1085. But see Henschke v. Moore (Pa.), 101 Atl. 308.

<sup>16</sup> Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 Pac. 430; Styles v. Lyon, 87 Conn. 23, 86 Atl. 564; Morehead Sea Food Co. v. Way, 169 N. Car. 679, 86 S. E. 603; Kuhn v. Loetzbiere, 58 Pa. Super. Ct. 148; Dayer-Smith v. Hadsley (1913), 108 L. T. (N. S.) 897, 57 Sol. J. 555. So as to limitation to so long as other party is engaged in the business: Smith v. Webb, 176 Ala. 596, 58 So. 913, 40 L. R. A. (N. S.) 1191n; F. T. Gunther Grocery Co. v. Koll, 153 Ky. 446, 155 S. W. 1145. See also Fox v. Barbee, 94 Kans. 212, 146 Pac. 364; Baird v. Smith, 128 Tenn. 410, 161 S. W. 492, L. R. A. 1917A, 376n.

<sup>17</sup> Hall Mfg. Co. v. Western Steel &c. Co., 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620; Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415; Madson v. Johnson, 164 Wis. 612, 160 N. W. 1085.

<sup>18</sup> Moorman v. Parkerson, 127 La. 835, 54 So. 47; Allen Mfg. Co. v. Murphy, 23 Ont. L. Rep. 467; notes in 24 L. R. A. (N. S.) 933, and 40 L. R. A. (N. S.) 473. But see Jewell Tea Co. v. Watkins, 26 Colo. App. 494, 145 Pac. 719; McColl Co. v. Wright, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249n; Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N. W. 412, 35 L. R. A. (N. S.)

119n. For restraint held too broad, see Steinmeyer v. Phenix Cheese Co. (N. J.), 102 Atl. 150.

<sup>19</sup> [Main section quoted in Gross v. Bibb, 19 N. Mex. 495, 145 Pac. 480, 489.]

Pearson v. Duncan (Ala.), 73 So. 406; Stewart v. Stearns &c. Lumber Co., 56 Fla. 570, 48 So. 19, 24 L. R. A. (N. S.) 649n; Barrone v. Moseley, 144 Ky. 698, 139 S. W. 869; Gross v. Bibb, 19 N. Mex. 495, 145 Pac. 480.

<sup>20</sup> Whitridge v. Mt. Vernon &c. Cotton Duck Co., 210 Fed. 302; Tarr v. Stearman, 264 Ill. 110, 105 N. E. 957; Gay v. Brent, 166 Ky. 833, 179 S. W. 1051; Sivley v. Cramer, 105 Miss. 13, 61 So. 653; Boggs v. Friend (W. Va.), 87 S. E. 873. Seller of a wagon and team can not require the purchaser to use them solely in connection with seller's business: Elijah v. Mottinger, 161 Iowa 371, 142 N. W. 1038. But a contract to buy all the beer used in the contractor's saloon from the other party, who agrees to furnish it at a certain price, is good: Joseph Schlitz Brewing Co. v. Travi, 179 Ill. App. 269. Compare also Walker v. Lawrence, 177 Fed. 363, 101 C. C. A. 417.

<sup>21</sup> Bryant Lumber Co. v. Fourche River Lumber Co., 124 Ark. 313, 187 S. W. 455; Sholl v. Peoria &c. R. Co., 276 Ill. 267, 114 N. E. 529; Minnesota &c. R. Co. v. Way, 34 S. Dak. 435, 148 N. W. 858.

### § 823. Nature of business.<sup>22</sup>

§ 825. **Sale of good will in absence of restrictive covenant.**—The good will of a business usually passes with its sale where there is no express stipulation in regard to such good will.<sup>23</sup>

§ 832. **Express provision against competing in business.**—An agreement with the buyer of a business, even though not with him “and assigns,” not to become a competitor is assignable to one to whom the buyer sells such business and good will, and it passes as an incident to the good will without formal written assignment.<sup>24</sup> As a general rule where a business is sold with the good will a covenant restraining the seller from re-engaging in the business, when only coextensive with the business, or reasonably necessary for the protection of the purchaser, is valid and enforceable.<sup>25</sup>

### § 833. Patents and secret processes.<sup>26</sup>

§ 834. **Contracts protecting ownership.**—Where a patented article has passed through the channels of trade into the hands of a retail dealer a price restriction by the patentee is invalid and no longer enforceable.<sup>27</sup>

<sup>22</sup> See ante § 804.

<sup>23</sup> *Boggs v. Friend* (W. Va.), 87 S. E. 873. See also *Donleavy v. Johnston*, 24 Cal. App. 319, 141 Pac. 229; *Fairfield v. Lowry*, 207 Mass. 352, 93 N. E. 598; *Counts v. Medley*, 163 Mo. App. 546, 146 S. W. 465. But compare *Hirschberg v. Bacher*, 159 Wis. 207, 149 N. W. 383.

<sup>24</sup> *Public Opinion Pub. Co. v. Ransom*, 34 S. Dak. 381, 148 N. W. 838, Ann. Cas. 1917A, 1010n. See also *Akers v. Rappe*, 30 Cal. App. 290, 158 Pac. 129.

<sup>25</sup> *Hall Mfg. Co. v. Western Steel & Works*, 227 Fed. 588, 142 C. C. A. 220; *Knowles v. Jones*, 182 Ala. 187, 62 So. 514; *Kimbrow v. Wells*, 112 Ark. 126, 165 S. W. 645; *Nickell v. Johnson*, 162 Ky. 520, 172 S. W. 938; *Gross v. Bibb*, 19 N. Mex. 495, 145 Pac. 480; *Metropolitan Opera Co. v. Hammerstein*, 162 App. Div. 691, 147 N. Y. S. 532; *Sutherland v. Connecticut Mut. Life Ins. Co.*, 87 Misc.

383, 149 N. Y. S. 1008. But compare *Buffalo Specialty Co. v. Gougar*, 26 Colo. App. 523, 144 Pac. 325; *Ludewese v. Farmers' Mut. Co-Op. Co.*, 164 Iowa 197, 145 N. W. 475.

<sup>26</sup> *Flexilis Werke v. Hess*, 205 Fed. 850, 124 C. C. A. 52; *A. B. Dick Co. v. Fuller*, 213 Fed. 98; *United Shoe Machinery Co. v. La Chapelle*, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D, 715; *Lock v. Citizens' Nat. Bank* (Tex. Civ. App.), 165 S. W. 536.

<sup>27</sup> *Kellogg Toasted Corn Flake Co. v. Buck*, 208 Fed. 383, following *Bauer & Cie v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 33 Sup. Ct. 616, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150n. Compare *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522, and note; and see note in 27 L. R. A. (N. S.) 401, 402. See as to secret process: *Flexilis Werke v. Hess*, 205 Fed. 850, 124 C. C. A. 52;



§ 835. Restricting resale of article.<sup>28</sup>

§ 838. Rights of owner of patent.<sup>29</sup>

§ 839. Transfer by owner of rights under patent.<sup>30</sup>

§ 840. Contracts which owner of patent is prohibited from making.—In the absolute sale of a patented article, as distinguished from a conditional sale reserving title or passing only a qualified title, the patentee can not dictate prices at which the article shall be resold by the purchaser, and a system of contracts by which this is attempted to be done in all cases is an unlawful restraint of trade and invalid both at common law and, in so far as it affects interstate commerce, also under the Sherman anti-trust act.<sup>31</sup>

§ 843. Contracts in restraint of trade—Presumptions as to validity.<sup>32</sup>

Grand Rapids Wood Finishing Co. v. Hatt, 152 Mich. 132, 115 N. W. 714.

<sup>28</sup> Straus v. American Pub. Assn., 231 U. S. 222, 58 L. ed. 192, 34 Sup. Ct. 84, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369n; W. H. Hill Co. v. Gray, 163 Mich. 12, 127 N. W. 803, 30 L. R. A. (N. S.) 327. See also ante § 834. But compare *Virtue v. Creamery Package Co.*, 227 U. S. 8, 57 L. ed. 393, 33 Sup. Ct. 202; *D'Ghiradelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041; *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522n.

<sup>29</sup> Compare *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.*, 154 Fed. 365, 83 C. C. A. 343, and *Butterick Pub. Co. v. Rose*, 141 Wis. 533, 124 N. W. 647, with *United States v. Keystone Watch Case Co.*, 218 Fed. 502, and *United States v. Kellogg Toasted Corn Flake Co.*, 222 Fed. 725, Ann. Cas. 1916A, 78n; *Ford Motor Co. v. Union Motor Sales Co.*, 244 Fed. 156; *Straus v. Victor Talking Mach. Co.*, 243 U. S. 490, 61 L. ed. 866, 37 Sup. Ct. 412, and *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 33 Sup. Ct. 616, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150n.

<sup>30</sup> *Henry v. A. B. Dick Co.*, 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. 364,

Ann. Cas. 1913D, 880n, cited in original section is overruled in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 61 L. ed. 871, 37 Sup. Ct. 416. See also *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 33 Sup. Ct. 616, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150n. But compare *Bailey v. Baker Ice Mach. Co.*, 239 U. S. 268, 60 L. ed. 275, 36 Sup. Ct. 50.

<sup>31</sup> *Ford Motor Co. v. Union Motor Sales Co.*, 244 Fed. 156, citing *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 33 Sup. Ct. 616, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150n (*The Sanatogen Case*); *Straus v. American Pub. Assn.*, 231 U. S. 222, 58 L. ed. 192, 34 Sup. Ct. 84, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369n; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 61 L. ed. 866, 37 Sup. Ct. 412; *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 61 L. ed. 871, 37 Sup. Ct. 416. See also *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. 9. But see as to conditional sale retaining title: *Bailey v. Baker Ice Mach. Co.*, 239 U. S. 268, 272, 60 L. ed. 275, 36 Sup. Ct. 50; *Ford Motor Co. v. Boone*, 244 Fed. 335.

<sup>32</sup> *Hall Mfg. Co. v. Western Steel*

§ 844. **Modern doctrine.**<sup>33</sup>

§ 846. **Recognition taken of modern conditions.**<sup>34</sup>

§ 847. **Divisibility or severability of contract.**<sup>35</sup>

§ 848. **Divisibility as to territorial extent—When valid.**<sup>36</sup>  
—A covenant not to engage in the manufacture and sale of imitation diamonds and jewelry in Great Britain and Ireland, the Isle of Man, France, the United States, Russia, or Spain, is too broad territorially, but, when ancillary to the sale of such a business, has been enforced as to Great Britain, Ireland and the Isle of Man.<sup>37</sup>

§ 853. **Acts which amount to breach.**—An agreement by a vendor in the contract of sale not to engage in the liquor business in a city, directly or indirectly, for five years, precludes him from so engaging in such business by mail order as well as in any other way.<sup>38</sup> So, a covenant in a bill of sale not to start a bus line in the same place or drive a bus there is broad enough to prohibit the covenantor from aiding a competitor by his name and influence.<sup>39</sup>

&c. Works, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620, 625, and note.

<sup>33</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 31 Sup. Ct. 502, Ann. Cas. 1912D, 734n, 34 L. R. A. (N. S.) 834n; *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. 632; *Darius Cole Transp. Co. v. White Star Line*, 186 Fed. 63, 108 C. C. A. 165; *Hall Mfg. Co. v. Western Steel &c. Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620; *Kimbrow v. Wells*, 112 Ark. 126, 165 S. W. 645; *Baird v. Smith*, 128 Tenn. 410, 161 S. W. 492, L. R. A. 1917A, 376, and note. See also *Bradshaw v. Millikin* (N. Car.), 92 S. E. 161; *Sullivan v. Rime*, 35 S. Dak. 75, 150 N. W. 556; *McKinley Tel. Co. v. Cumberland Tel. Co.*, 152 Wis. 359, 140 N. W. 38. But compare *Fields v. Holland*, 158 Ky. 544, 165 S. W. 699, L. R. A. 1915C, 865n; *Wood v. Texas Ice &c. Co.* (Tex. Civ. App.), 171 S. W. 497. Other cases holding certain agreements and transactions

valid and certain others invalid under particular statutes are reviewed in note in L. R. A. 1917A, 379-392.

<sup>34</sup> See ante § 844.

<sup>35</sup> *Hall Mfg. Co. v. Western Steel &c. Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620, 626. See also *McCullough v. Smith*, 243 Fed. 823; *Denson v. Alabama Fuel &c. Co.* (Ala.), 73 So. 525.

<sup>36</sup> [Main section cited in *Bennett v. Carmichael Produce Co.* (Ind. App.), 115 N. E. 793, 796.]

<sup>37</sup> *Goldsoll v. Goldman*, L. R. (1914) 2 Ch. Div. 603, 59 Sol. J. 43.

<sup>38</sup> *Gutzeit v. Strader*, 158 Ky. 131, 164 S. W. 318. But see *Cape Brewing &c. Co. v. Kippenberg*, 188 Mo. App. 499, 174 S. W. 201.

<sup>39</sup> *Holliston v. Ernoston*, 124 Minn. 49, 144 N. W. 415. For other agreements given a similar comprehensive construction, see *Alcock v. Alcock*, 189 Ill. App. 153; *Bottomley v. Brown*, 188 Mich. 134, 154 N. W. 37; *Locke v. Murdoch*, 20 N. Mex. 522, 151 Pac. 298. See also note in Ann. Cas. 1915A, 381.

§§ 854, 855. **Rights and remedies—Injunction.**—Injunction is a proper remedy and often granted to prevent the breach of a valid covenant not to engage in the same business or practice, where there is no adequate remedy at law.<sup>40</sup>

§ 856. **Remedies—Action for damages for breach.**—An action for damages for breach of the covenant will lie in a proper case.<sup>41</sup>

§ 858. **Laches—Burden of proof—Assignability.**<sup>42</sup>

<sup>40</sup> *Bush v. F. Wolf & Co.*, 143 Ga. 18, 84 S. E. 63; *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513; *Berghuis v. Schultz*, 119 Minn. 87, 137 N. W. 201; *Marvel v. Jonah*, 83 N. J. Eq. 295, 90 Atl. 1004, L. R. A. 1915B, 206n, Ann. Cas. 1916C, 185n; *Nelson v. Brassington*, 64 Wash. 180, 116 Pac. 629, Ann. Cas. 1913A, 289n; *Parkers Dye Works v. Smith*, 18 D. L. R. (Can.) 631.

<sup>41</sup> *Kimbrow v. Wells*, 112 Ark. 126, 165 S. W. 645; *Barrone v. Moseley Bros.*, 144 Ky. 698, 139 S. W. 869; *Thomas v. Gavin*, 15 N. Mex. 660, 110 Pac. 841; *Bradshaw v. Millikan* (N. Car.), 92 S. E. 161.

<sup>42</sup> That a valid contract in restraint

of trade may be assigned in a proper case, see *Akers v. Rappe*, 30 Cal. App. 290, 158 Pac. 129; *Public Opinion Pub. Co. v. Ransom*, 34 S. Dak. 381, 148 N. W. 838, Ann. Cas. 1917A, 1010n. As to effect of default of covenantee, or other breach of contract of purchase by him, on right to enforce restrictive covenant or agreement, see: *McAuliffe v. Vaughan*, 135 Ga. 852, 70 S. E. 322, Ann. Cas. 1912A, 290, 33 L. R. A. (N. S.) 255; *Canfield Lumber Co. v. Kint Lumber Co.*, 148 Iowa 207, 127 N. W. 70; *Moorman v. Parkerson*, 131 La. 204, 59 So. 122, Ann. Cas. 1914A, 1150n; *Fries v. Parr*, 139 N. Y. S. 220.

## CHAPTER XXIII

### COMBINATIONS, MONOPOLIES AND TRUSTS

§ 866. **Legislative grant of a monopoly.**—A legislative monopoly, even where constitutional and valid, does not give universal and unlimited rights that can not be affected by positive prohibitions.<sup>1</sup>

§ 867. **Definitions of terms as here used.**<sup>2</sup>

§§ 870, 871, 873, 874. **Combinations between manufacturers and between dealers.**<sup>3</sup>

§ 876. **Combinations to decrease production or withhold from market.**—An agreement among the owners of large quantities of wheat to hold it together and sell only as they might agree to, is void under the Illinois statute and at common law.<sup>4</sup>

§ 877. **Corners and combinations to prevent competition in other respects.**<sup>5</sup>

§§ 882, 883. **Combinations of laborers and other workmen—Right to combine confers no special privilege.**<sup>6</sup>

<sup>1</sup> Legislative monopolies such as a patent, while very extensive, do not give a universal license against positive prohibitions such as those found in the Sherman Anti-Trust Law: *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. 9. See also *Ford Motor Co. v. Union Motor Sales Co.*, 244 Fed. 156, 159, and *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 61 L. ed. 871, 37 Sup. Ct. 416, which overrules *Henry v. A. B. Dick Co.*, 224 U. S. 1, 56 L. ed. 645, 32 Sup. Ct. 364, Ann. Cas. 1913D, 880n.

<sup>2</sup> *United States v. Great Lakes Towing Co.*, 208 Fed. 733; *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137; note in *L. R. A.* 1917A, 376, 379.

<sup>3</sup> For combinations and agreements held unlawful, see: *Eastern States Retail Lumber Dealers Assn. v. United States*, 234 U. S. 600, 58 L. ed. 1490, 34 Sup. Ct. 951, *L. R. A.* 1915A, 788n; *McConnell v. Camors-McConnell Co.*, 152 Fed. 321, 81 C. C. A. 429; *Darius Cole Transp. Co.*

*v. White Star Line*, 186 Fed. 63, 108 C. C. A. 165, 225 U. S. 704, 56 L. ed. 1265, 32 Sup. Ct. 837; *United States v. Great Lakes Towing Co.*, 208 Fed. 733; *United States v. Corn Products Refining Co.*, 234 Fed. 964; *United States v. Associated Bill Posters*, 235 Fed. 540; *State v. Minneapolis Milk Co.*, 124 Minn. 34, 144 N. W. 417, 51 L. R. A. (N. S.) 244n; *Standard Fashion Co. v. Grant*, 165 N. Car. 453, 81 S. E. 606 (agreement not to sell any similar merchandise nor for less than label price); *Stewart v. W. T. Rawleigh Med. Co. (Okla.)*, 159 Pac. 1187, *L. R. A.* 1917A, 1276n. See also *Livingston Waterworks v. Livingston (Mont.)*, 162 Pac. 381; *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. S. 6. Statutes for the suppression of monopolies should be so construed and applied as to accomplish that end: *Pond Creek Coal Co. v. Lester*, 171 Ky. 811, 188 S. W. 907.

<sup>4</sup> *Lane v. Leiter*, 237 Fed. 149, 150 C. C. A. 295.

<sup>5</sup> *Lape v. Leiter*, 237 Fed. 149, 150 C. C. A. 295.

<sup>6</sup> *Irving v. Neal*, 209 Fed. 471;

§ 884. **Contracts between union and employer.**—An employer may make non-membership in a union a condition of employment, and where there is such an agreement between the employer and his employes, even though the employment is at will, third persons who attempt to induce a breach of such agreement and subversion of the status and by persuasion and deceptive statements to induce such employes to join a union and to coerce the employer by threats of a strike may be enjoined.<sup>7</sup>

§ 890. **Monopolies under state statute.**—State antitrust laws do not apply where the contract relates to interstate commerce and is covered by the federal law.<sup>8</sup>

§ 892. **Exclusive grant by private person.**—Contracts of exclusive agency, or the like, are usually upheld when not inimical to the public interests,<sup>9</sup> but, under some of the statutes, they are prohibited and invalid.<sup>10</sup>

§ 893. **Exclusive grant by carriers.**—A contract by a railroad company giving to a telegraph company the exclusive right to maintain a telegraph line upon its right of way is void.<sup>11</sup>

§ 895. **Discrimination—Exclusive service contract.**<sup>12</sup>

*Lawlor v. Loewe*, 209 Fed. 721, 126 C. C. A. 445.

<sup>7</sup> *Hitchman Coal &c. Co. v. Mitchell* (U. S.), 38 Sup. Ct. 65. See as to statutes held unconstitutional in prohibiting such contracts: *Adair v. United States*, 208 U. S. 161, 174, 52 L. ed. 436, 28 Sup. Ct. 277, 13 Ann. Cas. 764; *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, 35 Sup. Ct. 240, L. R. A. 1915C, 960n.

<sup>8</sup> *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791; *McCall Co. v. J. D. Stiff Dry Goods Co.* (Tex. Civ. App.), 142 S. W. 659. But compare *Segal v. McCall Co.* (Tex.), 184 S. W. 188; *J. R. Watkins Medical Co. v. Johnson* (Tex. Civ. App.), 162 S. W. 394. And see as to statutes held unconstitutional as interfering with right to contract: *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, 35 Sup. Ct. 240, L. R. A. 1915C, 960n; *State v. Daniels*, 118 Minn. 155, 136 N. W. 584.

<sup>9</sup> *Zellner Mercantile Co. v. Parlin &c. Plow Co.*, 98 Kans. 609, 159 Pac. 391. See also *Hood Rubber Co. v.*

*United States Rubber Co.*, 229 Fed. 583; *Sholl Bros. v. Peoria R. Co.*, 276 Ill. 267, 114 N. E. 529; *Sullivan v. Rime*, 35 S. Dak. 75, 150 N. W. 556. Ante § 804.

<sup>10</sup> *W. T. Rawleigh Med. Co. v. Gunn* (Tex. Civ. App.), 186 S. W. 385; *Newby v. W. T. Rawleigh Co.* (Tex. Civ. App.), 194 S. W. 1173. See also *Arctic Ice Co. v. Franklin Electric &c. Co.*, 145 Ky. 32, 139 S. W. 1080. But compare *Lock v. Citizens' Nat. Bank* (Tex. Civ. App.), 165 S. W. 536.

<sup>11</sup> *Western Union Tel. Co. v. Postal Tel. Co.*, 217 Fed. 533, 133 C. C. A. 385. See also *Fields v. Holland*, 158 Ky. 544, 165 S. W. 699, L. R. A. 1915C, 865n. But compare *Cumberland Tel. &c. Co. v. State*, 100 Miss. 102, 54 So. 670, 39 L. R. A. (N. S.) 277 (contract between telephone companies upheld); *Home Tel. Co. v. Sarcovie Light &c. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124n.

<sup>12</sup> *Tallassee Oil &c. Co. v. Holloway* (Ala.), 76 So. 434.

§§ 896, 897. **What are illegal trusts—Form not controlling.**—The statutes against unlawful monopolies and trusts can not be evaded by any subterfuge of form, nor by alleged good motives and beneficial effect.<sup>13</sup> And a device by which a number of corporations are welded into one controlling nearly all the commerce of the country in a particular branch required for economical production of a necessity, such as shoe machinery, is an unlawful monopoly or trust and a contract in furtherance thereof, part of the unlawful scheme, and directly and immediately affecting interstate commerce, is prohibited by the federal statute and will not be enforced.<sup>14</sup>

§ 898. **Rights and disabilities of members of trust as between themselves.**<sup>15</sup>

§§ 900, 901. **Rights and disabilities of members of trusts as against third persons.**<sup>16</sup>

§§ 903, 904. **Rights of third persons—Under statutes.**<sup>17</sup>

§ 906. **Antitrust statutes—Constitutionality.**<sup>18</sup>

<sup>13</sup> Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. 9; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 Sup. Ct. 859, 52 L. R. A. (N. S.) 525, 532; Thomsen v. Cayser, 243 U. S. 66, 61 L. ed. 597, 37 Sup. Ct. 353, Ann. Cas. 1917D, 322n.

<sup>14</sup> United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D, 715. See also Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U. S. 600, 58 L. ed. 1490, 34 Sup. Ct. 951, L. R. A. 1915A, 788n.

<sup>15</sup> Bluefields S. S. Co. v. United Fruit Co., 243 Fed. 1; J. R. Watkins Med. Co. v. Johnson (Tex. Civ. App.), 162 S. W. 394; Segal v. McCall Co. (Tex.), 184 S. W. 188; Pictorial Review Co. v. Pate Bros. (Tex. Civ. App.), 185 S. W. 309. See also Patterson v. Imperial Window Glass Co., 91 Kans. 201, 137 Pac. 955; State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145.

<sup>16</sup> Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. 280; Motion Picture &c. Co. v. Universal

Film Mfg. Co., 235 Fed. 398, 148 C. C. A. 660, 243 U. S. 502, 61 L. ed. 871, 37 Sup. Ct. 416; McCall Co. v. Parson &c. Co., 107 Miss. 865, 66 So. 274; Stewart v. W. T. Rawleigh Med. Co. (Okla.), 159 Pac. 1187, L. R. A. 1917A, 1276; Pulp Wood Co. v. Green Bay Paper &c. Co., 157 Wis. 604, 147 N. W. 1058.

<sup>17</sup> Thomsen v. Cayser, 243 U. S. 66, 61 L. ed. 597, 37 Sup. Ct. 353, Ann. Cas. 1917D, 322n; United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 146 C. C. A. 532; Frey & Son v. Cudahy Packing Co., 232 Fed. 640; Frey & Son v. Welch Grape Juice Co., 240 Fed. 114; American Steel Co. v. American Steel &c. Co., 244 Fed. 300; Tallassee Oil &c. Co. v. Holloway (Ala.), 76 So. 434; Stewart v. W. T. Rawleigh Med. Co. (Okla.), 159 Pac. 1187, L. R. A. 1917A, 1276. See also United States v. United Shoe Machinery Co., 234 Fed. 127; Dowd v. United Mine Workers of America, 235 Fed. 1, 148 C. C. A. 495; Lane v. Leiter, 237 Fed. 149, 150 C. C. A. 295; State Public Utilities Commission v. Romberg, 275 Ill. 432, 114 N. E. 191.

<sup>18</sup> Thomsen v. Cayser, 243 U. S. 66,

§ 907. **State antitrust acts—Limitations on power—Constitutionality.**—The fact that a statute prohibiting combinations lessening competition applies or may be applied to one which has benefited rather than injured the public, does not render the statute unconstitutional.<sup>19</sup> The Nebraska statute restricting sale of anti-hog-cholera serum is unconstitutional as granting a monopoly to a serum manufacturing plant licensed under the federal act.<sup>20</sup>

§ 909. **Antitrust acts of congress.**<sup>21</sup>

§§ 910, 911. **Federal antitrust acts—Construction and effect—Reasonableness.**—The Federal antitrust act is construed in accordance with the “rule of reason,” and applies in general only to contracts and combinations in unreasonable restraint of trade and not to agreements in partial restraint of trade ancillary to lawful contracts and not made to suppress competition.<sup>22</sup> But the statute can not be evaded and good motives or the like will not prevent its application where it is otherwise applicable.<sup>23</sup>

§ 912. **Federal antitrust act—Application of.**—The Clayton bill, as to monopolies, applies even to contracts entered into before its enactment, and, where the contract involved and unlawfully restrained interstate commerce, said statute is applicable although the acts of restraint occurred in the same state in which

61 L. ed. 597, 37 Sup. Ct. 353, Ann. Cas. 1917D, 322n (United States statute constitutional as to foreign commerce).

<sup>19</sup> *International Harvester Co. v. Missouri*, 234 U. S. 199, 58 L. ed. 1276, 34 Sup. Ct. 859, 52 L. R. A. (N. S.) 525n. See also *United States v. International Harvester Co.*, 214 Fed. 987.

<sup>20</sup> *Hall v. State*, 100 Nebr. 84, 158 N. W. 362, L. R. A. 1916F, 136. State anti-trust acts can not apply to interstate commerce covered by the federal act. See note in L. R. A. 1917A, 381.

<sup>21</sup> In addition to the act referred to in original section, see also Clayton Act of October 15, 1914; Cotton Futures Act of August 11, 1916, and Ann. Cas. 1917D, 322n; *International Harvester Co. v. Missouri*, 234 U. Food Control Act of August 10, 1917.

<sup>22</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 31 Sup. Ct. 502, Ann. Cas. 1912D, 734n, 34 L. R. A. (N. S.) 834n; *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. 632. See also *Nash v. United States*, 229 U. S. 373, 376, 57 L. ed. 1232, 33 Sup. Ct. 780; *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 609, 58 L. ed. 1490, 34 Sup. Ct. 951, L. R. A. 1915A, 788n.

<sup>23</sup> *Thomsen v. Cayser*, 243 U. S. 66, 61 L. ed. 597, 37 Sup. Ct. 353, S. 199, 58 L. ed. 1276, 34 Sup. Ct. 859, 52 L. R. A. (N. S.) 525n. An association of bill posters whereby a monopoly was established is a violation of the federal act, though the monopoly produced better conditions in the business: *United States v. Associated Bill Posters*, 235 Fed. 540.

the contract was made.<sup>24</sup> A system of contracts between manufacturers, jobbers and retailers, by which the manufacturers attempt to control the prices for all sales by all dealers, eliminating all competition and fixing the amount which the consumer shall pay amounts to a restraint of trade and is illegal, and a contract of absolute sale, made by the manufacturer with a purchaser, in which the latter agrees to sell the goods purchased at regular retail prices fixed by the manufacturer, where the manufacturer sells its entire product to purchasers under such restrictive contracts, is unlawful under the antitrust act of July 2, 1890, and this may be set up as a defense to an action to recover for goods sold under such contract.<sup>25</sup>

§ 913. **Federal antitrust act—When inapplicable.**—A contract making a certain jobber a sole agent in certain territory on condition that he would not sell the product at more than list prices is not in violation of the antitrust act.<sup>26</sup>

§§ 915-919. **State antitrust acts.**—An agreement in a contract for the sale of a store that the seller will not enter into any line of competing business in the town for five years is not in violation of a statute making contracts illegal when made with a

<sup>24</sup> Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398, 148 C. C. A. 660 (contract by one having patent monopoly for manufacture of moving picture machines requiring purchasers to not use films manufactured by competitors held invalid). Section 3 of said act, as applied to leases made in the conduct of interstate business, is constitutional: United States v. United Shoe Machinery Co., 234 Fed. 127.

<sup>25</sup> United States v. Kellogg Toasted Corn Flake Co., 222 Fed. 725, Ann. Cas. 1916A, 78n; Stewart v. Rawleigh Medical Co. (Okla.), 159 Pac. 1187, L. R. A. 1917A, 1276; W. T. Rawleigh Medical Co. v. Gunn (Tex. Civ. App.), 186 S. W. 385. See also Continental Wall Paper Co. v. Voight & Sons, 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. 280; Straus v. American Publishers' Assn., 231 U. S. 222, 58 L. ed. 192, 34 Sup. Ct. 84, Ann. Cas. 1915A, 369n, L. R. A. 1915A, 1099. But compare Great At-

lantic & Co. Tea Co. v. Cream of Wheat Co., 224 Fed. 566, 227 Fed. 46, 141 C. C. A. 594; Wilder Mfg. Co. v. Corn Products & Co., 236 U. S. 165, 59 L. ed. 520, 35 Sup. Ct. 398, Ann. Cas. 1916A, 118n; W. T. Rawleigh Medical Co. v. Osborne (Iowa), 158 N. W. 566; Ripy v. Art Wall Paper Mills, 41 Okla. 20, 136 Pac. 1080, 51 L. R. A. (N. S.) 33. Profit-sharing contracts made with customers by a manufacturing combination as part of a scheme to prevent competition are illegal, as in restraint of trade and in violation of Sherman Anti-Trust Act: United States v. Corn Products Refining Co., 234 Fed. 964. For other cases in which the federal act has been held applicable, see ante §§ 896, 897.

<sup>26</sup> Locker v. American Tobacco Co., 218 Fed. 447, 134 C. C. A. 247. See also Moroney Hardw. Co. v. Goodwin Pottery Co. (Tex. Civ. App.), 120 S. W. 1088.



view to lessen, or tendency to lessen, full and free competition.<sup>27</sup> But contracts of absolute sale binding the purchasers not to sell at less than the price fixed by the seller have been held in violation of the Texas antitrust act in several cases.<sup>28</sup>

<sup>27</sup> *Baird v. Smith*, 128 Tenn. 410, 161 S. W. 492, L. R. A. 1917A, 376, and note where other cases under similar statutes are reviewed, especially the recent cases of *Kimbro v. Wells*, 112 Ark. 126, 165 S. W. 645; *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513, and *Sullivan v. Rime*, 35 S. Dak. 75, 150 N. W. 556. But compare where the agreement was not ancillary or incident to a sale of the business or the like: *Robinson v. Levermann* (Tex. Civ. App.), 175 S. W. 160; *Segal v. McCall Co.* (Tex.), 184 S. W. 188; *Weidman v. Shragge*, 46 Can. S. C. 1, Ann. Cas. 1912D, 919.

<sup>28</sup> *J. R. Watkins Medical Co. v. Johnson* (Tex. Civ. App.), 162 S. W. 394; *Segal v. McCall Co.* (Tex.), 184 S. W. 188; *Pictorial Review Co. v. Pate Bros.* (Tex. Civ. App.), 185 S. W. 309. But compare *Munter v. Eastman Kodak Co.*, 28 Cal. App. 660, 153 Pac. 737. For construction and effect of various statutes, see the following: *Indiana: Dye v. Carmichael Produce Co.* (Ind. App.), 116 N. E. 425; *Michigan: Weickgenant*

*v. Eccles*, 173 Mich. 695, 140 N. W. 513; *Grand Union Tea Co. v. Lewitsky*, 153 Mich. 244, 116 N. W. 1090; *Minnesota: State v. Duluth Bd. of Trade*, 107 Minn. 506, 121 N. W. 395; 23 L. R. A. (N. S.) 1260n; *Mississippi: Cumberland Tel. &c. Co. v. State*, 100 Miss. 102, 54 So. 670, 39 L. R. A. (N. S.) 277; *Sivley v. Cramer*, 105 Miss. 13, 61 So. 653; *Missouri: State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *Home Tel. Co. v. Sarcoxie Light &c. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124n; *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67, 138 S. W. 36; *State v. People's Ice &c. Co.*, 246 Mo. 168, 151 S. W. 101; *Nebraska: Engles v. Morgenstein*, 85 Nebr. 51, 122 N. W. 688; *North Carolina: Wooten v. Harris*, 153 N. Car. 43, 68 S. E. 898; *Texas: Cases reviewed in note in L. R. A. 1917A, 388-390, and later case of Bomar v. Smith* (Tex. Civ. App.), 195 S. W. 964. See also as to other states note in L. R. A. 1917A, 381-387.

## CHAPTER XXIV

### VIOLATION OF SUNDAY LAWS

§ 925. **Generally.**—At common law contracts made on Sunday were not illegal or invalid on that account, and the rule now prevailing in most jurisdictions to the effect that such contracts are void depends wholly on statute.<sup>1</sup>

§ 932. **Performance of contract for labor on Sunday.**—A contract for vaudeville services is not void under the Texas statute where it calls for no services on Sunday except such as may be lawfully given.<sup>2</sup>

§ 933. **Exceptions of necessity and charity.**—Most of the statutes except works of necessity or charity.<sup>3</sup>

§ 934. **Suits to enforce contracts made on Sunday.**—Courts will not enforce illegal executory contracts made on Sunday nor compel their rescission where executed.<sup>4</sup>

§ 937. **Sales made on Sunday.**<sup>5</sup>

§ 939. **Sunday contract fully executed.**<sup>6</sup>

<sup>1</sup> *Bertram v. Morgan*, 173 Ky. 655, 191 S. W. 317, L. R. A. 1917D, 445n. Where order is given a traveling salesman on Sunday for goods, but there is no acceptance until on a week day the contract is not made until the week day and is not illegal as a Sunday contract: *Wheeler v. Krohn*, 9 Ala. App. 409, 64 So. 179. Contract for advertising space on curtain of theater running on Sunday is not void in Minnesota: *Houck v. Ingles*, 126 Minn. 257, 148 N. W. 100. A bail bond executed on Sunday to secure the release of one arrested in Texas on a charge of violating the federal law, is valid under the Texas laws: *De Orozco v. United States*, 237 Fed. 1008.

<sup>2</sup> *Bergere v. Parker* (Tex. Civ. App.), 170 S. W. 808.

<sup>3</sup> As to what are works of necessity, see notes in L. R. A. 1917E, 93, and 1917C, 377.

<sup>4</sup> *Bertram v. Morgan*, 173 Ky. 655, 191 S. W. 317, L. R. A. 1917D, 445n; *Williams v. Philadelphia Rapid*

*Transit Co. (Pa.)*, 101 Atl. 748. See as to recovery on implied contract or quantum meruit: *Kesler v. Stultz*, 15 Ga. App. 735, 84 S. E. 201. In Iowa a Sunday contract is good unless challenged for invalidity because in violation of the law: *Gooch v. Gooch* (Iowa), 160 N. W. 333, L. R. A. 1917C, 582, and defense to a claim on a note against a decedent's estate that it was a Sunday contract is a special defense required to be pleaded: *Rule v. Carey* (Iowa), 159 N. W. 699.

<sup>5</sup> In Massachusetts a contract for the purchase of land executed by the purchaser on Sunday is not binding on him: *Hindenlang v. Mahon*, 225 Mass. 445, 114 N. E. 684. Not invalid in Florida because contract executed on Sunday: *Greenblatt v. McCall & Co.*, 67 Fla. 165, 64 So. 748.

<sup>6</sup> *Wilson v. Calhoun*, 170 Iowa 111, 151 N. W. 1087 (deed held to have been executed on secular day, but court said that as transaction was

§ 944. **Deeds, mortgages and sealed instruments made on Sunday.**<sup>7</sup>

§ 946. **Notes and bills.**—A note signed on Sunday but not delivered on that day is not a Sunday contract, as delivery is essential to the complete and valid contract.<sup>8</sup>

§ 947. **Bona fide holder of note made on Sunday.**—A transfer of a promissory note in consideration of love and affection vests title in the transferee and he may enforce the note against the maker notwithstanding the note was made on Sunday, where it bears a secular date and he had no knowledge that it was made on Sunday.<sup>9</sup>

§§ 948-951. **Ratification of contracts made on Sunday—Completion or delivery on secular day.**—A contract which is illegal because made on Sunday can not be ratified by either party.<sup>10</sup> In Iowa, however, a promissory note executed on Sunday is voidable, rather than absolutely void, and may be ratified on a secular day by a payment on the note, a new promise to perform, or something equivalent thereto.<sup>11</sup> Although a contract by telephone is not binding because made on Sunday, letters between the parties following such conversation may make a binding contract.<sup>12</sup>

executed neither party could rescind and recover the property or purchase money even if deed was signed and delivered on Sunday). The law will not lend its aid to enforce an executory contract made on Sunday, but if fully executed on that day the law leaves the parties where it found them; and where a release is executed and delivered and the consideration paid on Sunday it is binding upon the parties, if otherwise valid, and operates as a discharge from liability as it purports to do: *Williams v. Philadelphia Rapid Transit Co.* (Pa.), 101 Atl. 748.

<sup>7</sup> Deed executed on Sunday is not invalid in West Virginia: *Wooldridge v. Wooldridge*, 69 W. Va. 554, 72 S. E. 654, Ann. Cas. 1913B, 653n. See also *Prout v. Hoy Oil Co.*, 263 Ill. 54, 105 N. E. 26 (oil and gas lease not invalidated because executed on Sunday).

<sup>8</sup> *Young v. Dublin Fertilizer Works*, 16 Ga. App. 651, 85 S. E. 941.

A note made on Sunday is void and ineffectual to discharge debt for which it was given: *Becker v. Noegel*, 165 Wis. 73, 160 N. W. 1055.

<sup>9</sup> *Gooch v. Gooch* (Iowa), 160 N. W. 333, L. R. A. 1917C, 582, and note. See also *Moselery v. Selma Nat. Bank*, 3 Ala. App. 614, 57 So. 91.

<sup>10</sup> *Hindenlang v. Mahon*, 225 Mass. 445, 114 N. E. 684; *Berston v. Gilbert*, 180 Mich. 638, 147 N. W. 496 (void and can not be ratified even though contract is antedated, and acting under contract and making payments does not create new contract); *Gist v. Johnson-Carey Co.*, 158 Wis. 188, 147 N. W. 1079, Ann. Cas. 1916E, 460n. See also note in Ann. Cas. 1912A, 290.

<sup>11</sup> *Gooch v. Gooch* (Iowa), 160 N. W. 333, L. R. A. 1917C, 582. See also *Miles v. Janvrin*, 200 Mass. 514, 86 N. E. 785.

<sup>12</sup> *Webster Mfg. Co. v. Montreal River Lumber Co.*, 159 Wis. 456, 150

**§§ 952, 953. Executed and executory Sunday contracts.—**

The courts will not aid in enforcing a contract made on Sunday, but where it has been fully executed the law leaves the parties where it found them, giving no relief to either.<sup>13</sup>

N. W. 409. See also *Young v. Dublin Fertilizer Works*, 16 Ga. App. 651, 85 S. E. 941.

<sup>13</sup> *Williams v. Philadelphia Rapid Transit Co. (Pa.)*, 101 Atl. 748. A contract made on Sunday will not be enforced against either party, and after it has been performed a party who has paid money or delivered

property thereunder can not recover the same; but this rule does not apply against a subsequent innocent purchaser for value and without notice: *Mann v. United Motor &c. Co. (Mass.)*, 116 N. E. 239. Compare *Gist v. Johnson-Carey Co.*, 158 Wis. 188, 147 N. W. 1079, Ann. Cas. 1916E, 460n.

## CHAPTER XXV

### USURY

#### § 960. Violation of statute as to usury—Generally.<sup>1</sup>

§§ 961, 962. Usury a personal defense.—Usury is a personal defense and may be waived.<sup>2</sup>

§ 963. Usurious note secured by mortgage.—In Georgia, a deed to secure a usurious loan is void.<sup>3</sup>

#### § 964. Largely a matter of statutory regulation.<sup>4</sup>

<sup>1</sup> For definitions of usury, see *Compton v. Collins*, 190 Ala. 499, 67 So. 395; *Monk v. Goldstein*, 172 N. Car. 516, 90 S. E. 519; *Carter v. Hook*, 116 Va. 812, 83 S. E. 386. As a rule a transaction is not usurious, if the principal is put to a real hazard: *Provident Life & Co. v. Fletcher*, 237 Fed. 104; *Brown v. Jones*, 89 Misc. 538, 152 N. Y. S. 571. Taint of usury attaching to an entire store account attaches to all the consecutive obligations growing out of the original transaction: *Compton v. Collins* (Ala.), 73 So. 334. In Georgia, where a deed is given as security with right to redeem on payment of interest and the contract is usurious, the deed is also void for usury: *Wiggins v. Sheppard*, 145 Ga. 835, 90 S. E. 56.

<sup>2</sup> *Solomon v. Alpena Cedar Co.* (Mich.), 160 N. W. 536. But it has been held that the holder of a mechanic's lien, who has failed to establish the same, but has been allowed to recover as for goods sold and delivered, may avoid a prior mortgage on the ground of usury: *Weaver Hardw. Co. v. Solomovitz*, 98 Misc. 413, 163 N. Y. S. 121. Even if a contract to deliver stock is on its face executed, the fact that it is under seal does not prevent the defendant in suit on promissory note from showing, as a defense, that the true consideration of the agreement, which was part of the same transac-

tion, was usurious: *Bradley v. McCutcheon*, 97 Misc. 412, 161 N. Y. S. 394. Corporation may set up defense of usury in proper case: *Ringer v. Virginia Timber Co.*, 213 Fed. 1001. Compare, however *Dorothy v. Commonwealth Commercial Co.*, 278 Ill. 269, 116 N. E. 143. See also as to judgment creditors, *Spinks v. Jordon*, 108 Miss. 133, 66 So. 405, L. R. A. 1915C, 634. As to sureties and indorsers, see and compare *Morris v. Reed*, 14 Ga. App. 729, 82 S. E. 314; *Burket v. Ures Consolidated Mining Co.*, 184 Ill. App. 491.

<sup>3</sup> *McCurry v. Hartwell Bank*, 236 Fed. 556 (conveyance held mortgage and not deed and lien thereof not defeated under Georgia statute though given to secure usurious loan); *Wacasia v. Radford*, 142 Ga. 113, 82 S. E. 442; *First Nat. Bank v. Rambo*, 143 Ga. 665, 85 S. E. 840. Mortgage at highest legal rate of interest also requiring mortgagor to pay mortgage tax and recording fee is usurious: *In re Elmore Cotton Mills*, 217 Fed. 810.

<sup>4</sup> *Roth v. Temkin* (N. J.), 100 Atl. 843; note in *Ann. Cas.* 1913C, 1398. The negotiable instrument law does not repeal the West Virginia statute, declaring contracts for the loan of money at a greater interest rate than that allowed to be void as to such excess: *Eskridge v. Thomas* (W. Va.), 91 S. E. 7.

§ 965. **Bona fide holders—Usurious contract between original parties.**<sup>5</sup>

§ 966. **Usury as a matter of intent.**—Usury frequently depends largely upon the intent of the lender.<sup>6</sup>

§ 967. **Substance and not form controls.**<sup>7</sup>

§ 968. **Usually applies to contracts of borrowing and lending.**—The usury statutes generally contemplate a contract or transaction in which the relation of debtor and creditor is created or exists, and do not condemn an absolute bona fide sale of property.<sup>8</sup> But where money is loaned to enable the borrower to buy a shop, upon agreement that the lender shall receive half of the rents, and they amount to more than the legal rate of interest, the transaction is usurious.<sup>9</sup> And an assignment of a certain sum out of his share of an estate by the beneficiary of a will may be in substance and effect a loan and amount to an attempted evasion and violation of the usury law.<sup>10</sup>

§§ 969, 970. **Application to contracts of purchase and sale—Resale to vendor.**—The usury statutes do not, as a rule, apply to bona fide contracts of absolute purchase and sale, and where interest is part of the consideration for such a contract it will not be regarded as usury at least up to maturity.<sup>11</sup> But where one party agrees to purchase property and resell it to the other on credit at an advance exceeding lawful interest on the purchase-

<sup>5</sup> See *Blake v. Askew*, 112 Ark. 514, 166 S. W. 965; *Wacasic v. Radford*, 142 Ga. 113, 82 S. E. 442; *Morris v. Reed*, 14 Ga. App. 729, 82 S. E. 314; *Title Guaranty & Co. v. Wheatfield*, 123 Md. 458, 91 Atl. 757; *Schantz v. Sotscheck*, 86 Misc. 121, 149 N. Y. S. 145; *Heitsch v. Minneapolis Threshing Mach. Co.*, 29 N. Dak. 94, 150 N. W. 457, L. R. A. 1915D, 349n; *De Watteville v. Sims*, 44 Okla. 708, 146 Pac. 224.

<sup>6</sup> *Loganville Banking Co. v. Forrester*, 143 Ga. 302, 84 S. E. 961, L. R. A. 1915D, 1199n; *Weaver Hardw. Co. v. Solomovitz*, 98 Misc. 413, 163 N. Y. S. 121.

<sup>7</sup> *Ringer v. Virgin Timber Co.*, 213 Fed. 1001; *Williams v. Eagle Bank*, 172 Ky. 541, 189 S. W. 883; *Brown v. Jones*, 89 Misc. 538, 152 N. Y. S.

571; *Monk v. Goldstein*, 172 N. Car. 516, 90 S. E. 519; *Baker v. Lynchburg Nat. Bank (Va.)*, 91 S. E. 157; *Washington Fire Ins. Co. v. Maple Valley Lumber Co.*, 77 Wash. 686, 138 Pac. 553. See also *Mercantile Trust Co. v. Kaston*, 273 Ill. 332, 112 N. E. 988.

<sup>8</sup> *Monk v. Goldstein*, 172 N. Car. 516, 90 S. E. 519.

<sup>9</sup> *Reese v. Bloodworth (Ga.)*, 91 S. E. 120. Compare *Stewart v. Briggs (Tex. Civ. App.)*, 190 S. W. 221.

<sup>10</sup> *Stotesbury v. Huber*, 237 Fed. 413. See also *Hartley v. Eagle Ins. Co.*, 167 App. Div. 230, 152 N. Y. S. 686.

<sup>11</sup> *Williams v. Eagle Bank*, 172 Ky. 541, 189 S. W. 883. See also *Monk v. Goldstein*, 172 N. Car. 516, 90 S. E. 519.

price, this has been held a mere attempt to evade the law and to be in substance a loan of money and usurious.<sup>12</sup>

**§ 972. Grantee of real estate assuming mortgage.<sup>13</sup>**

**§ 973. Discounting commercial paper.**—Taking interest by way of discount in advance for short periods is not usury.<sup>14</sup> So, authorizing a sale of receiver's certificates to the best advantage, though below par, is not usury, at least where they are not sold for less than could be obtained in open market.<sup>15</sup>

**§ 974. Restricting commissions—Exempting building and loan associations.<sup>16</sup>**

**§ 975. Incidental expenses in making or collecting loan not usury.<sup>17</sup>**

**§§ 976, 977. Incidental expenses—Agent to negotiate loan—Liability of principal.**—A mortgagor or other borrower may pay commission to an agent for procuring a loan without rendering it usurious,<sup>18</sup> and it has been held in a number of instances, although not under all circumstances, that a commission may legally be paid even where the recipient was an agent of the borrower, without invalidating the loan for usury.<sup>19</sup> As a

<sup>12</sup> Ringer v. Virgin Timber Co., 213 Fed. 1001. For other transactions held usurious, see also Blaisdell v. Steinfeld, 15 Ariz. 155, 137 Pac. 555; Carter v. Hook, 116 Va. 812, 83 S. E. 386.

<sup>13</sup> Powell v. Petteway, 69 Fla. 12, 67 So. 230 (purchaser assuming mortgage is estopped to set up usury as defense and so is one claiming title under him). See also note in Ann. Cas. 1914A, 188. Where a stranger to

<sup>14</sup> Crowell v. Jones, 167 N. Car. 386, 83 S. E. 551. Agreement of a prospective payee with a bank that it will discount notes to be executed by a third person, the bank not knowing such third person, nor relying on his credit and a discount and indorsement by such payee thereafter, does not make him an accommodation indorser, so as to preclude a defense of usury in the notes: Weaver Hardw. Co. v. Solomovitz, 98 Misc. 413, 163 N. Y. S. 121.

<sup>15</sup> New River Lumber Co. v. Ten-

nessee R. Co., 136 Tenn. 661, 191 S. W. 334.

<sup>16</sup> Statutes exempting building and loan associations from the operation of the ordinary usury laws, or allowing them to charge a somewhat higher rate of interest, are generally upheld: Halsell v. Merchants' Union Ins. Co., 105 Miss. 268, 62 So. 235, 645, Ann. Cas. 1916E, 229n; Mulrooney v. Irish-Am. Sav. &c. Assn., 249 Mo. 629, 155 S. W. 804.

<sup>17</sup> Lassman v. Jacobson, 125 Minn. 218, 146 N. W. 350, 51 L. R. A. (N. S.) 465n, Ann. Cas. 1915C, 774n; Testara v. Richardson, 77 Wash. 377, 137 Pac. 998; Washington Fire Ins. Co. v. Maple Valley Lumber Co., 77 Wash. 686, 138 Pac. 553.

<sup>18</sup> Todd v. First Nat. Bank, 173 Ky. 60, 190 S. W. 468. Compare also Harvard v. Davis, 145 Ga. 580, 89 S. E. 740.

<sup>19</sup> James Bradford Co. v. United Leather Co. (Del. Ch.), 95 Atl. 308; Barras v. Youngs, 185 Mich. 496, 152

general rule, where one leaves money with an agent to be loaned, and the agent takes usury, but the principal has no knowledge thereof and receives none of its fruits, the principal is not chargeable with the effects of the agent's misconduct so as to make the loan usurious as to the principal.<sup>20</sup> It is otherwise, however, where the principal expressly or impliedly authorizes or ratifies the usury.<sup>21</sup>

§§ 978, 979. **Time of payment—Interest becoming principal.**—Charging the highest rate of interest and taking it out in advance at the time of making the loan is usurious.<sup>22</sup> But the mere fact that interest is made payable semiannually, monthly, or the like, does not make the contract usurious.<sup>23</sup> Interest so compounded as to become principal and make the interest paid or agreed more than the highest legal rate on the actual amount of the loan, where there is no default, may render the transaction usurious;<sup>24</sup> but provisions for a higher rate in case of default, or after maturity, have often been upheld.<sup>25</sup>

N. W. 219; *Spain v. Talcott*, 165 App. Div. 815, 152 N. Y. S. 611; *Fisher v. Adamson*, 47 Utah 3, 151 Pac. 351. But see *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998. Payment of a large sum to an attorney for obtaining loan of his ward's money is held to make mortgage therefor usurious to that extent and unenforceable: *McFadden v. Palmer*, 83 N. J. Eq. 621, 92 Atl. 396. The fact that a borrower believed he was paying a bonus above the legal rate of interest for negotiation of a loan, the loan was not thereby rendered usurious where the negotiator was not the agent of the lender: *Sumpter v. Hot Springs Savings &c. Co.*, 126 Ark. 155, 189 S. W. 854.

<sup>20</sup> *Brown v. Johnson*, 43 Utah 1, 134 Pac. 590, 46 L. R. A. (N. S.) 1157n, Ann. Cas. 1916C, 321, and note, where this is shown to be the majority rule although there are some decisions to the contrary, and some cases make a distinction where the agent is a general agent, and where the agent is required to look to the borrower for his compensation. Although the agent of the lender deducts fees which, in addition to rate of interest and other charges, make more than the legal rate of interest during

time of loan, but lender did not authorize nor have knowledge of it, the transaction is not usurious as to him: *Harvard v. Davis*, 145 Ga. 580, 89 S. E. 740.

<sup>21</sup> *Schwarz v. Sweitzer*, 202 N. Y. 8, 94 N. E. 1090; *American Mortgage Co. v. Woodward*, 83 S. Car. 521, 65 S. E. 739; and note in Ann. Cas. 1916C, 328, 329. See also *McFadden v. Palmer*, 83 N. J. Eq. 621, 92 Atl. 396.

<sup>22</sup> *McCurry v. Hartwell Bank*, 236 Fed. 556. Reserving interest in advance at highest rate of interest is also held usurious in *Loganville Banking Co. v. Forrester*, 143 Ga. 302, 84 S. E. 961, L. R. A. 1915D, 1195n; and in *Reese v. Bloodworth*, 146 Ga. 355, 91 S. E. 120.

<sup>23</sup> *Varn v. White*, 68 Fla. 329, 67 So. 142; *Crowell v. Jones*, 167 N. Car. 386, 83 S. E. 551.

<sup>24</sup> *Ogden v. Bradshaw*, 161 Wis. 49, 152 N. W. 654, 150 N. W. 399.

<sup>25</sup> *Cissna Loan Co. v. Gawley*, 87 Wash. 438, 151 Pac. 792, L. R. A. 1916B, 807n. See also *Chicago City Bank &c. Co. v. Bremer*, 189 Ill. App. 258. It has been held not a violation of usury laws to add to amount of a debt interest thereon at the legal rate for one year and take a note for



§ 980. **Renewal bill or note—Extensions.**—The mere renewal of a debt does not ordinarily purge it of usury, at least as between the parties.<sup>26</sup> But the tendency of the courts is toward liberality in permitting the original debtor to purge his obligations of usury,<sup>27</sup> and it is held that although the note or other obligation given in renewal is signed by obligors other than the one originally bound, all usury may be purged from the transaction so long as the original obligor remains bound.<sup>28</sup>

§ 981. **Corporations.**<sup>29</sup>

§ 983. **Rule as to application of payments of usurious interest.**<sup>30</sup>

§§ 984, 985. **Recovery of usurious interest—Federal statute.**—Where a note carrying usurious interest was renewed by a note also including usurious interest, and a bank, purchasing the note from an indorsee, included usurious interest on the unpaid balance, it was held that the original debtor might recover

the debt and interest due in one year, bearing the legal rate of interest after its maturity: *Blair v. Fraley*, 172 Ky. 570, 189 S. W. 886.

<sup>26</sup> *Richardson v. Foster* (Wash.), 170 Pac. 321. See also *Person v. Mattson*, 33 N. Dak. 49, 156 N. W. 780, Ann. Cas. 1918A, 747n. Where a party to an account knew that the debt was usurious, and where nothing was said of usury and it was not eradicated from the account, the mere renewal of the debt did not purge it of usury: *Compton v. Collins* (Ala.), 73 So. 334. Subsequent dealings between the parties will not cure the infirmity: *Weaver Hardw. Co. v. Solomovitz*, 98 Misc. 413, 163 N. Y. S. 121. But when a usurious obligation is settled and abandoned and new security taken for debt lawfully due such new security, resting on a consideration purged of usury, may be valid: *Rushing v. Citizens' Nat. Bank* (Tex. Civ. App.), 162 S. W. 460.

<sup>27</sup> *Williams v. Eagle Bank*, 172 Ky. 541, 189 S. W. 883. See also for renewal held valid and free from usury: *Smith v. Smith*, 165 Ky. 810, 178 S. W. 1058.

<sup>28</sup> *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320 (holding that where assignee knows that it embraces usury, and thereafter the obligor dis-

charges it by executing a new note to assignee for old note, obligor is not estopped from complaining of usury as against payee in new note, and that where an innocent party, purchases it for value, and obligor discharges it by a new note to holder, a new debt is created, and the consideration for new note is valid, although the usury from old debt was carried into it, and obligor has no action against payee for such interest). Renewal of a demand note bearing 7 per cent. interest at 8 per cent. is held not to be usurious where a written agreement was made therefor, in *Goodlett v. Goodlett*, 100 S. Car. 84, 84 S. E. 414.

<sup>29</sup> See as to when a corporation can not interpose defense of usury under Illinois statute, *Dorothy v. Commonwealth Commercial Co.*, 278 Ill. 629, 116 N. E. 143.

<sup>30</sup> A debtor may elect to have all his payments upon the indebtedness treated as payments, first, upon the legal interest and principal, and in such case, no usury can be sued for until the whole debt has been paid: *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320. See also *Granite City Nat. Bank v. Cross*, 188 Ill. App. 242; *Allen v. First Guaranty State Bank* (Tex. Civ. App.), 175 S. W. 485. In

the amount of such interest.<sup>31</sup> The giving of a new note in renewal of a prior note is not a payment within some of the statutes relating to the recovery of usury paid.<sup>32</sup> And it is held that one who voluntarily pays usury can not recover it.<sup>33</sup>

### § 986. Set-off under state laws.<sup>34</sup>

**§ 988. Remedies and relief from usury—What law governs.**—An injunction, cancelation or other equitable relief is often granted in usury cases, but the lawful interest must usually be paid or tendered.<sup>35</sup> The transferee of a note, with knowledge of usury, who collects the balance thereof is liable in New Hampshire to the maker for the excess.<sup>36</sup> A note or other contract usurious under the law of the state where it is executed and made payable will not be enforced in another state;<sup>37</sup> but although it is executed in a state where it would be invalid, yet if it is for land in another state and is payable and valid there, it may be enforced even in the former state,<sup>38</sup> unless it is made or

Kentucky a partner who by agreement relieves his partner of all liability upon partnership indebtedness can insist not only on a credit of one-half of usury but of all paid after he assumed debt: *Williams v. Eagle Bank*, 172 Ky. 541, 189 S. W. 883.

<sup>31</sup> *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320.

<sup>32</sup> *Bank of Tuttle v. Gordon* (Okla.), 161 Pac. 1081. See as to necessity and sufficiency required under Oklahoma statute for return of money paid as usury: *Ardmore State Bank v. Lee* (Okla.), 159 Pac. 903; *Texmo Cotton Exch. Bank v. Liston* (Okla.), 160 Pac. 82; *Bank of Tuttle v. Gordon* (Okla.), 161 Pac. 1081; *Robinson v. Farmers' & Merchants' Bank* (Okla.), 162 Pac. 208.

<sup>33</sup> *Solomon v. Alpena Cedar Co.* (Mich.), 160 N. W. 536. As to statute of limitations, see: *Ardmore State Bank v. Lee* (Okla.), 159 Pac. 903. See generally as to recovery of penalty under federal and state statutes: *In re Elmore Cotton Mills*, 217 Fed. 810; *Monk v. Goldstein* (N. Car.), 90 S. E. 519; *First Nat. Bank v. Sensebaugh* (Okla.), 160 Pac. 455; *Anderson v. Tatro*, 44 Okla. 219, 144 Pac. 360 (remedy under condition giving debtor right to recover

twice the amount of interest paid is exclusive); *Thom v. First Nat. Bank* (Tex. Civ. App.), 191 S. W. 148.

<sup>34</sup> *People's Bank v. Loven*, 172 N. Car. 666, 90 S. E. 948; *Weaver Hardw. Co. v. Solomovitz*, 98 Misc. 413, 163 N. Y. S. 121. And compare *Leach v. Dolese*, 186 Mich. 695, 153 N. W. 47, Ann. Cas. 1917A, 1182n; *Morse v. Brown*, 162 N. Y. S. 666.

<sup>35</sup> *Patterson v. Moore*, 146 Ga. 364, 91 S. E. 116; *Weaver v. Bank of Bowersville*, 146 Ga. 142, 90 S. E. 864; *Lehmann v. Shimeall*, 195 Ill. App. 511. See also *Vaughan v. Farmers' & C. Bank*, 146 Ga. 51, 90 S. E. 478; *Pearson v. Glen Lumber Co.* (Okla.), 160 Pac. 48. But compare *Gilleran v. Colby*, 164 App. Div. 608, 150 N. Y. S. 326; *Scott v. Potts* (Okla.), 159 Pac. 932. Where usurious interest is included in a note, there is no right to any interest: *Gulfport Fertilizer Co. v. Jones* (Ala. App.), 73 So. 145.

<sup>36</sup> *Moffie v. Slawsby*, 77 N. H. 555, 94 Atl. 193.

<sup>37</sup> *Granite City Nat. Bank v. Cross*, 188 Ill. App. 242. See also *J. I. Case Threshing Mach. Co. v. Tomlin*, 174 Mo. App. 512, 161 S. W. 286; *Crawford v. Seattle & C. R. Co.*, 86 Wash. 628, 150 Pac. 1155.

<sup>38</sup> *Green v. Northwestern Trust Co.*,

contemplated by the parties as a contract under the laws of the former state.<sup>39</sup> Parties may stipulate for the payment of interest according to the laws of the state where the contract is executed or according to the laws of the state where it is payable, and if valid under the laws stipulated it is generally recoverable, although illegal under the laws of the other state.<sup>40</sup>

128 Minn. 30, 150 N. W. 229. See *Co. v. Walker*, 125 Ark. 404, 188 S. Ringer v. Virgin Lumber Co., 213 W. 1184; *First Nat. Bank v. Rambo*, 143 Ga. 605, 85 S. E. 840, Fed. 1001.

<sup>39</sup> *Harvard v. Davis*, 145 Ga. 580, <sup>40</sup> *Baxter v. Beckwith*, 25 Colo. App. 89 S. E. 740. See also *Wilson-Ward* 322, 137 Pac. 901.

## CHAPTER XXVI

### GAMING AND WAGERING

#### § 995. Futures.<sup>1</sup>

§ 996. **Must intend and agree to deliver goods.**—A contract of sale for future delivery is unenforcible as a wager or gambling contract where there is no intention of delivering the goods, but a mere intent to settle on the basis of the difference between the contract price and the market price on the day fixed for delivery.<sup>2</sup>

§§ 998, 999, 1000. **Intention not to deliver must be mutual—When intention of one party may defeat.**<sup>3</sup>

§§ 1002, 1003. **Futures—Margin transactions—Tests to determine validity.**<sup>4</sup>—Margin transactions are not necessarily illegal, and the actual purchase and sale of stocks or the like on margins is not unlawful in itself.<sup>5</sup>

<sup>1</sup> [Main section cited in *Merriam & Co. v. Cole* (Tex. Civ. App.), 198 S. W. 1054, 1057.]

The mere fact that plaintiff paid only a part of the price of cotton and resold it before delivery does not show a gambling transaction: *Doremus & Co. v. Collier Mfg. Co.*, 18 Ga. App. 645, 90 S. E. 175. See also *Stafford County Grain Co. v. Rock Milling & Co.*, 94 Kans. 360, 146 Pac. 1139; *Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. 686, 221 Fed. 1022. See upon the subject of this section the Federal Cotton Futurities Act of 1916.

<sup>2</sup> *Carpenter v. Beal-McDonnell & Co.*, 222 Fed. 453; *Kilpatrick v. Richter*, 146 Ga. 277, 91 S. E. 51; *Cohn v. Brinson*, 112 Miss. 348, 73 So. 59. See also *Orthwein-Matchette Inv. Co. v. McFarlin*, 93 Kans. 526, 144 Pac. 842; *Stafford County Grain Co. v. Rock Milling & Co.*, 94 Kans. 360, 146 Pac. 1139.

<sup>3</sup> *Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. 686, 221 Fed. 1022 (same, also stating that at common law contract was void if

both parties did not intend delivery and void under Missouri statute if either party did not intend delivery); *James v. Clement*, 223 Fed. 385, 138 C. C. A. 621 (cotton future contract mutually understood to be gambling, illegal though in form prescribed by rules of Cotton Exchange); *Richter v. Kilpatrick*, 143 Ga. 470, 85 S. E. 319; *Anderson v. Cavanaugh*, 16 Ga. App. 446, 85 S. E. 606; *Dinkelspeel v. O'Day*, 47 Utah 18, 151 Pac. 344 (mortgagee may foreclose mortgage given for loan for gambling where it was not so used although originally intended to be). Where actual acceptance is intended, an offer to receive and pay for goods to be delivered in the future, even though the party to whom the offer is made is not bound to make such delivery, is not the giving of an option in violation of the Illinois statute: *Schmidt v. Marine Milk Condensing Co.*, 197 Ill. App. 279.

<sup>4</sup> [Main section cited in *Merriam & Co. v. Cole* (Tex. Civ. App.), 198 S. W. 1054, 1057.]

<sup>5</sup> *Titcomb v. Richter*, 89 Conn. 226,

§ 1005. Legislative enactment concerning.<sup>6</sup>

§ 1006. Futures—Options.<sup>7</sup>

§ 1011. Gaming as defined by statute—Generally—Miscellaneous cases.<sup>8</sup>

§ 1014. Rights of parties—Validity of bills, notes, etc., given in payment of gambling debt.—In Virginia a note given a bank for money used in stock gambling is not void as against the bank where the bank did not know of such fact, although an accommodation indorser did.<sup>9</sup>

§ 1015. As between original parties and those with notice.—A contract or conveyance based on a gambling transaction which is absolutely void by statute or common law may be attacked not only by a party to it but by any one privy to him in blood or estate, and in an action on a void note given in settlement of a gambling debt the illegality of the consideration may be shown in defense.<sup>10</sup>

§ 1019. Recovery of money lost at gaming, wagering or dealing in futures.—In the absence of a statute authorizing it, the courts will not, in general, aid either party to the illegal transaction, and no recovery can be had for profits or money lost.<sup>11</sup>

93 Atl. 526; *Chandler v. Prince*, 221 Mass. 495, 109 N. E. 374.

<sup>6</sup> *Cohn v. Brinson*, 112 Miss. 348, 73 So. 59.

<sup>7</sup> *Schmidt v. Marine Milk Condensing Co.*, 197 Ill. App. 279. Contract for sale of stock and bonds giving buyer right to return same after two years and receive the purchase-price is not an option contract illegal under Illinois statute: *Shultz v. Miller-Hamilton*, 189 Ill. App. 396.

<sup>8</sup> *Cloyne v. Levy*, 26 Cal. App. 637, 148 Pac. 224 (contract to pay interest in case judgment affirmed not void as gaining control). An agreement by a thrasher, after looking over a farmer's wheat, that he would give the farmer 4,350 bushels of wheat therefor the thrasher to retain any excess thrashed therefrom and to make good to the farmer any deficiency necessary to make up the

4,350 bushels, is unenforceable as a "wagering contract": *Comer v. Powell* (Tex. Civ. App.), 189 S. W. 88.

<sup>9</sup> *Citizens' Nat. Bank v. McDonald*, 116 Va. 834, 83 S. E. 389.

<sup>10</sup> *Carpenter v. Beal-McDonnell & Co.*, 222 Fed. 453.

<sup>11</sup> *Carey v. Myers*, 92 Kans. 493, 141 Pac. 602, L. R. A. 1916B, 1056; *Sunderland v. Hibbard*, 97 Nebr. 21, 149 N. W. 57; *Davis v. Fleshman*, 245 Pa. 224, 91 Atl. 489. See, however, as to recovery from stakeholder: *Martin v. Francis*, 173 Ky. 529, 191 S. W. 259; *Hilton v. Bailey*, 46 Okla. 759, 149 Pac. 863; *Davis v. Fleshman*, 245 Pa. 224, 91 Atl. 489. See also as to right to recover money paid under Mississippi statute: *S. M. Weld & Co. v. Austin*, 107 Miss. 279, 65 So. 247.

§ 1021. Rights and liabilities of third persons.<sup>12</sup>

§§ 1024, 1025. **Collateral agreements.**—A note given to a bank for money borrowed from it is not void where the bank did not know it was to be used, as it was, in stock gambling, although an accommodation indorser did know that fact.<sup>13</sup> But where a broker knowingly participates in the illegal transaction, he can not recover for his services or for losses or advances.<sup>14</sup>

§ 1028. Securities given for gambling debts.<sup>15</sup>

§ 1029. **New contract—Ratification—Executed margin transactions.**—Although an agent is employed in connection with a gambling transaction, yet if, after it is finished, a specific sum remains in the agent's hands requiring no accounting, it may be recovered by the principal.<sup>16</sup>

<sup>12</sup> Under the Mississippi statute, the wife of one to whom a bank had knowingly lent or advanced money to deal in cotton futures is entitled to cancel a mortgage of her homestead and other property securing unpaid note for the loan, and this is true although the dealings were with broker's in another state, but she could not recover money not repaid except by renewals forming consideration for the note secured by such homestead mortgage: *Cohn v. Brinson*, 112 Miss. 348, 73 So. 59.

<sup>13</sup> *Citizens' Nat. Bank v. McDonald*, 116 Va. 834, 83 S. E. 389. Mere knowledge of a lender, without participation in the illegal transaction, that the money is to be used for an illegal purpose, will not prevent its

recovery of the money: *Mechanics' Realty & Co. v. Leva*, 16 Ga. App. 7, 84 S. E. 222.

<sup>14</sup> *Orthwein-Matchette Inv. Co. v. McFarlin*, 93 Kan. 526, 144 Pac. 842; *Stiebel v. Lissberger*, 166 App. Div. 164, 151 N. Y. S. 822; *Gwathney v. Burgiss*, 98 S. Car. 152, 82 S. E. 394.

<sup>15</sup> *Carpenter v. Beal-McDonnell & Co.*, 222 Fed. 453. Under the California constitution, one may maintain replevin for stock deposited as collateral on margin transactions, where no delivery was intended, but only a settlement based on the difference between contract price and market prices: *Hartnett v. Wilson*, 31 Cal. App. 678, 161 Pac. 281.

<sup>16</sup> *Forster v. Hill*, 215 Fed. 73, 131 C. C. A. 381.

## CHAPTER XXVII

### LOBBYING CONTRACTS

§ 1042. **Illustrations of unenforcible contracts.**<sup>1</sup>—Where a lawyer engaged by a county to recover money paid a judge under an invalid statute lobbied a bill to secure the same through the legislature, the transaction was against public policy and he could not recover compensation nor reimbursement for sums expended by him in so doing.<sup>2</sup>

§§ 1046, 1047. **When contract for services before legislative body not unlawful—Examples of valid contracts.**—A contract for services before a legislative body in collecting information and preparing and explaining a bill is not invalid as against public policy.<sup>3</sup>

§ 1050. **Contracts distinguished from lobbying.\***

§ 1051. **Effect of making fee contingent on success.**<sup>5</sup>—Where the compensation for services before a legislative body is made contingent upon success in getting a bill passed procuring contracts thereunder the agreement for such compensation is against public policy and invalid.<sup>6</sup> But a contract for a lawful purpose, although it incidentally requires that one of the parties

<sup>1</sup> [Main section quoted in *Hyland v. Oregon Hassam Pav. Co.*, 74 Ore. 1, 144 Pac. 1160, L. R. A. 1915C, 823n, Ann. Cas. 1916E, 941, 947.]

<sup>2</sup> *Buchanan v. Farmer*, 122 Ark. 562, 184 S. W. 33.

<sup>3</sup> *Hogston v. Bell (Ind.)*, 112 N. E. 883; *Hyland v. Oregon Hassam Pav. Co.*, 74 Ore. 1, 144 Pac. 1160, L. R. A. 1915C, 823n. Expenses incurred by the mayor of a city in securing an appropriation by Congress to build levees may be made good to him without its involving an illegal agreement against public policy to influence legislation: *Meehan v. Parsons*, 271 Ill. 546, 111 N. E. 529.

<sup>4</sup> [Main section cited in *Moore v. Hyde (S. Dak.)*, 163 N. W. 707, 709.]

*Kansas City Paper House v. Foley R. Printing Co.*, 85 Kan. 678, 118 Pac. 1056, 39 L. R. A. (N. S.) 747n, Ann. Cas. 1913A, 294; *Pennebaker v. Williams*, 136 Ky. 120, 143, 120 S. W. 321, 123 S. W. 672; *Obenchain v. Ransome-Crummey Co.*, 69 Ore. 547, 138 Pac. 1078, 139 Pac. 920.

<sup>5</sup> [Main section quoted in *Hyland v. Oregon Hassam Pav. Co.*, 74 Ore. 1, 144 Pac. 1160, L. R. A. 1915C, 823n, Ann. Cas. 1916E, 941, 946, 947.]

<sup>6</sup> *Globe Works v. United States*, 45 Ct. Cl. 497; *Hyland v. Oregon Hassam Pav. Co.*, 74 Ore. 1, 144 Pac. 1160, L. R. A. 1915C, 823n, Ann. Cas. 1916E, 941n; *Flynn v. Mineral Wells Bank*, 53 Tex. Civ. App. 481, 118 S. W. 848.

should render legitimate services before a legislative body, is not rendered contrary to public policy, nor violative of the Indiana statute, by the fact that compensation is contingent upon the successful outcome of the agreement where the result is not primarily dependent upon legislative action.<sup>7</sup>

§ 1054. Recovery of compensation.<sup>8</sup>

<sup>7</sup> *Hogston v. Bell* (Ind.), 112 N. E. 883. See also *Kansas City Paper House v. Foley R. Printing Co.*, 85 Kans. 678, 118 Pac. 1056, 39 L. R. A. (N. S.) 747n, Ann. Cas. 1913A, 294n; *Pennbaker v. Williams*, 136 Ky. 120, 143, 120 S. W. 321, 123 S. W. 672.

<sup>8</sup> *Buchanan v. Farmer*, 122 Ark. 562, 184 S. W. 33, abstracted in § 1042 ante. But compare *Meehan v. Parsons*, 271 Ill. 546, 111 N. E. 529.



## CHAPTER XXVIII

### EFFECT OF ILLEGALITY OF CONTRACT

§ 1061. **Void contract incapable of supporting a remedy.**—A void contract is incapable of supporting a remedy, and illegal agreements will not be enforced.<sup>1</sup>

§ 1062. **Rule as affected by public policy.**—The rule that where parties are in *pari delicto* the court will not aid either of them is not applied where the paramount public interest requires the intervention of the court.<sup>2</sup>

§ 1063. **Exception to the rule.**<sup>3</sup>

§ 1064. **Effect of performance or execution of contract.**<sup>4</sup>

§ 1065. **Contract presumed valid.**<sup>5</sup>

<sup>1</sup>Reichardt v. Hill, 236 Fed. 817, 150 C. C. A. 79; R. A. Somers & Co. v. Jack Cranston Co. (Ga. App.), 92 S. E. 772; A. H. Nilson Mach. Co. v. Kurtz & Co., 186 Ill. App. 424; Dodson v. McCurnin (Iowa), 160 N. W. 927; Patterson v. Imperial Window Glass Co., 91 Kans. 201, 137 Pac. 955. Compare also Michigan Steel Box Co. v. United States, 49 Ct. Cl. 421; Hart v. City Theatres Co., 215 N. Y. 322, 109 N. E. 497. See as to effect of failure to have license required: School Dist. No. 46 v. Johnson, 26 Colo. App. 433, 143 Pac. 264 (recovery refund); Zimmerman v. Brown (Idaho), 166 Pac. 924 (contract without license invalid where for protection of public); Barriere v. Depatie, 219 Mass. 33, 106 N. E. 572 (recovery allowed).

<sup>2</sup>Rideout v. Mars, 99 Miss. 199, 54 So. 801, 35 L. R. A. (N. S.) 485n, Ann. Cas. 1913D, 770n; and see post § 1104.

<sup>3</sup>See as to Eugenics statutes, Ann. Cas. 1916B, 1040, 1051.

<sup>4</sup>Pelosi v. Bugbee, 217 Mass. 579, 105 N. E. 222; Eno v. Sage, 83 Misc. 389, 144 N. Y. S. 1062; Carranza v. Hicks (Tex. Civ. App.), 190 S. W. 540; Phillip Levy & Co. v. Davis, 115 Va. 814, 80 S. E. 791. As to unperformed features of a contract illegal

as contrary to express provision of law and opposed to public policy, the court will leave the parties where it finds them: Davis v. Southern Pac. Co., 235 Fed. 731. Where a contract is not only *ultra vires*, but illegal, the parties being in *pari delicto*, it can not be enforced on the theory that the other party, having received the benefits, was estopped to assert its invalidity: Minnesota, & C. R. Co. v. Way, 34 S. Dak. 435, 148 N. W. 858.

<sup>5</sup>Cooper v. Northern Pac. R. Co., 212 Fed. 533; Illinois Surety Co. v. O'Brien, 223 Fed. 933, 139 C. C. A. 413; In re Wray, 233 Fed. 418, 147 C. C. A. 354; Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622; Russell v. Turner, 14 Ga. App. 344, 80 S. E. 731; Hogston v. Bell (Ind.), 112 N. E. 883. Contract lawful on its face may be enforced although the other party intended to execute it in illegal manner or for illegal purpose, when such intention is unknown to party seeking to enforce it: Holtzman v. Israel, 194 Ill. App. 474; Hogston v. Bell (Ind.), 112 N. E. 883; Sauer v. School Dist., 243 Pa. 294, 90 Atl. 150. Court should deny relief on its own motion where illegality is apparent on face of contract or proof: Barry v. Mulhall, 162 App. Div. 749, 147 N. Y. S. 996;

§ 1066. **Parties left in position in which they place themselves.**—The general rule is that the courts will leave the parties to an illegal contract in the position in which they have placed themselves,<sup>6</sup> and this rule has been so applied as to prevent a party from recovering money or property paid or transferred under the illegal contract, or the reasonable value of property or services thereunder, and the like,<sup>7</sup> but in some cases recovery has been allowed.<sup>8</sup>

§ 1067. **Illustration of illegal contracts.**—It has been held that a trade of saloon properties, including an arrangement for the illegal use by the parties of liquor licenses belonging to others is unlawful and the parties could obtain no relief thereunder;<sup>9</sup> and that an agreement between banks for the transfer of notes by one to the other to make it appear, falsely, that the bank making the transfer had not violated the law by making excessive loans, is not enforceable.<sup>10</sup> So it has been held that one employing an agent to make collections in violation of the criminal law can not recover from the agent the money collected by him.<sup>11</sup>

§ 1068. **A party in pari delicto may object to legality of contract.**<sup>12</sup>

*Sprague v. Webb*, 168 App. Div. 292, 153 N. Y. S. 1020; *Bishop v. Japhet* (Tex. Civ. App.), 171 S. W. 499.

<sup>6</sup> *Bulson v. Moffatt*, 173 Cal. 685, 161 Pac. 259; *Goddard v. Hall*, 56 Colo. 579, 140 Pac. 165; *McAndrew v. Taylor*, 15 Ga. App. 555, 83 S. E. 967; *Libby v. Pelham* (Idaho), 166 Pac. 575; *A. H. Nilson Mach. Co. v. Kurtz Action Co.*, 186 Ill. App. 424; *Allfather v. Schlicher* (N. J. Ch.), 97 Atl. 491.

<sup>7</sup> *Ridgway v. Wetterhold*, 96 Kans. 736, 153 Pac. 490; *Fears v. United Loan & Deposit Bank*, 172 Ky. 255, 189 S. W. 226; *Logan v. Fidelity-Phenix Fire Ins. Co.*, 161 App. Div. 404, 146 N. Y. S. 678; *Norbeck v. State*, 32 S. Dak. 189, 142 N. W. 847, Ann. Cas. 1916A, 229n.

<sup>8</sup> *Crocker v. United States*, 240 U. S. 74, 60 L. ed. 533, 36 Sup. Ct. 245 (recovery on quantum valebat); *Hill County v. Shaw & Borden Co.*, 225 Fed. 475, 140 C. C. A. 523 (recovery on quantum meruit or of the property or in trover where contract is merely *malum prohibitum*); *Tall-*

*man v. Lewis*, 124 Ark. 296, 186 S. W. 296 (recovery on quantum meruit or quantum valebat).

<sup>9</sup> *Simmer v. Cutter's Estate* (Mich.) 160 N. W. 605.

<sup>10</sup> *Exchange Bank of Ong v. Clay Center State Bank*, 100 Nebr. 278, 159 N. W. 409.

<sup>11</sup> *Danciger v. Cooley*, 98 Kans. 38, 157 Pac. 453. Lease of space for a fruit stand outside a store, providing that if this be contrary to ordinance, then the lessee shall have space inside, is not illegal, though an ordinance is passed forbidding the erection of such stand on the sidewalk: *Wicks v. Comves* (Tex. Civ. App.), 171 S. W. 774.

<sup>12</sup> Where plaintiff acted as broker for a foreign insurance company without the license required by statute, the fact that the insurance company was also guilty of crime in not procuring for him a certificate of authority in accordance with the statute did not preclude the company from pleading the illegality of plaintiff's act when sued for compensa-

§ 1069. Effect of illegality of contract—In equity.<sup>13</sup>

§ 1070. Effect of subsequent illegal contracts on prior contracts.—A new contract founded on a prior illegal one, without independent consideration, can not be made legal and enforceable;<sup>14</sup> but where it is supported by an independent consideration, and plaintiff does not require the aid of the illegal transaction, it may be enforced notwithstanding it is indirectly connected therewith.<sup>15</sup>

§§ 1071, 1072, 1073. Necessity of making prima facie case without disclosing illegality of contract—Rule criticized and restated.<sup>16</sup>

§§ 1074, 1075. Partial illegality when contract is divisible—Rule illustrated and applied.—The illegality and invalidity of one provision of a contract will not make the entire contract illegal and void where such provision is separable so that the contract can be enforced without its aid.<sup>17</sup>

§ 1076. Indivisible illegal contracts.—An indivisible ille-

tion: *Pride v. Commercial Union Ins. Co., Limited*, of London, England, 9 Ala. App. 334, 63 So. 803, judgment affirmed *Ex parte Pride*, 185 Ala. 672, 64 So. 1019 (also stating that the reason the law will not permit recovery on an illegal contract is based on public policy and not in order to protect the defendant who sets up the illegality). See also *Lanham v. Meadows*, 72 W. Va. 610, 78 S. E. 750, 47 L. R. A. (N. S.) 592n. But compare *Douglass v. Standard Real Estate Loan Co.*, 189 Ala. 223, 66 So. 614.

<sup>13</sup> The rule against the maintenance of an action on an illegal contract is the same in law and in equity: *Lamb v. Tomlinson*, 261 Ill. 388, 103 N. E. 1058; *Wolkovisky v. Rapaport*, 216 Mass. 48, 102 N. E. 910, Ann. Cas. 1915A, 809n.

<sup>14</sup> *Haymond v. Hyer* (W. Va.), 92 S. E. 854. See also *Cahill v. Gilman*, 84 Misc. 372, 146 N. Y. S. 224.

<sup>15</sup> *Mechanics' Realty &c. Co. v. Leva*, 16 Ga. App. 7, 84 S. E. 222. One test for determining whether an action can be maintained for breach of a contract calling for a performance of criminal acts, is whether

plaintiff can establish his case otherwise than through the illegal transaction to which he himself was a party: *Wald v. Wheelon*, 27 N. Dak. 624, 147 N. W. 402. See also *Cahill v. Gilman*, 84 Misc. 372, 146 N. Y. S. 224. The seller of goods under a conditional sale contract or lease in violation of a statute prohibiting peddling without a license, can not recover by bringing trover instead of assumpsit, for his rights still rest upon the illegal contract: *Albertson & Co. v. Shenton* (N. H.), 98 Atl. 516.

<sup>16</sup> [Main section cited in *Denson v. Alabama Fuel &c. Co.* (Ala.), 73 So. 525, 529, and in *Moore v. Hyde* (S. Dak.), 163 N. W. 707, 708 (service of attorney in securing a pardon not that of a lawyer and such part of the contract being void as against public policy and being nonseparable, the whole contract was void).]

<sup>17</sup> *McCullough v. Smith*, 243 Fed. 823; *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527; *Denson v. Alabama Fuel & Iron Co.* (Ala.), 73 So. 525; *Gibbs v. Wallace*, 58 Colo. 364, 147 Pac. 686; *Wells v. Vandalia R. Co.*, 56 Ind.

gal contract is wholly void,<sup>18</sup> and this is true in general both where there is a single, entire, and illegal consideration for one or more promises and where there are several considerations, some illegal and some legal, for one promise.<sup>19</sup>

§ 1077. **Illegal consideration can not be apportioned.**<sup>20</sup>

§ 1078. **Contracts growing out of or connected with illegal contracts.**—A lawful contract will be enforced, where otherwise valid and binding, notwithstanding it is incidentally connected with an illegal contract, where it is supported by an independent consideration and does not require the aid of the

App. 211, 103 N. E. 360; *Miller v. Atchison &c. R. Co.*, 97 Kans. 782, 156 Pac. 780 (contract for interstate shipment containing some provisions invalid under Interstate Commerce Act held not invalid in toto); *Stratton v. Wilson*, 170 Ky. 61, 185 S. W. 522; *McCutcheon v. Terminal Station Commission*, 88 Misc. 148, 150 N. Y. S. 850; *Dinkelspeel v. O'Day*, 47 Utah 18, 151 Pac. 344; *Tomkins v. Seattle Constr. &c. Co. (Wash.)*, 165 Pac. 384. One not licensed as required by statute, as a plumber, after he has performed a contract based on an estimate covering both labor and materials, can recover for materials, since the consideration was not single, and illegality as to labor would not make the whole contract void: *Barriere v. Depatie*, 219 Mass. 33, 106 N. E. 572. Provision binding one party not to defend a divorce suit brought by the other has been held not to invalidate a severable portion providing for separation and property settlement: *Huber v. Culp*, 46 Okla. 570, 149 Pac. 216.

<sup>18</sup> *Cleveland &c. R. Co. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145; *Kuhn v. Buhl*, 251 Pa. 348, 96 Atl. 977, Ann. Cas. 1917D, 415n; *Prudential Life Ins. Co. v. Pearson (Tex. Civ. App.)*, 188 S. W. 513. See also *Geary v. New Orleans*, 139 La. 781, 72 So. 245. Provision of contract of railroad relief association depriving member, suing for injuries, of the right to any benefits, or waiving right to damages being prohibited by statute, invalidate the whole contract: *Baltimore &c. R. Co. v. Miller*, 183

Ind. 323, 107 N. E. 545; *Baltimore &c. R. Co. v. Hagan*, 183 Ind. 522, 109 N. E. 194. An interstate contract for the sale of goods, containing an agreement not to resell except at label prices, has been held wholly void by reason of the illegality of such provision as to resale: *Butterick Pub. Co. v. Mistrot-Munn Co.*, 167 App. Div. 632, 153 N. Y. S. 61. A provision of a contract to exempt another from liability for violation of law being contrary to public policy and void, if not severable, avoids the entire contract: *Cooper v. Northern Pac. R. Co.*, 212 Fed. 533.

<sup>19</sup> *Teachout v. Bogy (Cal.)*, 166 Pac. 319. See also *Western Indemnity Co. v. Crafts*, 240 Fed. 1; *Fears v. United Loan &c. Bank*, 172 Ky. 255, 189 S. W. 226. Agreement to pay a fixed price per inch for advertisements, in consideration of the printing of them for that price and the newspaper's remaining neutral during the campaign, is not divisible: *Miller v. Glockner*, 1 Ohio App. 149, 35 Ohio C. C. 371. So, contracts containing illegal provisions as to control of corporations have been held invalid as an entirety in several instances: *Teich v. Kaufman*, 174 Ill. App. 306; *Funkhouser v. Capps (Tex. Civ. App.)*, 174 S. W. 897.

<sup>20</sup> *Bryant Lumber Co. v. Fourche River Lumber Co.*, 124 Ark. 313, 187 S. W. 455; *Butterick Pub. Co. v. Mistrot-Munn Co.*, 217 N. Y. 678, 112 N. E. 1055; *Cahill v. Gilman*, 84 Misc. 372, 146 N. Y. S. 224; *Lloyd v. Robinson (Tex. Civ. App.)*, 160 S. W. 128.

illegal contract.<sup>21</sup> But it is otherwise where the contract is not supported by an independent consideration but is in furtherance of the illegal transaction or so directly connected therewith as to require its aid.<sup>22</sup> The test generally applied is whether the enforcement of the contract requires the aid of the illegal contract.<sup>23</sup>

**§ 1085. Recovery of that parted with under executed agreement.**<sup>24</sup>

**§ 1087. Abandonment of illegal contracts.**—It is held in a very recent case that while the courts will not enforce an illegal contract, a party may disaffirm a contract not involving moral turpitude and recover money paid on it.<sup>25</sup>

**§ 1089. Ratification of illegal contract.**—A contract which is illegal and void can not be ratified.<sup>26</sup>

**§ 1093. Effect of subsequent payment of license fee.**<sup>27</sup>

**§ 1094. Enforcing or obtaining relief from illegal contracts.**—As already shown, the general rule is that courts will not enforce illegal contracts either in law or in equity and that where parties are in *pari delicto* a court will leave them

<sup>21</sup> *Carlisle v. Smith*, 234 Fed. 759; *Walters Nat. Bank v. Bantock*, 41 Okla. 153, 137 Pac. 717, L. R. A. 1915C, 531. See also *Haymond v. Hyer* (W. Va.), 92 S. E. 854. Illegality of a contract between two attorneys and a client, because of the object sought to be accomplished by it, will not preclude one of the attorneys from maintaining an action against the other for recovery of half of the fee received from the client: *Columbus v. Sheehy*, 43 App. D. C. 462. See also *Martindale v. Shaha* (Okla.), 151 Pac. 1019.

<sup>22</sup> *In re Lutz Estate*, 181 Mo. App. 267, 170 S. W. 334; *Schofield v. Texas Bank & Co.* (Tex. Civ. App.), 175 S. W. 506; *Stirtan v. Blethen* (Wash.), 139 Pac. 618; *Sicklesteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024.

<sup>23</sup> *Tompkins v. Seattle Constr. & Co.* (Wash.), 165 Pac. 384.

<sup>24</sup> See and compare *Duane v. Merchants' Legal Stamp Co.* (Mass.), 116

N. E. 873, with *Warren v. Interstate Realty Co.*, 192 Ill. App. 438, and *Schofield v. Texas Bank & Co.* (Tex. Civ. App.), 175 S. W. 506.

<sup>25</sup> *Duane v. Merchants' Legal Stamp Co.* (Mass.), 116 N. E. 873. See also post §§ 1105, 1106.

<sup>26</sup> *Fears v. United Loan & Co. Bank*, 172 Ky. 255, 189 S. W. 226; *Strauss Linotyping Co. v. Schwalbe*, 159 App. Div. 347, 144 N. Y. S. 549; *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

<sup>27</sup> Where plumbers who were doing business in a city of Missouri, and had not paid the occupation tax imposed by an ordinance of an adjoining city of Kansas, contracted to do plumbing in the latter city, it was held that the contract could be enforced if the tax was paid before the work was done or where the incapacity was cured by the action of the Kansas city council: *Draper v. Miller*, 92 Kans. 695, 140 Pac. 890, 141 Pac. 1014.

where it found them. This rule is illustrated and enforced in many cases in addition to those cited in preceding sections.<sup>28</sup>

**§ 1095. Exceptions—Recovery provided for by statutes.<sup>29</sup>**

**§§ 1098, 1099. Recovery permitted when parties not in *pari delicto*—Rule illustrated.**—Where the parties are not in *pari delicto* the courts usually give relief in a proper case to the party that is comparatively innocent.<sup>30</sup> Such relief will be given to a party whose concurrence in the illegality was caused by fraud, duress, or undue influence of the other party.<sup>31</sup>

**§ 1100. Penalty on both parties—No undue advantage given.<sup>32</sup>**

**§ 1101. When parties not equally at fault.<sup>33</sup>**

<sup>28</sup> *Fields v. Holland*, 158 Ky. 544, 165 S. W. 699, L. R. A. 1915C, 865n; *Wolkovisky v. Rapaport*, 216 Mass. 48, 102 N. E. 910, Ann. Cas. 1915A, 809n; *Lion Bonding & Surety Co. v. Capital Fire Ins. Co.*, 96 Nebr. 51, 146 N. W. 1051; *Edwards v. Boyle*, 37 Okla. 639, 133 Pac. 233; *Northwestern Salt Co. v. Electrolytic & Co.*, L. R. (1913) 3 K. B. 422, Ann. Cas. 1915B, 228 (court bound to dismiss action for breach of illegal contract or refuse relief on its own motion where illegality is apparent even though not pleaded). Where an executor, in order to purchase land at his own sale, had the deed made to his son who was to reconvey to him, but because of a misdescription, the legal title was not conveyed and it was held that a court of equity would not aid either the son or executor, both being parties to an unlawful transaction: *Gilmore v. Thomas*, 252 Mo. 147, 158 S. W. 577. A creditor of an assignor for benefit of creditors, who made a colorable transfer of a note in order to secure the assignee's removal, under a statute, authorizing removal on petition of majority of creditors, has been held not entitled to recover a dividend paid to the transferee, as the agreement was illegal: *Lowe v. Crocker*, 154 Wis. 497, 143 N. W. 176. Parties contracting for logging measurements in violation of statute, providing a standard rule of measure-

ment, and who fully executed their contract, are in *pari delicto*, can not recover in accordance with statutory rule of measurement: *Bellew v. Williams*, 109 Miss. 74, 67 So. 849.

<sup>29</sup> In re *Progressive Wall Paper Corp.*, 229 Fed. 489, 143 C. C. A. 557.

<sup>30</sup> *Woodall v. Peden*, 274 Ill. 301, 113 N. E. 608; *Baltimore & C. R. Co. v. Hagan*, 183 Ind. 522, 109 N. E. 194; *Norbeck v. State*, 32 S. Dak. 189, 142 N. W. 847, L. R. A. 1916A, 229n. See also *Chambers v. Burroughs*, 44 App. D. C. 168, certiorari denied *Burroughs v. Chambers*, 239 U. S. 649, 60 L. ed. 485, 36 Sup. Ct. 284.

<sup>31</sup> *Fears v. United Loan & C. Bank*, 172 Ky. 255, 189 S. W. 226. Where one on false representations of another that a proposed contract had been held legal by the courts, entered into it, but received no benefit therefrom and abandoned it when he found it was illegal, he was not in *pari delicto* and could rescind and cancel a note given to the other: *Coons v. Lain* (Tex. Civ. App.), 168 S. W. 981. But compare where the party knew the contract was illegal: *Davis v. Janeway* (Okla.), 155 Pac. 241.

<sup>32</sup> *McDuffee v. Hayden-Cœur d'Alene Irr. Co.*, 25 Idaho 370, 138 Pac. 503.

<sup>33</sup> *Gilchrist v. Hatch*, 183 Ind. 371, 106 N. E. 694; *Fears v. United Loan & C. Bank*, 172 Ky. 255, 189 S. W. 226. Mere knowledge that money was to

§§ 1103, 1104. **Principle of *pari delicto* as affected by public policy—When one in *pari delicto* may be granted relief.**—Relief is sometimes given to a party in *pari delicto* on grounds of public policy where it would not ordinarily be given merely for his own benefit or protection.<sup>34</sup>

§§ 1105, 1106. **Locus poenitentiae—Rule illustrated.**—In a proper case a party may abandon and disaffirm a contract, not involving moral turpitude, and recover money paid on it.<sup>35</sup> Thus where one had deposited money in advance for four months' rent of property to be used as a bawdy house, but abandoned or "threw up" the contract after some repairs had been made, it was held that he could recover the deposit.<sup>36</sup> And one who deposits money with a stakeholder may recover the same from him under the doctrine of this section.<sup>37</sup>

be used by the borrower for an illegal purpose will not defeat the lender's right to recover: *Futch v. Sanger* (Tex. Civ. App.), 163 S. W. 597.

<sup>34</sup> *Gilchrist v. Hatch*, 183 Ind. 371, 106 N. E. 694; *Rideout v. Mars*, 99 Miss. 199, 54 So. 801, 35 L. R. A. (N. S.) 845n, Ann. Cas. 1913D, 770n. Thus a railroad company may have cancellation of a lease for illegality, although it was in *pari delicto*, on the ground that the lease was executory and its enforcement contrary to public policy: *Cleveland R. Co. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145. Where plaintiff, a party to a fraudulent conveyance in trust, makes out a *prima facie* case in a suit to enforce the trust, defendant's guilty participation in the fraud will not

preclude him from proving the illegal part: *Thomas v. Anderson*, 76 W. Va. 496, 85 S. E. 657.

<sup>35</sup> *Duane v. Merchants' Legal Stamp Co.* (Mass.), 116 N. E. 873.

<sup>36</sup> *Burgess v. Manchester Inv. Co.* (Mo. App.), 186 S. W. 1144. So it has been held that one who had made an insurance contract whereby he was to receive the benefits of a rebate offered in violation of statute, while the contract was executory, could recover the premiums paid thereunder: *Federal Life Ins. Co. v. Hoskins* (Tex. Civ. App.), 185 S. W. 607.

<sup>37</sup> *Martin v. Francis*, 173 Ky. 529, 191 S. W. 259; *Hilton v. Bailey* (Okla.), 149 Pac. 863; *Davis v. Fleshman*, 245 Pa. 224, 91 Atl. 489.

## CHAPTER XXIX

### CONFLICT OF LAWS

§§ 1110-1114. **General rule—Lex loci contractus.**—The general rule is well settled that a contract, where no contrary intention appears, is governed, as to its nature, obligation, validity and construction, by the law of the place where it is made.<sup>1</sup>

§§ 1115, 1116. **Where is the place of contract—Place of celebration—Place of acceptance.**—Where parties to a contract reside in different states the place of contract is the place where the final assent is given by the one party to the other's terms,<sup>2</sup> or, in other words, the place at which the last act was done by either party essential to a meeting of minds and completion of the contract.<sup>3</sup>

§§ 1118, 1119. **Place of performance—When it governs—Rule illustrated.**—Where a contract is either expressly or impliedly to be performed in another state, its validity and construction are generally governed by the law of the place of performance.<sup>4</sup>

<sup>1</sup> Western Union Tel. Co. v. Favish (Ala.), 71 So. 183; New York Life Ins. Co. v. Scheuer (Ala.), 73 So. 409; Horvitz v. Fredson, 178 Ill. App. 303; Millar v. Hilton, 189 Mich. 635, 155 N. W. 574; Fiocchi v. Smith (N. J.), 97 Atl. 283; McClement v. Supreme Court, I. O. F., 88 Misc. 475, 152 N. Y. S. 136; Carpenter v. Hanes, 167 N. Car. 551, 83 S. E. 577; Clark v. First Nat. Bank (Okla.), 157 Pac. 96. The rule that the validity and construction of a contract must be determined by the law of the state where made applies only when personal rights and obligations of the parties are involved, and not where it relates to real estate in another state or to a transaction entirely as to a matter and property in another state: Cable Co. v. McElhoe, 58 Ind. App. 637, 108 N. E. 790.

<sup>2</sup> Peak v. International Harvester Co., 194 Mo. App. 128, 186 S. W. 574.

<sup>3</sup> Clark v. Belt, 223 Fed. 573, 138 C. C. A. 1. See also Garretson v. Western L. Indemnity Co., 175 Iowa 172, 157 N. W. 160; Swann-Day Lumber Co. v. Cornett, 161 Ky. 98, 170 S. W. 516. See as to place of contract where it is made by letter or telegram: Farmers' Produce Co. v. Schreiner (Okla.), 150 Pac. 483, L. R. A. 1916A, 1297 and note. A party in Michigan wrote to another in Chicago, Ill., ordering the latter to buy stock for him, and the order was subsequently confirmed by the parties in a telephone conversation while the former was in Michigan and the latter was in Chicago, contract between the parties was an Illinois contract: Tyng & Co. v. Converse, 180 Mich. 195, 146 N. W. 629.

<sup>4</sup> Thatcher Implement & Co. v. Brubaker, 193 Mo. App. 627, 187 S. W. 117; Fish v. Delaware & C. R. Co., 211 N. Y. 374, 105 N. E. 661, Ann. Cas.



§§ 1122, 1123. **Agreements as to law which shall control.**—Parties may ordinarily agree in good faith as to the state or jurisdiction whose law is to control,<sup>5</sup> and it is a general rule that a contract is to be governed by the law with a view to which it was made, which is a question of intention to be deduced, where not expressly stated, from the place, terms, character, and purposes of the transaction.<sup>6</sup>

§§ 1124, 1125. **Formal validity—Statute of frauds.**—Where a contract is executed in the form required by the statute of frauds of the state where it is made and to be performed, it will generally be held valid as to that question and enforced in other states,<sup>7</sup> but some courts hold that the law of the forum governs where the statute affects merely the remedy.<sup>8</sup> It has also been held in an action in Kentucky on a parol contract there made for the lease of lands in Texas, that the Kentucky statute of frauds governs, and, the contract being within such statute can not be enforced,<sup>9</sup> and that the law of the place of making the contract governs as to its formal execution rather than the place of performance.<sup>10</sup>

§ 1126. **Essential validity—Legality.**<sup>11</sup>

§§ 1127, 1130. **Capacity of parties—Married women.**—As a general rule the law of the place where a contract is made governs as to the capacity of the parties to make such a con-

1915C, 763; *Security Trust &c. Bank v. Gleichmann* (Okla.), 150 Pac. 908, L. R. A. 1915F, 1203. See also *Elswick v. Ramey*, 157 Ky. 639, 163 S. W. 751; *Buck v. Meyer*, 195 Mo. App. 287, 190 S. W. 997; *General R. Signal Co. v. Commonwealth*, 118 Va. 301, 87 S. E. 598.

<sup>5</sup> *Midland Savings &c. Co. v. Henderson*, 47 Okla. 693, 150 Pac. 868; *Crawford v. Seattle &c. R. Co.*, 86 Wash. 628, 150 Pac. 1155.

<sup>6</sup> *Fisk Rubber Co. v. Muller*, 42 App. D. C. 49.

<sup>7</sup> *Halloran v. Jacob Schmidt Brewing Co.* (Minn.), 162 N. W. 1082, L. R. A. 1917E, 777.

<sup>8</sup> See cases on both sides reviewed in case cited in last preceding note; also note in 51 L. R. A. (N. S.) 908.

<sup>9</sup> *Boone v. Coe*, 153 Ky. 233, 154 S.

W. 900, 51 L. R. A. (N. S.) 907n. Compare *Howell v. North*, 93 Nebr. 505, 140 N. W. 779; *Callaway v. Prettyman*, 218 Pa. 293, 67 Atl. 418; *Exchange Bank v. McMillan*, 76 S. Car. 561, 57 S. E. 630.

<sup>10</sup> *D. Canale & Co. v. Pauly &c. Cheese Co.*, 155 Wis. 541, 145 N. W. 372. See also notes in 64 L. R. A. 122, and 51 L. R. A. (N. S.) 910.

<sup>11</sup> *The Miguel di Larrinaga*, 217 Fed. 678; *Carpenter v. Hanes*, 167 N. Car. 551, 83 S. E. 577; *Marx v. Hefner*, 46 Okla. 453, 149 Pac. 207; *Northwestern Mut. Life Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108, 52 L. R. A. (N. S.) 275n; *Canale &c. Co. v. Pauley &c. Cheese Co.*, 155 Wis. 541, 145 N. W. 372. See also ante §§ 1110-1114.

tract;<sup>12</sup> but the law of the *lex rei sitae* or law of the place where the land is situated governs as to the capacity of a party to convey or mortgage it as well as in other respects.<sup>13</sup>

§ 1132. **Capacity to contract—Law of domicil.**—The law of the domicil is not controlling as to the capacity to contract as against the law of the place of making the contract, but yields to the latter.<sup>14</sup>

§§ 1137, 1138. **Discharge of contracts—Statute of limitations.**—The statute of limitations ordinarily relates only to the remedy, and the general rule is well settled that the statute of the law of the forum governs in that regard.<sup>15</sup>

§§ 1142, 1143. **Contracts relating to realty.**—The general rule is well settled that contracts relating to real estate and affecting the title or some interest therein are governed by the law of the place where the property is situated;<sup>16</sup> but this rule has only a limited application to executory contracts and does not ordinarily of itself determine the question where the contract is executory and affects merely the personal rights or obligations of the parties.<sup>17</sup>

§§ 1144, 1145. **Lex situs controls as to covenants which run with land—Distinction between such covenants and personal covenants.**—The *lex rei sitae* or law of the place where

<sup>12</sup> Cockburn v. Kinsley, 25 Colo. App. 89, 135 Pac. 1112; Burr v. Beckler, 264 Ill. 230, 106 N. E. 206, L. R. A. 1916A, 1049, and note, Ann. Cas. 1915D, 1132n; Union Trust Co. v. Knabe, 122 Md. 584, 89 Atl. 1106; Union Trust Co. v. Schlens, 122 Md. 584, 89 Atl. 1116.

<sup>13</sup> Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; Bender v. Bailey, 130 La. 341, 57 So. 998; Morris v. Linton, 74 Nebr. 411, 104 N. W. 927. See also notes in L. R. A. 1916A, 1011, 1039; and 26 L. R. A. (N. S.) 764; and post § 1142. Most, but not all, of the cases cited in this section relate to the capacity of married women to contract.

<sup>14</sup> Burr v. Beckler, 264 Ill. 230, 106 N. E. 206, L. R. A. 1916A, 1049 and note, Ann. Cas. 1915D, 1132n.

<sup>15</sup> Cooper v. Jewett, 233 Fed. 618,

147 C. C. A. 426; Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139; Philp v. Hicks (Miss.), 72 So. 931; Arthur & Co. v. Burke, 83 Wash. 690, 145 Pac. 974.

<sup>16</sup> Freeman v. Falconer, 201 Fed. 785, 120 C. C. A. 32; Thomas J. Baird Invest. Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217; also note in Ann. Cas. 1913C, 230; Brown v. Wm. Pearson Co., 169 Iowa 50, 150 N. W. 1057; Hughes v. Winkelman, 243 Mo. 81, 147 S. W. 994, L. R. A. 1916A, 1007 and note.

<sup>17</sup> Selover v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. 69; Clark v. Belt, 223 Fed. 573; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. 452; Walsh v. Selover, 109 Minn. 136, 123 N. W. 291. But compare Thomas J. Baird Invest. Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217.

the land is situated governs as to covenants that run with the land.<sup>18</sup> But many courts make a distinction between such covenants and personal covenants and hold that the latter are not governed by the *lex rei sitae* where the contract is made elsewhere.<sup>19</sup>

§ 1149. **Sale or attachment of goods—When *lex sitae* controls.**<sup>20</sup>

§§ 1157, 1158, 1159. **Validity of chattel mortgages and bills of sale—Removal of goods to another jurisdiction—Mortgagee consenting to removal—Comity.**—It is held by the great weight of authority that a chattel mortgage, executed and recorded in the state where the property is situated and valid there, will be enforced by the courts of another state into which the property is afterward removed.<sup>21</sup> But many of the courts hold that the lien of the mortgage is waived or lost as against bona fide purchasers or creditors where the property is so removed with the mortgagee's consent.<sup>22</sup>

§§ 1171-1176. **Bills and notes—Place of execution—Presumption—Place of payment—Negotiability.**—A note takes effect from the time of its delivery rather than the time it is dated or signed and is generally governed by the law of the place of delivery completing the contract.<sup>23</sup> But, in the absence of anything

<sup>18</sup> *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Newsom v. Langford* (Tex. Civ. App.), 174 S. W. 1036; *Lyndon Lumber Co. v. Sawyer*, 135 Wis. 525, 116 N. W. 255, 16 L. R. A. (N. S.) 177n. See also *Ellis v. Abbott*, 69 Ore. 234, 138 Pac. 488.

<sup>19</sup> *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484; *Mather v. Stokely*, 218 Fed. 764, 134 C. C. A. 442 (law of forum held to govern as to rate of interest or liquidated damages); *McCoy v. Griswold*, 114 Ill. App. 556; *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441, 26 L. R. A. (N. S.) 934.

<sup>20</sup> As to attachment of corporate stock, see: *Barber v. Morgan*, 84 Conn. 618, 80 Atl. 791, Ann. Cas. 1912D, 951 and note.

<sup>21</sup> *Smith v. Consolidated Wagon &c. Co. (Idaho)*, 163 Pac. 609; *Cable Co. v. McElhoe*, 58 Ind. App. 637, 108

N. E. 790; *Farmers' &c. Bank v. Sutherland*, 93 Nebr. 707, 141 N. W. 827, Ann. Cas. 1914B, 1250n, and note 46 L. R. A. (N. S.) 95. *Newsom v. Hoffman*, 124 Tenn. 369, 137 S. W. 490 (if removed without mortgagee's consent). See also as to conditional sales and leases: *Adams v. Fellers*, 88 S. Car. 212, 70 S. E. 722, 35 L. R. A. (N. S.) 385 and note. A few recent decisions take the opposite view from that stated in the text: *Allison v. Teeters*, 176 Mich. 216, 142 N. W. 340; *Farmer v. Evans* (Tex. Civ. App.), 192 S. W. 342.

<sup>22</sup> *Moore v. Keystone Driller Co. (Idaho)*, 163 Pac. 1114, L. R. A. 1917D, 940 and note; *Pennington County Bank v. Bauman*, 87 Nebr. 25, 126 N. W. 654; *Newsom v. Hoffman*, 124 Tenn. 369, 137 S. W. 490.

<sup>23</sup> *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710; *Burr v. Beckler*, 264 Ill. 230, 106 N. E. 206,

to the contrary, it will be presumed to have been made and delivered at the place stated in the date.<sup>24</sup> The law of the place where a note is made and payable governs, but where a different place of payment is stated in the note the law of such place usually controls, at least as to most matters, including the matter of negotiability.<sup>25</sup>

§ 1178. Law governing liability of parties to bills and notes.<sup>26</sup>

§§ 1179, 1180. Necessity of demand and protest, and notice of dishonor.—Although there is some conflict among the authorities, the prevailing rule seems to be that while the law of the place where an indorsement is signed and delivered so that it becomes a contract governs the validity and extent of the contract and hence as to the necessity of some presentment, protest and notice of dishonor, yet, where the indorsement is made in one jurisdiction and the note is made payable in another, the law of the latter jurisdiction governs as to the manner of giving and sufficiency of the presentation, protest and notice of dishonor.<sup>27</sup>

§§ 1182, 1183, 1184. Interest—Stipulation as to rate—Good faith.<sup>28</sup>

L. R. A. 1916A, 1049, 1054, Ann. Cas. 1915D, 1132n, 1135; American School of Osteopathy v. Turner, 143 Mo. App. 416, 128 S. W. 229. See also Dodd v. Axle-Nut Sign Co., 126 Ark. 14, 189 S. W. 663.

<sup>24</sup> Parks v. Evans, 5 Houst. (Del.) 576; Bombolaski v. Newton First Nat. Bank, 55 Ind. App. 172, 101 N. E. 837, 103 N. E. 422; Finch v. Calkins, 183 Mich. 298, 149 N. W. 1037.

<sup>25</sup> Kobey v. Hoffman, 229 Fed. 486, 143 C. C. A. 554; Tatum v. Commercial Bank & Co., 193 Ala. 120, 69 So. 508; Sykes v. Citizens' Nat. Bank, 78 Kans. 688, 98 Pac. 206, 19 L. R. A. (N. S.) 665 and note; First Nat. Bank v. John McGrath & Sons Co., 111 Miss. 872, 72 So. 701; American Nat. Bank v. Allen, 195 Mo. App. 98, 190 S. W. 947; First Nat. Bank v. Fleitmann, 168 App. Div. 75, 153 N. Y. S. 869; Security Trust & Co. Bank v. Gleichmann (Okla.), 150 Pac. 908, L. R. A. 1915F, 1203. But see where mortgage secur-

ing note stipulated that it should be governed by laws of state where executed and not where payable: Bell v. Riggs, 34 Okla. 834, 127 Pac. 427, 41 L. R. A. (N. S.) 1111.

<sup>26</sup> Guernsey v. Imperial Bank, 188 Fed. 300, 110 C. C. A. 278, 40 L. R. A. (N. S.) 377, and note; Browns Valley State Bank v. Porter, 232 Fed. 434, 146 C. C. A. 428; notes in 19 L. R. A. (N. S.) 665 and in Ann. Cas. 1915D, 1135.

<sup>27</sup> Guernsey v. Imperial Bank, 188 Fed. 300, 110 C. C. A. 278, 40 L. R. A. (N. S.) 377.

<sup>28</sup> See as to right of parties to select and stipulate as to jurisdiction by whose laws the validity and construction contract shall be determined, and the necessity of good faith rather than attempted evasion of usury laws, and as to conflict of laws generally as to rate of interest and usury: Midland Sav. & Co. v. Henderson, 47 Okla. 693, 150 Pac. 868, L. R. A. 1916D, 745, and extended note.

§ 1185. **Insurance contracts—Generally.**—The rule that the validity of a contract is usually determined by the law of the place where the contract is made applies to insurance contracts as well as others, and this is the place where the final act necessary to make the contract binding is done.<sup>29</sup> And it has been held that the right of the insured to assign a policy of which his wife is the beneficiary is to be determined by the law of the state by which the contract of insurance is governed rather than by that of the state in which the assignment is made where the right to assign it is denied in the latter state on the ground that the husband has no property in the policy, and not on grounds of public policy, and the insured is not domiciled in such state.<sup>30</sup>

§§ 1186, 1187. **Authority of agent—Policy mailed to agent of insurer.**—Where an insurance company incorporated in one state does business by mail in other states, although the application is sent to the home office and the certificate or policy is there made out and sent to the applicant in another state and dues and assessments are paid through the mail, but the policy is payable in the state of the applicant's residence, it is held that the policy is governed by the laws of the latter state.<sup>31</sup> But where the policy or certificate expressly provides that the application is made and the policy or certificate issued by the insurance company at the home office in another state, it is governed by the law of that state, with a view to which it was made.<sup>32</sup> And where a fire insurance policy provides that to be valid it must be countersigned by an agent in another state from that in which the

<sup>29</sup> *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234, 56 L. ed. 419, 32 Sup. Ct. 220, 38 L. R. A. (N. S.) 57; *Head v. New York Life Ins. Co.*, 241 Mo. 403, 147 S. W. 827; *Lukens v. International Life Ins. Co.*, 269 Mo. 574, 191 S. W. 418 (place of delivery); *Pringle v. Modern Woodmen of America*, 87 Nebr. 548, 127 N. W. 876; *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194. See also *Swing v. Marion Pulp Co.*, 47 Ind. App. 199, 93 N. E. 1004 (where offer by mail and acceptance by mail contract completed when and where letter of acceptance is mailed); *Clarey v. Union Cent. Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. (N. S.) 881;

*Stone v. Old Colony St. R. Co.*, 212 Mass. 459, 99 N. E. 218.

<sup>30</sup> *Northwestern Mut. L. Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108, 52 L. R. A. (N. S.) 275, and note. See also *Western Indemnity Co. v. Rupp*, 147 Ky. 489, 144 S. W. 743. But compare *Wilde v. Wilde*, 209 Mass. 205, 95 N. E. 295.

<sup>31</sup> *Iowa &c. Traveling Men's Assn. v. Ruge*, 242 Fed. 762; *Haas v. Mut. Life Ins. Co.*, 90 Nebr. 808, 134 N. W. 937, Ann. Cas. 1913B, 919, and note (contract completed in state where insured resided and governed by law of that state and not by law of state of home office of insurance company).

<sup>32</sup> *Keatley v. Grand Fraternity*, 2

property is situated, and it is countersigned by such agent in such other state and then mailed to the insured in the state where the property is situated, the policy is governed by the law of the state where it was countersigned by the agent.<sup>33</sup>

§ 1188. **Delivery and payment of first premium.**—Where the policy provides that it shall not be valid or effective until payment of the first premium, or such payment and delivery, the place where this occurs is the place where the contract is made and the law of such place governs.<sup>34</sup>

§ 1189. **Parties designating state whose laws are to govern.**—In such cases, as well as in others, the parties may usually stipulate as to the place according to the law of which the contract shall be governed.<sup>35</sup> But such a stipulation may be defeated in whole or in part in a particular case where the application of the foreign law so designated would be contrary to the public policy of the forum or to some statute of the place where the contract is made or to some limitation in the charter of the insurer company.<sup>36</sup>

§ 1190. **Validity—Policy usually governed by law of the place.**—The general rule that a contract is to be construed according to the law of the place where it is made or to be performed applies and is illustrated in many insurance cases.<sup>37</sup>

Boyce (Del.) 511, 82 Atl. 294. See also *Stone v. Old Colony St. R. Co.*, 212 Mass. 459, 99 N. E. 218 (contract held completed at home office and law of that state governed); *Stone v. Penn Yan & C. R. Co.*, 197 N. Y. 279, 90 N. E. 843, 134 Am. St. 879 (same). But compare *Head v. New York Life Ins. Co.*, 241 Mo. 403, 147 S. W. 827; *Washington Life Ins. Co. v. Lovejoy (Tex.)*, 149 S. W. 398 (holding that this only applies to its construction).

<sup>33</sup> *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

<sup>34</sup> *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234, 56 L. ed. 419, 32 Sup. Ct. 220, 38 L. R. A. (N. S.) 57; *Jefferson v. New York Life Ins. Co.*, 151 Ky. 609, 152 N. W. 780; *Davis v. New York Life Ins. Co.*, 212 Mass. 310, 98 N. E. 1043, 41 L. R. A. (N. S.) 250, and note; *Coscarella*

*v. Metropolitan Life Ins. Co.*, 175 Mo. App. 130, 157 S. W. 873; *Haas v. Mutual Life Ins. Co.*, 90 Nebr. 808, 134 N. W. 937, Ann. Cas. 1913B, 919, and note.

<sup>35</sup> *Keatley v. Grand Fraternity*, 2 Boyce (Del.) 511, 82 Atl. 294; *Green v. Security Mut. Life Ins. Co.*, 159 Mo. App. 277, 140 S. W. 325.

<sup>36</sup> *Automobile Ins. Co. v. Guaranty Securities Corp.*, 240 Fed. 222; *State Life Ins. Co. v. Westcott*, 166 Ala. 192, 52 So. 344; *Federal Union Surety Co. v. Flemister*, 95 Ark. 389, 130 S. W. 574; *Muld v. Rehanine*, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243n; *Southern Mut. Aid Assn. v. Cobb*, 60 Fla. 198, 53 So. 505.

<sup>37</sup> *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234, 56 L. ed. 419, 32 Sup. Ct. 220, 38 L. R. A. (N. S.) 57; *Automobile Ins. Co. v. Guar-*

### § 1191. Construction and rights of parties.<sup>38</sup>

§ 1192. **Contracts of carriers.**—The law of the place where the contract for shipment of goods is made ordinarily governs as to the rights and obligations created thereunder and the interpretation of rights arising out of it.<sup>39</sup> But the rights and liabilities of parties to an interstate railroad shipment depend on the governing federal legislation, the contract made, and the common-law rules as applied in the federal courts.<sup>40</sup> And a contract exempting a carrier from liability, although valid when made, will not be enforced in Nebraska, where it is contrary to the laws of that state, in an action for personal injuries there caused.<sup>41</sup>

### § 1194. Connecting lines—American rule.<sup>42</sup>

§ 1195. **Contract tickets.**—It has been held that a limitation of liability to a certain amount is to be construed according to the law of the place where the contract is made unless contrary to the law or public policy of the forum.<sup>43</sup> But it has also been held that where a ticket limiting liability for baggage is purchased

anty Securities Corp., 240 Fed. 222. See ante § 1185. *St. Francis Box & Co. v. Perry & Co.*, 125 Ark. 413, 189 S. W. 47 (if valid where made will be held valid in another state); *Union Cent. Life Ins. Co. v. Barnes*, 175 Ky. 364, 194 S. W. 339. Compare *Continental Ins. Co. v. Perry* (Tenn.), 197 S. W. 487.

<sup>38</sup> *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234, 56 L. ed. 419, 32 Sup. Ct. 220, 38 L. R. A. (N. S.) 57; *Wilde v. Wilde*, 209 Mass. 205, 95 N. E. 295. See also *Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574; *Hays v. King*, 44 Okla. 180, 143 Pac. 1142; *State Bank v. King*, 244 Pa. 29, 90 Atl. 453.

<sup>39</sup> *Model Mill Co. v. Carolina & C. R. Co.*, 136 Tenn. 211, 188 S. W. 936.

<sup>40</sup> *Cincinnati & C. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A, 265, and note; *Chicago & C. R. Co. v. Paden* (Okla.), 162 Pac. 727. See also *Atchison & C. R. Co. v. Harold*, 241 U. S. 371, 60 L. ed. 1050, 36 Sup. Ct. 665; *Chesapeake & C. R. Co. v. Jordan* (Ind. App.), 114 N. E. 461; *Aradalon v.*

*New York & C. R. Co.*, 225 Mass. 235, 114 N. E. 297. And see as to effect of Carmack amendment on state regulations as to limiting liability, notes in 50 L. R. A. 819, Ann. Cas. 1915D, 612; 1912B, 672; also *Lynch v. Southern Exp. Co.*, 18 Ga. App. 761, 90 S. E. 655; *Sweetser v. Chicago & C. R. Co.*, 196 Ill. App. 623; *Atchison & C. R. Co. v. Smyth* (Tex. Civ. App.), 189 S. W. 70.

<sup>41</sup> *Maucher v. Chicago & C. R. Co.*, 100 Nebr. 237, 159 N. W. 422 (also holding that a release by circus employes operating a circus train was governed by the Nebraska law and not by the Carmack amendment). But compare *Nevill v. Gulf & C. R. Co.* (Tex. Civ. App.), 187 S. W. 388.

<sup>42</sup> See generally note in 52 L. R. A. (N. S.) 858; Ann. Cas. 1915B, 80 (liability of initial carrier under Carmack amendment); Ann. Cas. 1916A, 493 (liability of passenger carrier selling through ticket for acts and negligence of connecting carriers).

<sup>43</sup> *Robert v. Chicago & C. R. Co.*, 148 Mo. App. 96, 127 S. W. 925.

in one country but the contract of carriage is to be performed in another, the validity and effect of such stipulation is to be determined according to the law of the latter country.<sup>44</sup> Ordinarily, however, it is held that the place where the ticket is purchased is the place of contract and that the law of such place governs.<sup>45</sup> Where a certificate purchased in Massachusetts for ocean passage was exchanged for a ticket in England, the contract of carriage was made in England.<sup>46</sup>

§ 1196. **Maritime contracts.**—The law of the United States will be applied and enforced by the federal courts in a proceeding by the owner of a foreign vessel sunk in a collision with an iceberg on the high seas for the limitation of liability authorized by such law and admiralty rules.<sup>47</sup>

§ 1197. **Contracts of affreightment.**<sup>48</sup>

§ 1198. **Contracts of telegraph company.**—The rule as to damages obtaining in the state where the contract is made generally controls in an action for breach thereof, when not controlled by act of congress;<sup>49</sup> but where a telegram was sent from Vermont to Kansas, and the receiver thereof was to pay and did pay the charges, it was held that his right to damages for delay was governed by the laws of Kansas, except as modified by act of congress.<sup>50</sup> The act of congress of June 18, 1910, supersedes state laws as to interstate business of telegraph companies.<sup>51</sup>

§ 1199. **Remedies—Lex fori—Generally.**—Although the lex fori governs as to method of procedure and matters affecting the remedy generally, it is the general rule that a contract which

<sup>44</sup> Brown v. Canadian Pac. R. Co., 4 Manitoba 396.

<sup>45</sup> Pittsburgh &c. R. Co. v. Grom, 142 Ky. 51, 133 S. W. 977; El Paso &c. R. Co. v. London, 58 Tex. Civ. App. 397, 124 S. W. 744; Galveston &c. R. Co. v. Wiseman (Tex.), 136 S. W. 793. See also Pennsylvania Co. v. O'Connell, 84 Ohio St. 218, 95 N. E. 773, Ann. Cas. 1912C, 540, and note.

<sup>46</sup> Secoulsky v. Oceanic Steam Nav. Co., 223 Mass. 465, 112 N. E. 151.

<sup>47</sup> Oceanic Steam Nav. Co. v. Mellor, 233 U. S. 718, 58 L. ed. 1171, 34 Sup. Ct. 754, L. R. A. 1916B, 637, and note.

<sup>48</sup> See ante § 1192.

<sup>49</sup> Western Union Tel. Co. v. Favish (Ala.), 71 So. 183; Western Union Tel. Co. v. Smith (Tex. Civ. App.), 188 S. W. 702.

<sup>50</sup> Bailey v. Western Union Tel. Co., 97 Kans. 619, 156 Pac. 716, 160 Pac. 985.

<sup>51</sup> Western Union Tel. Co. v. Showers (Miss.), 73 So. 276; Western Union Tel. Co. v. Bank of Spencer (Okla.), 156 Pac. 1175; Western Union Tel. Co. v. Orr (Okla.), 158 Pac. 1139; Western Union Tel. Co. v. Bolling (Va.), 91 S. E. 154.



is valid where made and to be performed is valid everywhere and will be enforced in another state unless contrary to good morals or the statute or public policy of the state where it is sought to be enforced.<sup>52</sup>

§§ 1200, 1201. **Lex fori governs as to remedy—Rule applied.**—The rule that the law of the forum governs as to the remedy is well settled and has been applied to various questions affecting the remedy. Thus, rules of the forum as to evidence and its admissibility control,<sup>53</sup> and the general doctrine is applied to many other questions affecting the remedy and mode of procedure.<sup>54</sup>

§ 1202. **When forum will refuse to enforce contract.**—Where a contract is void under the governing laws of the place where it is made it will not be enforced in another state even though it would have been valid if made in the latter state.<sup>55</sup> And a contract, even if valid where made, will not be enforced in another state in which it is void under a statute or contrary to the public policy of such state.<sup>56</sup>

<sup>52</sup> *Halloran v. Jacob Schmidt Brewing Co.* (Minn.), 162 N. W. 1082, L. R. A. 1917E, 777; *Klein v. Keller*, 42 Okla. 592, 141 Pac. 1117, Ann. Cas. 1916D, 1070, and note; *Marx v. Hefner*, 46 Okla. 453, 149 Pac. 207. Where the law of the place of contract and performance deals with the substantive liability of a party to a contract which is sought to be enforced in another jurisdiction, a limitation on such liability imposed by the law of the former place will be enforced in the forum unless contrary to public policy: *Hinkly v. Freick*, 86 N. J. L. 281, 90 Atl. 1108. One who invokes the doctrine of comity between states must prove that the contract is a foreign contract contemplated by the doctrine: *Hare v. Young*, 26 Idaho 682, 146 Pac. 104.

<sup>53</sup> *Kansas City So. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834, and note; *Malcom Sav. Bank v. Cronin*, 80 Nebr. 228, 114 N. W. 158, 116 N. W. 150.

<sup>54</sup> *Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. 412; *Corbett v. Boston &*

*R. Co.*, 219 Mass. 351, 107 N. E. 60; *McAdow v. Kansas City &c. R. Co.* (Mo.), 164 S. W. 188; *Clark v. First Nat. Bank (Okla.)*, 157 Pac. 96; ante §§ 1137, 1138, 1139. See also *Meacham v. Jamestown &c. R. Co.*, 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851. But compare as to burden of proof and the like under Federal Employer's Liability Act, *Central Vt. R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. 865, Ann. Cas. 1916B, 252.

<sup>55</sup> *Burr v. Beckler*, 264 Ill. 230, 106 N. E. 206, L. R. A. 1916A, 1049, and note, Ann. Cas. 1915D, 1132, and note; *Orr Admr. v. Orr*, 157 Ky. 570, 163 S. W. 757.

<sup>56</sup> *Grosman v. Union Trust Co.*, 228 Fed. 610, 143 C. C. A. 132; *Burrus v. Witcover*, 158 N. Car. 384, 74 S. E. 11, 39 L. R. A. (N. S.) 1005. A contract which is illegal or contrary to a state statute and illegal for that reason will not be enforced no matter whether it is entered into within or without the state: *Standard Fashion Co. v. Grant*, 165 N. Car. 453, 81 S. E. 606.

§ 1203. Foreign laws not judicially noticed.<sup>57</sup>

<sup>57</sup> In an action in Missouri on an Iowa contract, where there is neither proof nor ground for presumption as to the law of Iowa, the Missouri court will apply the law of Missouri: *Davis v. McColl*, 179 Mo. App. 198, 166 S. W. 1113. The law of the forum

furnishes prima facie the rule of decision, and a party who seeks the benefit of the *lex loci contractus* must aver and prove it: *Fish v. Delaware &c. R. Co.*, 158 App. Div. 92, 143 N. Y. S. 365.

## CHAPTER XXX

### STATUTE OF FRAUDS

§ 1213. **Construction of statute.**—The statute of frauds is not construed so as to have a retroactive effect, and the Michigan statute of 1913 requiring a contract for commissions in regard to real estate to be in writing does not affect a contract already made and existing when it took effect.<sup>1</sup>

§ 1214. **Operation and effect of statute generally—Executed contracts.**—The statute does not apply to executed contracts.<sup>2</sup>

§ 1215. **Effect on verbal agreements.**—The effect of the statute on oral contracts is to prevent them from being enforced, where it is applicable, by barring the remedy or excluding oral evidence, and not to make them void or illegal; and if the contract is carried out, or the parties choose to perform it, the statute does not affect the transaction so far as concerns the legal effect and consequences arising from such execution or performance.<sup>3</sup>

<sup>1</sup> *Collin v. Kittelberger*, 193 Mich. 133, 159 N. W. 482.

<sup>2</sup> *Smith-Powers Logging Co. v. Bernitt*, 237 Fed. 570, 150 C. C. A. 452 (oral agreement creating interest in land not affected by statute of frauds when carried into effect by parties); *Hansen v. Uniform Seamless Wire Co.*, 243 Fed. 177; *Spalding v. White*, 184 Ill. App. 217; *Doubet v. Doubet*, 186 Ill. App. 316; *Gagnon v. Baden & Co. Spring Co.*, 56 Ind. App. 407, 105 N. E. 512; *McDaniels v. Harrington*, 80 Ore. 628, 157 Pac. 1068. See also *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906 (deed destroyed before recorded). But compare *Carlock v. Johnson*, 165 Wis. 49, 160 N. W. 1053. An antenuptial contract by a man to make a woman his beneficiary in an insurance policy is executed by their marriage and insertion of her name as beneficiary, and the statute of frauds is not applicable: *Freitas v. Freitas*, 31 Cal. App. 16, 159 Pac. 611. Statute does not apply

where parties have carried out an oral agreement to convey land and payment of purchase-price is the only thing to be done: *Grayson v. Grayson* (Mo. App.), 190 S. W. 930. Where, in pursuance of a parol agreement, conveyed land is transferred in consideration of nursing, etc., the deed is not void because the grantor, under statute of frauds, could not have been compelled to execute it: *Houston v. Ritchie* (Tex. Civ. App.), 191 S. W. 362. See also where the parties intended to reduce contract for sale of logs to writing without signing formal writing, but logs were delivered and paid for: *Hughes v. Eastern R. & Co. Lumber Co.*, 93 Wash. 558, 161 Pac. 343.

<sup>3</sup> *Gagnon v. Baden & Co. Springs Co.*, 56 Ind. App. 407, 105 N. E. 512; *Grayson v. Grayson* (Mo. App.), 190 S. W. 930; *Edwards v. Old Settlers' Assn.* (Tex. Civ. App.), 166 S. W. 423 (not void but only prevents enforcement).

And where the instrument sought to be enforced is in writing, as the statute requires, the statute does not apply even though the instrument was given in pursuance of an oral agreement which could not have been enforced because within the statute as an agreement to pay the debt of another.<sup>4</sup> So, the courts generally refuse to permit the statute to be used as an engine of fraud, and a party can not successfully invoke it to take advantage of his own fraud.<sup>5</sup> But the statute applies to protect a defendant in an action upon a parol contract to buy land where his promise to buy and the plaintiff's agreement to sell are still executory.<sup>6</sup> So the statute prevents the maintenance of an action for specific performance of a verbal agreement for the sale of land or for damages for breach of the contract,<sup>7</sup> and a court of law will not give damages for breach of an oral agreement to make a written contract where such agreement is within the statute.<sup>8</sup>

**§ 1216. Operation and effect—Quasi and implied contracts.**—The statute of frauds does not apply to quasi or implied contracts raised by the law and parties have often been held entitled to recover, where services had been performed or benefits received, on the theory of quasi or implied contract, even where the performance or situation was not such as to take the express contract out of the statute.<sup>9</sup>

**§ 1217. Statutes generally held to affect remedies.**—The general rule is that the statute of frauds affects only the remedy and does not make parol contracts within the statute absolutely void.<sup>10</sup>

<sup>4</sup> Delaney v. McNeil, 195 Ill. App. 524.

<sup>5</sup> Wright v. Cline, 172 Ky. 514, 189 S. W. 425; First Nat. Bank v. LaFayette Trust Co., 85 Misc. 341, 148 N. Y. S. 491. See also Shipley v. Shipley, 274 Ill. 506, 113 N. E. 906.

<sup>6</sup> Poe v. Smith, 172 N. Car. 67, 89 S. E. 1003.

<sup>7</sup> Kilday v. Schancupp, 91 Conn. 29, 98 Atl. 335, L. R. A. 1917A, 151.

<sup>8</sup> Clark v. Bradford Gas & Power Corp. (Del.), 98 Atl. 368.

<sup>9</sup> Matt J. Ward Co. v. Goelet, 230 Fed. 979, 145 C. C. A. 173; Weinhard v. Thompson Estate Co., 242 Fed.

315; Matousek v. Quirici, 195 Ill. App. 391; Macurda v. Fuller, 225 Mass. 341, 114 N. E. 366 (value of land recovered when conveyed on oral trust which was unenforceable under statute); Boulanger v. Churchill, 86 N. J. Eq. 96, 97 Atl. 947 (remedy on quantum meruit and not on oral contract where part performance of services not such as to take out of statute).

<sup>10</sup> Wood v. Lett, 195 Ala. 601, 71 So. 177; Gagnon v. Baden Lick & Co. Springs Co., 56 Ind. App. 407, 105 N. E. 512; ante § 1215.

§§ 1218, 1219. **Defense of statute personal—When may be invoked by third person.**—The defense of the statute of frauds is a personal defense, and can not be made, as a rule, by strangers who are neither parties nor privies to the contract.<sup>11</sup>

§ 1220. **Waiver of statute.**—A party entitled to the protection of the statute of frauds may waive it,<sup>12</sup> and this may be done impliedly, by performance or by failing to invoke it, or the like, as well as expressly.<sup>13</sup> But, while the conduct of a defendant in performing an oral contract for the purchase of grain of the value of more than five hundred dollars will constitute a waiver of the statute of frauds as to such contract, this does not operate as a waiver of the statute as a defense in an action for breach of another oral contract.<sup>14</sup>

§§ 1221-1223. **Conflict of law—Law of forum—Lex loci contractus—Law of place of performance.**—As a general rule, at least where the contract does not relate to realty, the statute of frauds of the forum will be applied in those states in which it is regarded as merely affecting the remedy.<sup>15</sup> But there is much conflict among the decisions and some courts hold that the statute of the place of contract, especially if it be also the place of performance, enters into the contract, and affects the substance so that if the contract is valid there it should be enforced in the courts of a sister state even if not evidenced as required by the law of the forum.<sup>16</sup> There is also some conflict among the au-

<sup>11</sup> Ex parte Banks, 185 Ala. 275, 64 So. 74; General Bonding &c. Ins. Co. v. McCurdy (Tex. Civ. App.), 183 S. W. 796; Schulz v. Buckeye Lumber Co., 94 Wash. 520, 162 Pac. 588. But see Kent v. Ellis, 31 Can. S. C. 110, 2 B. R. C. 721.

<sup>12</sup> El Dorado Ice &c. Mill Co. v. Kinard, 96 Ark. 184, 131 S. W. 460; S. H. Kress v. Moscowitz, 105 Ark. 638, 152 S. W. 298; Domeracki v. Janikowski, 255 Ill. 575, 99 N. E. 579; Bailey v. Henry, 125 Tenn. 390, 143 S. W. 1124; Campbell v. O'Neill, 69 W. Va. 459, 72 S. E. 732.

<sup>13</sup> Gilman v. McDaniel, 177 Iowa 76, 158 N. W. 459; Henry v. Hilliard, 155 N. Car. 372, 71 S. E. 439, 49 L. R. A. (N. S.) 1; Harn v. Patterson (Okla.), 160 Pac. 924. Many of the cases cited in last preceding note are to same effect.

<sup>14</sup> Webster-Tapper Co. v. Eastern Hay Co. (R. I.), 98 Atl. 50. And parol waiver, by a surety of a provision in a contractor's bond as to the time within which suit must be brought is not binding when the bond itself is required by the statute to be in writing: Wainwright Trust Co. v. United States Fidelity &c. Co. (Ind. App.), 114 N. E. 470.

<sup>15</sup> C. W. Rantoul Co. v. Claremont Paper Co., 196 Fed. 305, 116 C. C. A. 125; Boone v. Coe, 153 Ky. 233, 154 S. W. 900, 51 L. R. A. (N. S.) 907, and note; Marvel v. Marvel, 70 Nebr. 498, 97 S. W. 640, 113 Am. St. 792; Exchange Bank v. McMillan, 76 S. Car. 561, 57 S. E. 630.

<sup>16</sup> Halloran v. Jacob Schmidt Brewing Co. (Minn.), 162 N. W. 1082, L. R. A. 1917E, 777 (citing and reviewing cases on both sides).

thorities in regard to what law governs as between that of the place of contract, that of the place of performance and that of the place where the property is located.<sup>17</sup>

§ 1224. **How statute must be invoked.**—Where the fact that the contract is within the statute appears on the face of the complaint a demurrer is available,<sup>18</sup> but the defense of the statute can not be thus raised unless it does so appear.<sup>19</sup> In such case the defendant may invoke the statute by special answer pleading it,<sup>20</sup> or, in most jurisdictions, by a general denial.<sup>21</sup> The reason for this rule as to the effect of the general denial is that it requires the plaintiff to prove a valid contract. If the question is not raised in any of these ways, and no objection is made to the admission of the contract in evidence, the defense of the statute of frauds is generally regarded as waived.<sup>22</sup>

<sup>17</sup> Maylink v. Rhea, 123 Iowa 310, 98 N. W. 779 (place where land situated); Garnes v. Frazier (Ky.), 118 S. W. 998 (place of performance and not where contract made); Howell v. North, 93 Nebr. 505, 140 N. W. 779 (place where land situated and contract to be performed and not law of former); Callaway v. Prettyman, 218 Pa. 293, 67 Atl. 418 (place of contract); D. Canale & Co. v. Pauley & Co. Cheese Co., 155 Wis. 541, 145 N. W. 372 (place where contract made and not where goods delivered).

<sup>18</sup> Clinton Sugar Refining Co. v. Horras, 176 Iowa 706, 158 N. W. 602; Magee v. Fish, 175 App. Div. 125, 161 N. Y. S. 1057; Cushing v. Monarch Timber Co., 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1914C, 1239n; note in 49 L. R. A. (N. S.) 7.

<sup>19</sup> Reilly v. Woolbert (Ala.), 72 So. 10; Kinney v. Kinney (Ga. App.), 93 S. E. 496; Lasher v. McDennott, 173 App. Div. 79, 158 N. Y. S. 708. Some courts hold that where the contract thus appears within the statute its benefit can be obtained by motion on the trial to dismiss: Magee v. Fish, 175 App. Div. 125, 161 N. Y. S. 1057.

<sup>20</sup> Mendel v. Miller, 134 Ga. 610, 68 S. E. 430; note in 49 L. R. A. (N. S.) 27.

<sup>21</sup> Sprague v. Hozie, 155 Mich. 30, 118 N. W. 497, 19 L. R. A. (N. S.) 874, 130 Am. St. 558; Render v. Lillard (Okla.), 160 Pac. 705; Carr v.

Carr, 28 R. I. 554, 68 Atl. 582; Goodrich v. Rogers, 75 Wash. 212, 134 Pac. 947 (where complaint sets out contract not apparently within statute); notes in Ann. Cas. 1912D, 47, 49 L. R. A. (N. S.) 11. Or by denial of the contract: Owen v. Riddle, 81 N. J. L. 546, 79 Atl. 886, Ann. Cas. 1912D, 45; Altoona Portland Cement Co. v. Buabank, 44 Okla. 75, 143 Pac. 847; McClanahan v. Otto-Marmet Coal & Co. (W. Va.), 82 S. E. 752; note in 49 L. R. A. (N. S.) 16. The general rule is thus stated in a recent case: "The party to be charged may simply deny the contract alleged, or deny it and set up a different contract, and avail himself of the statute, without pleading it, by objecting to the evidence; or he may admit the contract and plead the statute, and in either case the contract can not be enforced": Henry v. Hilliard, 155 N. Car. 372, 71 S. E. 439, 49 L. R. A. (N. S.) 1, 9.

<sup>22</sup> Gilman v. McDaniels, 177 Iowa 76, 158 N. W. 459; Henry v. Hilliard, 155 N. Car. 372, 71 S. E. 439, 49 L. R. A. (N. S.) 1, and note on 24. See also Jennings v. Augir, 215 Fed. 658; Healy v. Obeare, 29 Cal. App. 696, 157 Pac. 569, 570. The statute must be pleaded in defense, unless the plaintiff's pleadings are in such form as to advise the defendant of the precise nature of the claim: Shaffer v. Natoma Farm, 195 Ill. App. 97.

§ 1226. **Fourth section—Promises by executors and administrators.**<sup>23</sup>

§§ 1227, 1228. **Fourth section—Promise to answer for debt of another.**—An original promise is not within this clause of the statute, but a collateral promise to answer for the debt or default of another is within the statute, if not in writing, and can not be enforced.<sup>24</sup> This is the general rule, but there is some conflict among the authorities in applying it, and the question usually depends very largely upon the intention of the parties. If the promisor receives no benefit and the person whose debt he promises to pay remains liable the promise is within the statute and unenforcible,<sup>25</sup> but if the promise is merely to pay his own debt,<sup>26</sup> or if the credit is given in the first instance to the promisor,<sup>27</sup> or the promise is upon a new consideration moving to the promisor and beneficial to him, the promise is not, ordinarily, within the statute,<sup>28</sup> but the intention of the parties is important and generally controlling in determining the question.<sup>29</sup>

§ 1229. **Necessity for a subsisting binding obligation.**—If there is no subsisting legal obligation on the part of the person

<sup>23</sup> Hannan v. Dreckman, 182 Ill. App. 146 (verbal agreement by administrator on distribution to sell a mortgage and pay portion of proceeds to certain heirs not within statute); Gabbert v. Evans (Mo. App.), 166 S. W. 635 (promise by executrix who was sole beneficiary to pay attorneys individually employed by her to defend claim an original promise and not within statute). See note in Ann. Cas. 1913C, 396, as to construction of this clause of the statute.

<sup>24</sup> Frohardt v. Duff, 156 Iowa 144, 135 N. W. 609, Ann. Cas. 1915B, 254, 255; Fairbanks v. Barker (Maine), 97 Atl. 3 (also stating tests as to when promise is original and when collateral); Peele v. Powell, 156 N. Car. 553, 73 So. 234; note in 15 L. R. A. (N. S.) 214. See also Guimarin v. Southern Life & Trust Co., 106 S. Car. 37, 90 S. E. 319.

<sup>25</sup> Brinkley Car Works & Co. v. Cook, 110 Ark. 325, 161 S. W. 1065 (promise to pay pre-existing debt with no new consideration collateral and within statute); Conti v. John-

son (Vt.), 100 Atl. 874; Mankin v. Jones, 63 W. Va. 373, 60 S. E. 248, 15 L. R. A. (N. S.) 214 (promise within statute where original debtor remains liable); post §§ 1229, 1243.

<sup>26</sup> Mitchell v. Davis (Mo. App.), 190 S. W. 357; post § 1235.

<sup>27</sup> Shepherd v. Butcher Tool & Co. (Ala.), 73 So. 498; Cordray v. James, 19 Ga. App. 156, 91 S. E. 239; Sprick Bros. Invest. Co. v. Whipple, 33 S. Dak. 287, 145 N. W. 559; post §§ 1236, 1237.

<sup>28</sup> Brinkley Car Works & Co. v. Cook, 110 Ark. 325, 161 S. W. 1065; Tremayne v. McCaskey Register Co., 181 Ill. App. 398; Munroe v. Mundy, 164 Iowa 707, 146 N. W. 819; Enterprise Trading Co. v. Bank (Tex. Civ. App.), 167 S. W. 296; post § 1234.

<sup>29</sup> Waldock v. First Nat. Bank, 43 Okla. 348, 143 Pac. 53; Security Bank Note Co. v. Shrader, 70 W. Va. 475, 74 S. E. 416, Ann. Cas. 1914A, 488; post § 1240. See also note in 15 L. R. A. (N. S.) 214-225 on entire subject, and especially as to controlling effect of intention.

for whom the promise is made it is not within the statute,<sup>30</sup> but where a father on being asked by a merchant whether he should give the former's son any more credit, told the merchant to sell him anything within reason and he, the father, would take care of it, and the merchant made such sales and charged them to the son, it was held that the father could not be held under the statute because the relation of debtor and creditor existed between the son and the merchant.<sup>31</sup>

§§ 1231, 1232. **Original and collateral promises.**—Tests for determining when the promise is original and when collateral have already been stated.<sup>32</sup> Illustrative cases are also considered in subsequent sections, but many others may also be cited.<sup>33</sup>

§ 1233. **Original promises—Payment out of property of debtor.**—An agreement by a bank to pay a note left for collection, out of insurance money belonging to the maker, after the bank's claims were satisfied, is not within the statute,<sup>34</sup> and the same has been held as to the promise of a bank to pay a check out of property belonging to the payee.<sup>35</sup>

§ 1234. **Original promises—New consideration moving to promisor.**—A new and valid consideration moving to the promisor will generally make his promise, based thereon, an original promise not within the statute.<sup>36</sup> But an oral agreement to

<sup>30</sup> Fox v. Laney (S. Car.), 92 S. E. 1044; Sprick Bros. Inv. Co. v. Whipple, 33 S. Dak. 287, 145 N. W. 559; Clement v. Rowe, 33 S. Dak. 499, 146 N. W. 700.

<sup>31</sup> Mueller v. Woodson (Mo. App.), 198 S. W. 1134.

<sup>32</sup> Ante §§ 1227, 1228.

<sup>33</sup> Promises held original and not within the statute: Clinton Co. v. Stiles, 197 Ill. App. 505; Johnson v. Huffaker, 99 Kans. 466, 162 Pac. 1150, L. R. A. 1917D, 872; Lohmeyer v. Young (Mo. App.), 195 S. W. 507; Clausen-Flanagan Brewery v. Luther, 97 Misc. 650, 162 N. Y. S. 281; Murphy v. Hanna (N. Dak.), 164 N. W. 32. Promises held collateral and within the statute: Perry v. Jarman, 125 Ark. 240, 188 S. W. 544 (agreement to pay for goods delivered to tenant if tenant failed); Southern Coal & Co. v. Randall, 141 Ga. 48, 80 S. E. 285 (guaranty); Bennighoff

v. Robbins (Mont.), 166 Pac. 687. Other illustrative cases of both kinds are cited, with abstract of decision, in 40 L. R. A. (N. S.) 242-247.

<sup>34</sup> Pirie v. Granite Sav. Bank & Co. (Vt.), 100 Atl. 676. But compare Few v. Hilsman (Ga.), 89 S. E. 79.

<sup>35</sup> Armstrong v. First Nat. Bank (Mo. App.), 195 S. W. 562. See also Johnson v. Bank of Sun Prairie, 155 Wis. 603, 145 N. W. 178. The promise of A., on B. giving him an order for money, to pay part of it to C., to whom B. was indebted, is not within the statute: Moore v. Kirkland, 112 Miss. 55, 72 So. 855.

<sup>36</sup> Johnson v. Huffaker, 99 Kans. 466, 162 Pac. 1150, L. R. A. 1917D, 872 (promise to pay note and mortgage of another by one who had become owner of property, made to protect his interest and based on forbearance of creditor to foreclose);



pay the debt of another may be within the statute of frauds and therefore unenforceable even though founded on a valuable consideration.<sup>37</sup>

**§ 1235. Original promises—Promise to pay own debt.<sup>38</sup>**

**§§ 1236, 1237. Question determined by person to whom credit is given—Services rendered, etc.**—It is the general rule that where credit is given wholly to the promisor the promise is original, but where the credit is given to the person to whom the goods are delivered or for whom the services are performed, the promise of another to answer for the debt is collateral and within the statute.<sup>39</sup>

**§ 1238. Language indicative of collateral promise.**—Language such as a promise to see the seller paid, or to pay if the debtor does not, is indicative of a collateral promise, and in the absence of anything to the contrary is usually held to bring the promise within the statute, but it is not necessarily controlling and yields to the intention of the parties and circumstances showing it to be an original promise.<sup>40</sup>

Miller v. Beck, 72 Ore. 140, 142 Pac. 603 (promise by grantee to perform grantor's contract with a purchaser not promise to answer for his debt or default); Enterprise Trading Co. v. Bank (Tex. Civ. App.), 167 S. W. 296. See also Norman v. Bullock Co. Bank, 187 Ala. 33, 65 So. 371 (agreement to pay certain sum for assignment of note and mortgage is not a promise to answer for debt or default of maker of note within statute); Baskett Lumber & Mfg. Co. v. Gravlee (Ala. App.), 73 So. 291; Cassels v. Alabama City & C. R. Co. (Ala.), 73 So. 494.

<sup>37</sup> Clinton Co. v. Stiles, 197 Ill. App. 505; Ribock v. Canner, 218 Mass. 5, 105 N. E. 462; Bennington Lumber Co. v. Attaway (Okla.), 158 Pac. 566 (promise by property owner to pay for lumber furnished contractor for and used in such owner's building); Howell v. Harvey, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.) 1077n.

<sup>38</sup> Where a physician before treating defendant's adult son called defendant in and obtained from him a promise to pay for the services, the father thereby became primarily liable

as for his own debt and the agreement was binding notwithstanding a statute of frauds: Mitchell v. Davis (Mo. App.), 190 S. W. 357.

<sup>39</sup> Where goods are sold and delivered to a contractor for construction of another's house, a promise of payment made by its owner is collateral and within statute, but if the credit is given to owner of house, the contract is not within the statute: Shepherd v. Butcher Tool & C. Co. (Ala.), 73 So. 498. Where one orally promises to see that a debt is paid for goods delivered to a third person, credit must be extended only to promisor, or otherwise agreement is within statute of frauds: Cordray v. James, 19 Ga. App. 156, 91 S. E. 239. See also Conti v. Johnson (Vt.), 100 Atl. 874; Hurst Hardware Co. v. Goodman, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598n, Ann. Cas. 1912B, 218 (promise of stockholder to pay corporate debts collateral and within statute); note in Ann. Cas. 1913D, 851.

<sup>40</sup> Note in 15 L. R. A. (N. S.) 217-221. Compare Cordray v. James, 19 Ga. App. 156, 91 S. E. 239.

§§ 1240, 1241. **Question one of intention—When for jury.**—The question as to whether the promise is original or collateral is usually controlled and determined by the intent of the parties as gathered therefrom and from their conduct and relations to each other.<sup>41</sup> This is generally a question for the jury.<sup>42</sup>

§ 1242. **Relinquishment of lien.**—Many recent cases announce and apply the doctrine of this section to the effect that a promise to a lienholder by one having an interest in property for his own benefit or protection to pay off the lien thereon in consideration of its relinquishment or forbearance to enforce it is an original promise not within the statute of frauds.<sup>43</sup>

§ 1243. **Independent promise releasing another.**—As a general rule at least, an independent unconditional promise constituting a novation, releasing the original debtor so that he is no longer liable, is an original promise not within the statute.<sup>44</sup>

§§ 1245, 1246. **Contracts of indemnity—Oral promise to indemnify grantor.**—An oral guaranty is collateral and within the statute of frauds;<sup>45</sup> but contracts of indemnity, including promises by one person to indemnify another for becoming guar-

<sup>41</sup> *Millsaps v. Nixon*, 102 Ark. 425, 144 S. W. 915; *Waldock v. First Nat. Bank*, 43 Okla. 348, 143 Pac. 53; *Security Bank Note Co. v. Shrader*, 70 W. Va. 475, 74 S. E. 416, Ann. Cas. 1914A, 488, and note.

<sup>42</sup> *Frohardt v. Duff*, 156 Iowa 144, 135 N. W. 609, 40 L. R. A. (N. S.) 242n, Ann. Cas. 1915B, 254, and note; *McGowan Commercial Co. v. Midland Coal & Co.*, 41 Mont. 211, 108 Pac. 655 (unless no dispute as to contract and question depends only on construction and effect of its terms). See also *Day v. Adcock* (Ala.), 66 So. 911; *Downs v. Perkins*, 207 Mass. 409, 93 N. E. 645; *Whitehurst v. Padgett*, 157 N. Car. 424, 73 S. E. 240; *Corcoran v. Huey*, 231 Pa. 441, 80 Atl. 881; *Lorick v. Caldwell*, 85 S. Car. 94, 67 S. E. 143.

<sup>43</sup> *McDonald v. General Constr. Co.*, 152 Iowa 273, 132 N. W. 369; *Fitzgerald v. Flanagan*, 155 Iowa 217, 135 N. W. 738; *Frohardt Bros. v. Duff*, 156 Iowa 144, 135 N. W. 609, 40 L. R. A. (N. S.) 242, and note, Ann. Cas. 1915B, 254; *Johnson v.*

*Huffaker*, 99 Kans. 466, 162 Pac. 1150, L. R. A. 1917D, 872; *Manning v. Anthony*, 208 Mass. 399, 94 N. E. 466, 32 L. R. A. (N. S.) 1179; *Lee v. Unkefer*, 85 S. Car. 199, 65 S. E. 989, 67 S. E. 246; *Spencer v. Nalle* (Tex. Civ. App.), 143 S. W. 991. See also *Brinkley Car Works & Co. v. Cook*, 110 Ark. 325, 161 S. W. 1065; *Monroe Lumber Co. v. Bezeau*, 192 Mich. 307, 158 N. W. 880. But compare *Draggo v. West Bay Sugar Co.*, 144 Mich. 195, 107 N. W. 911.

<sup>44</sup> *La Duke v. John T. Barbee & Co.* (Ala.), 73 So. 472; *Baxter v. Chico Const. Co.*, 31 Cal. App. 492, 160 Pac. 1084; *Van Cappellen v. Chicago & C. R. Co.*, 126 Minn. 251, 148 N. W. 104 (agreement to pay injured person's physician as part of consideration for release of damages is based on consideration moving to promisor and not within statute).

<sup>45</sup> *Southern Coal & Co. v. Randall*, 141 Ga. 48, 80 S. E. 285; *United Securities Co. v. Tilley*, 177 Mo. App. 113, 163 S. W. 281; post §§ 3931, 3932.

antor for a third person, are generally regarded as original and not within the statute, at least where they are induced and sustained by a benefit to the promisor.<sup>46</sup>

§ 1247. Illustrations of collateral promises.<sup>47</sup>

§§ 1248, 1249. Agreements in consideration of marriage—Promise to do some act other than marry as consideration of marriage.—A parol promise other than the mere promise to marry, in consideration of marriage, is within the statute.<sup>48</sup>

§ 1250. Antenuptial contracts.<sup>49</sup>

§ 1252. Antenuptial agreement—Execution.—Subsequent marriage is not such a performance or execution of the contract as will take it out of the statute.<sup>50</sup>

§§ 1253-1255. Contracts relating to land—Necessity for and sufficiency of writing—Scope of clause.—The fourth section of the statute of frauds is applicable, in general, to the sale of lands, tenements or hereditaments, or any interest therein, and including, among other things, contracts for exchange of lands and easements.<sup>51</sup> In most states a verbal promise to devise land

<sup>46</sup> McCormick v. Boylan, 83 Conn. 686, 78 Atl. 335, Ann. Cas. 1912A, 882, and note; Buchholz v. Feustel, 179 Ill. App. 396; Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142; Dent v. Arthur, 156 Mo. App. 472, 137 S. W. 285; Patrick v. Barber, 78 Nebr. 823, 112 N. W. 358; Handsaker v. Pederesen, 71 Wash. 218, 128 Pac. 230. See also Alphin v. Lowman, 115 Va. 441, 79 S. E. 1029, Ann. Cas. 1915A, 863, and note. But see contra Craft v. Lott, 87 Miss. 590, 40 So. 426, 6 Ann. Cas. 670.

<sup>47</sup> Where goods are sold and delivered to contractor for construction of a house, promise of payment made by owner of house is collateral and within statute: Shepherd v. Butcher Tool & Hardw. Co. (Ala.), 73 So. 498. A contractor's bond, being a special promise to answer for another, must be in writing: Wainwright Trust Co. v. United States Fidelity & Co. (Ind. App.), 114 N. E. 470. Oral acceptance of an order not based on a consideration to the acceptor is within the statute: Hill v. Wright, 144 Ky. 806, 139 S. W. 946. Oral promise by a father to pay

a previously contracted debt of son, with no consideration to father, is within the statute: Fisher v. Lutz, 146 Wis. 664, 132 N. W. 592. Oral promise to pay debt of third person out of money the promisor has agreed to loan the debtor is within statute: Mine & Co. Supply Co. v. Stockgrowers' Bank, 173 Fed. 859, 98 C. C. A. 229.

<sup>48</sup> London v. G. L. Anderson Brass Works (Ala.), 72 So. 359; Cole v. Cole, 99 Miss. 335, 54 So. 953, 34 L. R. A. (N. S.) 147n, Ann. Cas. 1913E, 332, and note (within clause as to sale of land).

<sup>49</sup> Freitas v. Freitas, 31 Cal. App. 16, 159 Pac. 611; Watkins v. Watkins, 82 N. J. Eq. 483, 89 Atl. 253 (parol antenuptial contract to make a marriage settlement in consideration of marriage is within statute).

<sup>50</sup> Frazer v. Andrews, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593n, 13 Ann. Cas. 556; McCartney v. Fitzworth, 142 App. Div. 292, 126 N. Y. S. 905; Rowell v. Barber, 142 Wis. 304, 125 N. W. 937, 27 L. R. A. (N. S.) 1140.

<sup>51</sup> Profile Cotton Mills v. Calhoun Water Co., 189 Ala. 181, 66 So. 50

is held to be within the statute,<sup>52</sup> but in others it is held not to be within the statute, at least where based on a consideration performed, after it is made and before the death of the promisor.<sup>53</sup> A deed placed in escrow with a third person for delivery on performance by the grantee of a certain condition is not a sufficient memorandum under the statute, where, although it contains the names of the parties, recites the consideration, and describes the property, it does not state the contract or terms of sale.<sup>54</sup>

**§ 1256. Cases not within statute—Constructive trusts.**—Constructive or resulting trusts are not within the statute and may be established by parol.<sup>55</sup>

**§ 1257. Cases not within statute—Party fences and location of boundary line.**—An agreement locating and establishing a boundary line which was unknown and in dispute is not within the statute.<sup>56</sup> But it is otherwise as to a parol agreement

(easement); *Kyle v. Jordan* (Ala.), 71 So. 417 (contract for sale of land); *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366 (promise to reconvey); *Hicks v. Rupp*, 49 Mont. 40, 140 Pac. 97 (for sale of land); *Suddard v. Lewis*, 175 App. Div. 749, 162 N. Y. S. 493 (contract to sell); *Caples v. Morgan*, 81 Ore. 692, 160 Pac. 1154, L. R. A. 1917B, 760 (lease); *Society of Independent Doukhobors v. Hecker*, 83 Ore. 65, 162 Pac. 851 (oral assignment of contract for purchase of land); *Clegg v. Brannan* (Tex. Civ. App.), 190 S. W. 812 (exchange of land); *Callan v. Walters* (Tex. Civ. App.), 190 S. W. 829 (easement). See also *King v. Crone*, 114 Ark. 121, 169 S. W. 238; *Scotti v. Bullock*, 225 Mass. 510, 114 N. E. 674; *Walters v. Walters*, 172 N. Car. 328, 90 S. E. 304; *Fidelity Nat. Bank v. E. H. Stanton Co.*, 93 Wash. 344, 160 Pac. 960. Statute of frauds is not applicable where a grantee seeks to avoid building restrictions contained in the plat of the property purchased, on the ground that it was not signed by the grantee: *Doran v. Graham*, 195 Ill. App. 65. Nor where one takes title to land under verbal agreement to convey to another on payment of certain sums of money: *Henry v. Britt*, 197 Ill. App. 167. Nor to a parol partition: *Scott v. Watson* (Tex. Civ. App.),

167 S. W. 268; *Moore v. Reid* (Tex. Civ. App.), 186 S. W. 245.

<sup>52</sup> *Brown v. Golightly*, 106 S. Car. 519, 91 S. E. 869, Ann. Cas. 1918A, 1185; *Henderson v. Davis* (Tex. Civ. App.), 191 S. W. 358. See also *Gernhert v. Straeffer's Exr.*, 172 Ky. 823, 189 S. W. 1141; *Lasher v. McDermott*, 173 App. Div. 79, 158 N. Y. S. 708; *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461, and note.

<sup>53</sup> *Gordon v. Spellman*, 145 Ga. 682, 89 S. E. 749, Ann. Cas. 1918A, 852; *Woods v. Dunn*, 81 Ore. 457, 159 Pac. 1158.

<sup>54</sup> *Main v. Pratt*, 276 Ill. 218, 114 N. E. 576.

<sup>55</sup> *Home Land &c. Co. v. Routh*, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142n; *McPherrin v. Fair*, 57 Colo. 333, 141 Pac. 472; *Doll v. Doll*, 96 Nebr. 185, 147 N. W. 471; *Belcher v. Young*, 90 Wash. 303, 155 Pac. 1060. But see *Hunter v. Feild* (Ark.), 169 S. W. 813 (for case in which there was held to be no resulting trust and statute was applicable).

<sup>56</sup> *Payne v. McBride*, 96 Ark. 168, 131 S. W. 463, Ann. Cas. 1912B, 661, and note; *Grants Pass Land &c. Co. v. Brown*, 168 Cal. 456, 143 Pac. 754; *Smith v. Seitz*, 87 Conn. 678, 89 Atl. 257; *Garvin v. Threlkeld*, 173 Ky. 262, 190 S. W. 1092 (but holding other-

where the line is known and not in dispute and the attempt is to establish a line known not to be the true line.<sup>57</sup>

§ 1258. **Cases not within statute—Licenses to enter on land.**<sup>58</sup>

§ 1259. **Fixtures.**—An agreement for the sale of fixtures which are part of the realty and so treated is within the statute;<sup>59</sup> but when removable and treated as personalty the prevailing rule is otherwise.<sup>60</sup>

§ 1260. **Fructus industriales.**<sup>61</sup>

§ 1261. **Other collateral contracts not within fourth clause—Illustrations.**—Parol authority from purchasers of land to their trustee to reconvey part of it to the grantor upon repayment of a proportionate part of the price has been held not within the statute,<sup>62</sup> and the abandonment of a contract in regard to real estate, such as one of conditional purchase, is not a transfer of an interest in land within the statute.<sup>63</sup> So, a verbal direction by the seller of land to the purchaser, who still owed part of the purchase-money, to pay part of the purchase-price

wise when agreement was that a certain old line should be established by surveyor and a division fence erected it was not executed but was subject to subsequent establishment). So, agreements as to division fences have often been upheld as not within the statute: *McAfee v. Walker*, 82 Kans. 182, 107 Pac. 637, 27 L. R. A. (N. S.) 226n; *Meyer v. Perkins*, 89 Nebr. 59, 130 N. W. 986, Ann. Cas. 1912C, 468, and note. Compare *Tulbert v. Sons*, 116 Minn. 195, 133 N. W. 467.

<sup>57</sup> *Mann v. Mann*, 152 Cal. 23, 91 Pac. 994; *Fuelling v. Fuesse*, 43 Ind. App. 441, 87 N. E. 700; *Voigt v. Hunt* (Tex. Civ. App.), 167 S. W. 745.

<sup>58</sup> See as to difference between license and easement: *Profile Cotton Mills v. Calhoun Water Co.*, 189 Ala. 181, 66 So. 50; *Albrecht v. Drake Lumber Co.*, 67 Fla. 310, 65 So. 98; *McReynolds v. Harrigfeld*, 26 Idaho 26, 140 Pac. 1096; *American Sand & Gravel Co. v. Chicago Gravel Co.*, 184 Ill. App. 509.

<sup>59</sup> *McLeod v. Clark* (Miss.), 71 So. 11 (parol reservation of right to re-

move house which is part of realty within statute). A parol promise by a grantee that he will construct upon the land a dwelling house for himself is within the statute of frauds: *Holloway v. Smith* (Ala.), 73 So. 417.

<sup>60</sup> *Wetopsky v. New Haven & C. Gas Light Co.*, 88 Conn. 1, 90 Atl. 30, Ann. Cas. 1916D, 968n (contract for sale and removal of house is not within statute when it is treated as personalty and sold as such).

<sup>61</sup> *Stuttgart Rice Mill Co. v. Renisch*, 123 Ark. 351, 184 S. W. 836; *Willard v. Higdon*, 123 Md. 447, 91 Atl. 577, Ann. Cas. 1916C, 339 (holding that there may be a parol sale of growing crops and also that there may be a parol reservation of crops where land is conveyed).

<sup>62</sup> *King v. Lane* (Tex. Civ. App.), 186 S. W. 392.

<sup>63</sup> *W. F. Miller Co. v. Grussi*, 90 Conn. 555, 98 Atl. 90. See also *McKay v. Home for Friendless Children* (Iowa), 161 N. W. 47, citing *McCall v. Bear Creek Coal & C. Co.*, 162 Iowa 491, 143 N. W. 532.

later to become due to a third person whom the seller owed, is not within the statute.<sup>64</sup> An agreement for common use of a railroad switch is not a contract for the sale of land within the statute.<sup>65</sup> And an implied waiver of a right to support of surface arising from acceptance of a deed reserving to the grantor the right to remove coal is not within the statute.<sup>66</sup> Nor is an equitable mortgage by the delivery of unrecorded title papers by a debtor to his creditor within the statute.<sup>67</sup>

**§§ 1262, 1263. Cases not within fourth clause—Partnership to deal in lands.**—An agreement of partnership or joint adventure to deal in lands is not within the statute.<sup>68</sup>

**§ 1265. Cases not within fourth clause of statute—Judicial sales.**—A verbal agreement between two persons to bid at a judicial sale of land in which neither has any interest, stipulating that if either becomes the owner the land shall be equally divided, is a contract for the sale of land within the statute.<sup>69</sup>

**§ 1266. Contracts within statute—Parol contract to arbitrate.**<sup>70</sup>

<sup>64</sup> *Foster v. Hoff*, 37 Okla. 144, 131 Pac. 531, Ann. Cas. 1916B, 218. And generally an oral agreement to pay off an encumbrance on the land, or the purchase-price to the seller or another is not within the statute, note in Ann. Cas. 1916B, 221, 222. But, while such an agreement to remove an existing incumbrance is good, a parol general agreement to make a good title, if the deed does not have that effect, is within the statute: *Ladd v. Holman*, 109 Maine 46, 82 Atl. 437, Ann. Cas. 1913D, 1238.

<sup>65</sup> *P. M. Bruner Granitoid Co. v. Glencoe Lime & Co.* (Mo. App.), 187 S. W. 807.

<sup>66</sup> *Gordon v. Delaware & C. R. Co.*, 253 Pa. 110, 97 Atl. 1032.

<sup>67</sup> *Jennings v. Auger*, 215 Fed. 658.

<sup>68</sup> *Fitch v. King*, 279 Ill. 62, 116 N. E. 624; *Sonnesyn v. Hawbaker*, 127 Minn. 15, 148 N. W. 476; *Kohl v. Munson*, 97 Nebr. 170, 149 N. W. 314; *Moran v. McDevitt* (R. I.), 83 Atl. 1013; *Burgyn v. Jones*, 113 Va.

511, 75 S. E. 188, 41 L. R. A. (N. S.) 120, Ann. Cas. 1913E, 564, and note. See also *Beebe v. Olentine*, 97 Ark. 390, 134 S. W. 936, *Lane v. Lodge*, 139 Ga. 93, 76 S. E. 874; *Goodwin v. Smith*, 144 Ky. 41, 137 S. W. 789; *Phoenix Land Co. v. Exall* (Tex.), 159 S. W. 474. But see contra, *Huntington v. Bordeaux*, 149 Wis. 263, 135 N. W. 845. Compare also *Reilly v. Woolbert* (Ala.), 72 So. 10. An oral contract giving an exclusive right to sell lands for one-half the net profits as compensation is an agency for sale, and not a partnership, so as not to be void under the Virginia statute: *Atlantic Coast Realty Co. v. Robertson*, 240 Fed. 372. See also *Matney v. Yates* (Va.), 93 S. E. 694.

<sup>69</sup> *Henderson v. Henrie*, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628, Ann. Cas. 1912B, 318, and note.

<sup>70</sup> *Lilley v. Tuttle*, 52 Colo. 121, 117 Pac. 896, Ann. Cas. 1913D, 196 and note.

§ 1267. **Cases within clause four—Easements.**—A contract for an easement in land is within the statute, and must be in writing.<sup>71</sup>

§§ 1268, 1269. **Contracts within fourth clause—Contracts for sale of growing trees—Sale of standing timber to be immediately removed.**<sup>72</sup>

§ 1270. **Cases within fourth clause—Leases.**—The question as to whether leases are within the statute depends upon the provisions of the particular governing statute. Leases for a term of not more than one year, or in many jurisdictions for not more than three years, are generally excepted, but if for longer than the term excepted they must be in writing.<sup>73</sup>

§ 1271. **How contract concerning land may be taken out of statute.**—There are many cases illustrating and enforcing the general doctrine that part performance by paying purchase-money, taking possession and making valuable improvements, or the like, under a parol contract of sale or lease will take it out of the statute or entitle the party so performing to assistance from a court of equity, and most courts hold that part performance may be sufficient even though it consists of only some and not all of the acts above stated.<sup>74</sup>

<sup>71</sup> Profile Cotton Mills v. Calhoun Water Co., 189 Ala. 181, 66 So. 50; Sargent v. Leonardi, 223 Mass. 556, 112 N. E. 633; Bowington v. Williams (Tex. Civ. App.), 166 S. W. 719.

<sup>72</sup> The statute applies to a sale of growing trees as part of the real estate: Starks v. Garver Lumber Mfg. Co., 182 Mo. App. 241, 167 S. W. 1198; Groce v. West Lumber Co. (Tex.), 165 S. W. 519. But not to a contract for sale of standing timber to be immediately removed, with mere license to enter and remove: West Lumber Co. v. C. R. Cummings Export Co. (Tex. Civ. App.), 196 S. W. 546.

<sup>73</sup> Tracy v. Deshon, 157 Ky. 226, 162 S. W. 1116 (lease for two years must be in writing under Kentucky statute); Bumiller v. Walker (Ohio), 116 N. E. 797; Jones v. Bennett, 40 Okla. 664, 140 Pac. 148 (Oklahoma statute does not require contract to make a lease to be in writing); Mc-

Daniels v. Harrington, 80 Ore. 628, 157 Pac. 1068 (good for one year in parol but not longer). See post § 4551. The statute of frauds, it is held, does not affect leases taken in the name of a partner, treated in equity as partnership assets, as equity treats all partnership property as personalty so far as partnership rights are concerned: Dikis v. Likis, 187 Ala. 218, 65 So. 398.

<sup>74</sup> Smith-Powers Logging Co. v. Bernitt, 237 Fed. 570; Sears v. Reddick, 211 Fed. 856 (parol contract to convey sustained where other party had so changed his situation in reliance thereon that he could not be restored to original situation nor compensated in damages); Storthz v. Watts, 125 Ark. 393, 188 S. W. 1166 (performance under lease); Kane v. Hudson, 273 Ill. 350, 112 N. E. 683; Bastian v. Crawford, 180 Ind. 697, 103 N. E. 792; Read Drug &c. Co. v. Naltaus, 129 Md. 67, 98 Atl.

§§ 1272, 1273. **Insufficient performance — Possession.** — The mere continuance in possession, where the party is already in possession, is not, ordinarily, sufficient to take the case out of the statute.<sup>75</sup> And many of our courts reject the English doctrine and hold that the mere taking of possession does not of itself satisfy the statute in any ordinary case.<sup>76</sup> But making valuable and permanent improvements by the purchaser, on the contract being made, and paying part of the purchase-price, is sufficient to take the case out of the statute, although he was already in possession as tenant of the vendor.<sup>77</sup> And it is held that a purchaser can not, after payment of part of the purchase-price and taking possession, defeat a recovery of the balance by setting up the statute of frauds.<sup>78</sup>

§ 1274. **Insufficient performance—Payment of purchase-money—Exchange of lands.**—Mere payment of purchase-money is not such part performance as will render a contract enforceable against the vendee where it is in parol or the vendee has not signed it.<sup>79</sup> An oral agreement for exchange of lands is within the statute,<sup>80</sup> but when possession has been taken thereunder it will usually be enforced and a court of equity will decree specific performance when it has been so far executed as to make its rescission inequitable.<sup>81</sup>

158, 37 Am. Rep. 202 (making repairs under lease); *Friend v. Smith*, 191 Mich. 99, 157 N. W. 347 (contract to deed land where other party moved on land, took care of premises and made improvements as agreed); *Lindell v. Lindell*, 135 Minn. 368, 160 N. W. 1031 (taking possession and making improvements); *Adams v. White*, 40 Okla. 535, 139 Pac. 514 (part payment of purchase price and taking possession in good faith). See also *Halligan v. Frey* (Iowa), 141 N. W. 944, 49 L. R. A. (N. S.) 112 and note on 117-121.

<sup>75</sup> *Shecklett v. Cummins*, 178 Mo. App. 309, 165 S. W. 1145. See also *Sandberg v. Clausen*, 134 Minn. 321, 159 N. W. 752.

<sup>76</sup> See notes in 3 L. R. A. (N. S.) 790, and 8 L. R. A. (N. S.) 870.

<sup>77</sup> *Eason v. Roe*, 185 Ala. 71, 64 So. 55. See also *McGuin v. Willey*, 24 Cal. App. 303, 141 Pac. 49.

<sup>78</sup> *Witt v. Booth*, 98 Kans. 554, 158 Pac. 851. See also *Lane v. Flint*, 217 Mass. 96, 104 N. E. 570. And see generally as to contracts fully performed by other party and performed as to part within statute: *Hellings v. Wright*, 29 Cal. 649, 156 Pac. 365; *Spalding v. White*, 184 Ill. App. 217; *Friend v. Smith*, 191 Mich. 99, 157 N. W. 347; *Harris v. Hardwick*, 18 N. Mex. 303, 137 Pac. 581; *Robertson v. Howerton* (Okla.), 156 Pac. 329; *Erickson v. Mixer* (S. Dak.), 157 N. W. 592.

<sup>79</sup> *Summers v. Hively* (W. Va.), 88 S. E. 608. See also *Kelley v. Fischer*, 263 Ill. 184, 105 N. E. 21; *Levy v. Yerbrough*, 41 Okla. 16, 136 Pac. 1120.

<sup>80</sup> *Gordon v. Simmons*, 136 Ky. 273, 124 S. W. 306, Ann. Cas. 1912A, 305n.

<sup>81</sup> See note in Ann. Cas. 1912A, 309-311.



§ 1277. **Agreements not to be performed within a year—Scope of clause.**—Agreements that can reasonably be performed within a year, or that depend upon some contingency upon the happening of which they may be performed within a year are not within the fifth clause of the statute as phrased in most jurisdictions,<sup>82</sup> and the statute does not apply to an executed contract of employment under which by its terms the employé was to be paid a percentage of the profits, even though such payment was not to be made until after the year had expired.<sup>83</sup> But a contract in consideration of support for life has been held to be within a statute making an oral agreement invalid “which by its terms is not to be performed during the lifetime of the promisor.”<sup>84</sup>

§§ 1278, 1279. **Contracts within fifth clause—Contracts to last a year from date in future—Leases—Services.**—A verbal contract to begin in futuro, which can not be performed within a year from the time performance is to begin is within the statute in most jurisdictions.<sup>85</sup> This rule has often been applied to leases and contracts of employment to begin in futuro.<sup>86</sup>

<sup>82</sup> *Graham v. Jonesboro &c. R. Co.*, 111 Ark. 598, 164 S. W. 729; *Cox v. Baltimore &c. R. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453; *Renyck v. Allington &c. Co.*, 179 Mich. 630, 146 N. W. 252; *Simmons v. Simmons*, 95 Nebr. 607, 146 N. W. 951; *Uncle Sam Oil Co. v. Richards* (Okla.), 158 Pac. 1187; *McClanahan v. Ott-Marmet Coal &c. Co.*, 74 W. Va. 543, 82 S. E. 752. An oral agreement for the execution of a written contract whereby one should secure the right to extract gasoline from gas controlled by the other party for 10 years is within the statute of frauds: *Clark v. Bradford Gas & Power Corp.* (Del. Ch.), 98 Atl. 368. See also *Matt J. Ward Co. v. Goelett*, 230 Fed. 979, 145 C. C. A. 173; note in L. R. A. 1915D, 1190 (promise of marriage as within statute). An assignment of a life insurance policy to secure moneys due, or which might be due in the future from insured to the assignee, is not within the statute of frauds, although no definite time is fixed in the contract during which it is to continue in force, and although it appears

therefrom that the parties contemplated that it would continue in force for more than a year, if by a reasonable construction its terms do not require it to remain in force for more than a year: *Mutual Life Ins. Co. v. Ritscher*, 196 Ill. App. 27. See also *Springfield Fire &c. Ins. Co. v. Snowden*, 173 Ky. 664, 191 S. W. 439.

<sup>83</sup> *Harris Transfer &c. Co. v. Moor*, 10 Ala. App. 469, 65 So. 416.

<sup>84</sup> *Hagan v. McNary*, 171 Cal. 141, 148 Pac. 937, L. R. A. 1915E, 562. See also *Edwards v. Farve*, 110 Miss. 864, 71 So. 12.

<sup>85</sup> *Diamond v. Jacquith*, 14 Ariz. 119, 125 Pac. 712, L. R. A. 1916D, 880; *Magee v. Fish*, 175 App. Div. 125, 161 N. Y. S. 1057; *Johnston v. Flickinger*, 97 Misc. 169, 160 N. Y. S. 962; *Mayer v. Seril*, 98 Misc. 270, 162 N. Y. S. 903; note in 49 L. R. A. (N. S.) 820.

<sup>86</sup> *Leases: Bumgardner v. Scaggs*, 180 Ill. App. 668; *Leindecker v. Schaffer*, 194 Ill. App. 508; *Biddle v. Whitmore* (Minn.), 158 N. W. 808; *Shacklett v. Cummins*, 178 Mo. App. 309, 165 S. W. 1145. But see contra, *Jones v. Bennett*, 40 Okla. 664, 140

§ 1281. **Contracts which can not be performed within a year.**—Contracts which by their terms or their nature and the nature and situation of the parties can not possibly be performed within a year are within the statute.<sup>87</sup>

§§ 1282, 1283. **Cases not within fifth clause—Contracts which may be performed within a year—Rule illustrated.**—An oral agreement which may reasonably be performed within a year is not within the statute even though one or both of the parties may have expected that it would not be performed within that time.<sup>88</sup>

§ 1284. **Performance depending on contingency.**—An oral contract by one to rear and maintain another's child until the child's maturity is not within the statute, although the parties may not have expected that the child would die within a year.<sup>89</sup> Many other cases illustrate the doctrine that if a contract may or may not be performed, according to the happening or not happening of some contingency within a year, such as death, or some other event which may or may not take place within the year, it is not within the statute.<sup>90</sup>

§§ 1285, 1286. **Contracts not within fifth clause—Contracts to continue during life—Contracts to be performed on death of party or third person.**—Contracts for employ-

Pac. 148; *Darnell v. Hume*, 40 Okla. 668, 140 Pac. 775. Contracts of employment: *School Dist No. 46 v. Johnson*, 26 Colo. App. 433, 143 Pac. 264; *Carroll v. Palmer Mfg. Co.*, 181 Mich. 280, 148 N. W. 390; *Franco v. Caruso*, 158 N. Y. S. 751.

<sup>87</sup> *Matt J. Ward Co. v. Goelet*, 230 Fed. 979, 145 C. C. A. 173; *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543; *Mrs. K. Edwards & Sons v. Farve*, 110 Miss. 864, 71 So. 12.

<sup>88</sup> *Buckey v. Continental Gin Co.*, 113 Ark. 15, 166 S. W. 744; *Bonner v. Kimball & Co. Lumber Co.*, 114 Ark. 42, 169 S. W. 242; *Collins v. Snow*, 218 Mass. 542, 106 N. E. 148; *McClanahan v. Otto Marmet Coal & Co.*, 74 W. Va. 543, 82 S. E. 752. The test as to whether a contract is within the statute is whether at the time of such agreement it could have been performed within a year, and not

whether in fact such contract was so performed; hence, if performance within the year was possible, the contract is not within the statute, but it is within the statute if by its terms it could not possibly be performed within a year: *Mutual Life Ins. Co. v. Ritsher*, 196 Ill. App. 27.

<sup>89</sup> *Myers v. Saltry*, 163 Ky. 481, 73 S. E. 1138, Ann. Cas. 1916E, 1134n.

<sup>90</sup> *Young Men's Christian Assn. v. Estell*, 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (N. S.) 783, Ann. Cas. 1914D, 136; *Cox v. Baltimore & C. Co.*, 180 Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453, and note (even though it is a contract of permanent employment for life); *East Tennessee Tel. & Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543, and note; *Adair v. Stallings* (Tex. Civ. App.), 165 S. W. 140; note in Ann. Cas. 1916E, 1134, 1136.

ment or the like to continue during life are not within the statute, as they may terminate and be performed within a year upon the contingency of death of a party.<sup>91</sup>

§ 1287. Statute applies to contracts which can not possibly or reasonably be performed within a year.<sup>92</sup>

§§ 1289, 1290. Performance on one side within year—Sufficiency a question of construction.—Complete performance on one side, within a year, of a contract not to be performed within a year is generally held sufficient to take the case out of the statute as to both parties.<sup>93</sup> But part performance, not complete on either side, will not take it out of the statute,<sup>94</sup> although a party who has performed services under such a contract can usually recover so far as he has performed,<sup>95</sup> some courts holding that it is taken out of the statute to that extent<sup>96</sup> and others holding that the recovery must be upon the quantum meruit.<sup>97</sup>

§§ 1291, 1292. Seventeenth section of statute—Scope.—A contract for sale of corporate stock is one for the sale of goods, wares or merchandise, within the statute.<sup>98</sup>

<sup>91</sup> *Pierson v. Kingman Milling Co.*, 91 Kans. 775, 139 Pac. 394, 92 Kans. 468, 140 Pac. 1033; *Waggener v. Howsley*, 164 Ky. 113, 175 S. W. 4; *Lipton v. Lipton*, 55 Tex. Civ. App. 192, 118 S. W. 842 (contract to be performed on death of person); ante § 1284.

<sup>92</sup> *East Tennessee Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S. W. 530, Ann. Cas. 1915C, 543, and note; also ante § 1281.

<sup>93</sup> *Diamond v. Jacquith*, 14 Ariz. 119, 125 Pac. 712, L. R. A. 1916D, 880, and note; *Long v. Long*, 162 Cal. 427, 122 Pac. 1077; *Re Chamberlain*, 146 App. Div. 583, 131 N. Y. S. 245.

<sup>94</sup> *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, 146 S. W. 130; *Union Sav. & Co. v. Krumm*, 88 Wash. 20, 152 Pac. 681. See, however, *Bagwell v. Milam*, 9 Ga. App. 315, 71 S. E. 684 (Georgia statute expressly makes exception in case of part performance); *Heery v. Reed*, 80 Kans. 380, 102 Pac. 846.

<sup>95</sup> *Smith v. Chase & Co. Piano Mfg. Co.*, 185 Mich. 313, 151 N. W. 1025; note in L. R. A. 1916D, 895.

<sup>96</sup> *Halmel v. Highland Park College*, 171 Iowa 492, 152 N. W. 571; *Smith v. Chase & Co. Piano Mfg. Co.*, 175 Mich. 371, 141 N. W. 563.

<sup>97</sup> *Lally v. Crookston Lumber Co.*, 85 Minn. 257, 88 N. W. 846; *Thatcher v. New York & C. R. Co.*, 153 App. Div. 186, 138 N. Y. S. 463. See also *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125 Pac. 860, L. R. A. 1916D, 892, and note.

<sup>98</sup> *Stift v. Stiewel*, 91 Ark. 445, 125 S. W. 1008, 18 Ann. Cas. 597; *Russell v. Betts*, 107 Ark. 629, 156 S. W. 457; *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323; *Davis Laundry & Co. v. Whitmore*, 92 Ohio St. 44, 110 N. E. 518, Ann. Cas. 1917C, 988; *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 Pac. 1158, 51 L. R. A. (N. S.) 398, Ann. Cas. 1915D, 346; *Korner v. Madden*, 152 Wis. 646, 140 N. W. 325.

**§ 1293. Transactions construed as contracts for sale.—**

An oral contract by a large stockholder in which he agrees upon a qualified sale of stock by him as agent, to refund the purchase-money, and to take back the stock personally if the purchaser should become dissatisfied, is not one for the sale of such stock from the purchaser to the stockholder and is not within the statute.<sup>99</sup> But a contract arising from an order and acceptance in the ordinary course of trade in buying and selling, such as an order for shoes, is one of sale within the statute even though they have to be manufactured.<sup>1</sup>

**§ 1294. Work and labor contracts distinguished from contracts of sale.—**A contract to manufacture and install a soda water fountain according to special design or plan, prepared by another, is not a contract for the sale of goods or chattels within the statute, but is one for work and labor not required to be in writing.<sup>2</sup>

**§ 1296. New York rule.**<sup>3</sup>—The memorandum is not required to constitute the contract in itself.<sup>4</sup>

**§ 1302. Form of memorandum.**—Thus, a memorandum order sent by the buyer's agent and accepted by the seller satisfies the statute where the amount, price, and place of delivery are

<sup>99</sup> Schaefer v. Strieder, 203 Mass. 467, 89 N. E. 618. See also Trenholm v. Klopfer, 88 Nebr. 236, 129 N. W. 436; Clapp v. Gilt Edge Consol. Mines Co., 33 S. Dak. 123, 144 N. W. 721. But compare Clement v. Rowe, 33 S. Dak. 499, 146 N. W. 700; Korrer v. Madden, 152 Wis. 646, 140 N. W. 325.

<sup>1</sup> Krippendorf-Dittman Co. v. Hunt-Riddick Mercantile Co. (Mo. App.), 190 S. W. 44. But an order for manufacture of goods for future delivery is not: Greenhut Cloak Co. v. Oreack, 130 Minn. 304, 153 N. W. 613. Sale for future delivery is within statute: Peck v. Abbott & Co., 223 Mass. 423, 111 N. E. 890. See also generally: Simpson v. Schaefer (Ga. App.), 93 S. E. 254; Elmore v. Busseno, 175 App. Div. 233, 161 N. Y. S. 533.

<sup>2</sup> Bond v. Bourk, 54 Colo. 51, 129 Pac. 223, 43 L. R. A. (N. S.) 97, and note, Ann. Cas. 1914C, 599. See also

to the same effect Rantoul Co. v. Claremont Paper Co., 196 Fed. 305, 116 C. C. A. 125. But compare Lesan Advertising Co. v. Castleman, 165 Mo. App. 575, 148 S. W. 433. In Iowa the statute is expressly made inapplicable to contracts for sale of personalty where the seller must expend labor, skill or money in procuring or producing it, and a contract to buy corn which the seller was to obtain from farmers is not invalid under the statute: Sugar Refining Co. v. Horras (Iowa), 158 N. W. 602.

<sup>3</sup> R. & L. Co. v. Metz, 160 N. Y. S. 145; Schneider v. Lezinsky, 162 N. Y. S. 769.

<sup>4</sup> Spiegel v. Lowenstein, 162 App. Div. 443, 147 N. Y. S. 655 (written contract of purchase of specified quantity at special price on "usual terms" will satisfy the statute).

stated.<sup>5</sup> And a memorandum confirming a sale may be sufficient.<sup>6</sup> A written memorandum of a broker representing both parties, or that of an auctioneer, if sufficient in substance will take the contract of sale out of the statute.<sup>7</sup>

§ 1303. **Correspondence as evidence of contract.**—Letters or other written correspondence in the way of telegrams, or letters and telegrams, may together constitute a sufficient memorandum to satisfy the statute.<sup>8</sup>

§ 1305. **The contents of the memorandum.**—The memorandum must be so complete in itself, or with the aid of other writings referred to, as not to require resort to parol evidence to ascertain the contract.<sup>9</sup>

§ 1306. **Names of parties must be shown.**<sup>10</sup>

<sup>5</sup> McCaffrey Bros. Co. v. Hart-Williams Coal Co., 96 Nebr. 774, 148 N. W. 966. See also Hager v. Hennegberger, 83 Misc. 417, 145 N. Y. S. 152 (signature of buyer's agent sufficient).

<sup>6</sup> Williams v. De Soto Oil Co., 213 Fed. 194, 129 C. C. A. 538.

<sup>7</sup> T. H. Brooke & Co. v. Cunningham Bros., 19 Ga. App. 21, 90 S. E. 1037; Thomas Henderson & Co. v. Baron, 164 N. Y. S. 697; Wright v. Harrison, 137 Tenn. 157, 192 S. W. 716. For corporate minutes held insufficient in action between stockholders on mutual agreement to pay corporate debts, see: Asbury v. Mauney (N. Car.), 92 S. E. 267. As to note as memorandum within the statute, see Ann. Cas. 1914D, 74.

<sup>8</sup> Thomas J. Baird Inv. Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217; Nickerson v. Bridges, 216 Mass. 416, 103 N. E. 939; Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791; United Securities Co. v. Tilley, 177 Mo. App. 113, 163 S. W. 281 (telegram); Truskett v. Rice Bros. & Co. (Mo. App.), 180 S. W. 1048; Roskam-Scott Co. v. Thomas, 175 App. Div. 84, 161 N. Y. S. 776; John C. Wiarda & Co. v. Independent Chemical Co., 162 N. Y. S. 158. But a complete and binding contract can be so created only where the parties, subject-matter, and terms may be ascertained without the aid of parol

testimony: Paul v. Graham, 193 Mich. 447, 160 N. W. 616. A sufficient memorandum may consist of a letter from owner to his agent offering to lease on stated terms, followed by oral acceptance: Willey v. Goulding, 99 Kans. 323, 161 Pac. 611. See also Dodge v. Root, 83 Ore. 21, 162 Pac. 254. See further on this subject, note in Ann. Cas. 1914C, 1010.

<sup>9</sup> Hamby v. Truitt, 14 Ga. App. 515, 81 S. E. 593; Blumauer-Frank Drug Co. v. Young (Idaho), 167 Pac. 21; Paul v. Graham, 193 Mich. 447, 160 N. W. 616; Llewellyn v. Sunnyside Coal Co., 242 Pa. 517, 89 Atl. 575. See also Thos. J. Baird Inv. Co. v. Harris, 209 Fed. 291, 126 C. C. A. 217; Wetopsky v. New Haven Gas & Co., 88 Conn. 1, 90 Atl. 30; Mumeas v. Gay, 217 Mass. 403, 104 N. E. 961; Watkins v. Watkins, 82 N. J. Eq. 483, 89 Atl. 253; Lusky v. Keiser, 128 Tenn. 705, 164 S. W. 777; Wright v. Harrison, 137 Tenn. 157, 192 S. W. 716.

<sup>10</sup> Poel v. Brunswick-Balke & Co., 159 App. Div. 365, 144 N. Y. S. 725. Where contract within statute is made by agent the principal can not sue on it unless his name appears in the memorandum or his identity so appears therein that it can not be disputed: Lovesy v. Palmer, L. R. (1916) 2 Ch. 233. Release of distributive share of an estate need not mention name of a grantee, nor de-

§ 1307. Description of subject-matter—Personal property.<sup>11</sup>

§ 1308. Contents of memorandum—Admissibility of evidence aliunde.—The doctrine of this section is illustrated by the cases cited in the next following section. Another matter that may well be mentioned under this section is as to the admissibility of parol evidence where the memorandum has been lost. The prevailing, and almost unquestioned, rule is that if there was once a written memorandum fully complying with the statute such loss may be shown and a recovery be had in a proper case on clear and convincing parol proof of its making and contents.<sup>12</sup>

§§ 1309-1312. Contents of memorandum — Descriptions of real estate.—A memorandum describing the real estate merely as a certain number of acres out of a larger tract is not sufficient to satisfy the statute of frauds, and parol evidence is not admissible to show out of what part the particular number of acres should be taken.<sup>13</sup> But the statute is satisfied by writings referring to the property as a farm of so many acres known under a certain designation in a certain locality, as, for instance, the “Joe Shelby or Anderson farm of 800 acres, near Aullville,” where it appears that there is such a farm of that size locally so known.<sup>14</sup>

§§ 1313, 1314. Whether the memorandum must show the consideration—Weight of authority.—In Alabama, as

scribe the real estate: *Koenig v. Koenig*, 92 Kans. 761, 142 Pac. 261.

<sup>11</sup> *Langstroth v. J. C. Turner Cypress Lumber Co.*, 162 App. Div. 818, 148 N. Y. S. 224 (memorandum held sufficient).

<sup>12</sup> *Van Boskerck v. Torbert*, 184 Fed. 419, Ann. Cas. 1916E, 171, and note.

<sup>13</sup> *Roberts v. Bennett*, 166 Ky. 588, 179 S. W. 605, L. R. A. 1916C, 1098. For other descriptions held insufficient, see: *Mims v. Gillis*, 19 Ga. App. 53, 90 S. E. 1035; *Meremac Portland Cement & Co. v. Kreis (Mo.)*, 168 S. W. 1148; *Howard v. Innes*, 253 Pa. 593, 98 Atl. 761; *Clegg v. Brannan (Tex. Civ. App.)*, 190 S. W. 812; *Hannon v. Scanlon*, 158 Wis. 357, 148 N. W. 1082.

<sup>14</sup> *Anderson v. Hall (Mo.)*, 188 S.

W. 79. See also *Matherley v. Wright*, 171 Ky. 264, 188 S. W. 385; *Laforme v. Bradley*, 77 N. H. 128, 88 Atl. 1000. Where the owner gave another written authority containing a partially incorrect description to sell a farm, and the latter afterward purchased the farm himself, taking a receipt for the first payment, signed by defendant, describing the farm and referring to the authority to sell, this was sufficient within statute of frauds: *Meek v. Hurst (Mo.)*, 191 S. W. 68. For other descriptions held sufficient, see: *Harvey v. Bross*, 216 Mass. 57, 104 N. E. 350; *Tracy v. Berridge*, 180 Mo. App. 220, 167 S. W. 1176; *Beaton v. Fussell (Tex. Civ. App.)*, 166 S. W. 458; *Spaulding v. Smith (Tex. Civ. App.)*, 169 S. W. 627.

well as in many other states, the statute requires the memorandum to show the consideration, and an agreement can not be taken out of the statute by parol evidence of a valuable consideration.<sup>15</sup> The memorandum contemplated by some statutes, however, such as the Oregon statute, is not required to show the consideration, at least where the law imports a consideration.<sup>16</sup> And, in any event, the authorities are almost unanimous in holding that the words "for value received" constitute a sufficient showing of the consideration.<sup>17</sup>

**§§ 1317, 1318. Form of signature—Place of signature.—**The signature required by the statute may be either written or printed.<sup>18</sup> It need not be subscribed at the bottom of the contract or memorandum.<sup>19</sup>

**§ 1319. Who must sign.—**Nearly all of the statutes require the memorandum to be signed only by the party or parties to be charged, or his or their authorized agent, and this does not necessitate its being signed by the other party.<sup>20</sup> In many states the authority of an agent who makes a contract for the

<sup>15</sup> *Dillworth v. Holmes Furniture &c. Co.* (Ala. App.), 73 So. 288. See also *Saunders v. Bank of Mecklenburg*, 112 Va. 443, 71 S. E. 714, Ann. Cas. 1913B, 982, showing the authorities to be nearly equally divided on the question where the statute requires the "agreement" to be shown in writing, but that in a majority of jurisdictions either because a different view is taken or because, as in many of them, the statute is different, the consideration is not required to be shown in the memorandum.

<sup>16</sup> *Taggart v. Hunter* (Ore.), 152 Pac. 871.

<sup>17</sup> *Dillworth v. Holmes Furniture &c. Co.* (Ala. App.), 73 So. 288; *Jansen v. Kuenzie*, 145 Wis. 473, 130 N. W. 450, Ann. Cas. 1912A, 1241, and note. A recital of the purchase of corporate stocks and payment of price and agreement for payment of percentage of price annually by vendors, sufficiently shows consideration for promise of vendors: *In re Sim's Estate* (Minn.), 160 N. W. 765. But a deed, deposited with a third person for delivery to grantees upon their payment of the price, although re-

citing a consideration of \$10, is not a memorandum of the grantor's oral contract to sell for \$3,000 sufficient to satisfy the statute of frauds: *Holland v. McCarthy*, 173 Cal. 597, 160 Pac. 1069.

<sup>18</sup> *Kilday v. Schancupp*, 91 Conn. 29, 98 Atl. 335, L. R. A. 1917A, 151.

<sup>19</sup> *Kilday v. Schancupp*, 91 Conn. 29, 98 Atl. 335, L. R. A. 1917A, 151; *Burris v. Starr*, 165 N. Car. 657, 81 S. E. 929, Ann. Cas. 1914D, 71n. For signatures held sufficient, see: *California &c. Land Co. v. Cuddeback*, 27 Cal. App. 450, 150 Pac. 379; *McCrea v. Bentley*, 154 N. Y. S. 174. But where several persons on one side prepared an agreement for the sale of land, which in the body of the agreement recited their names merely for purposes of identification, they were held not to have signed it so as to be binding against them under the statute of frauds: *Sutherland v. Munsey*, 119 Va. 791, 89 S. E. 882. See also *Willebrandt v. Sisters of Mercy* (Mich.), 152 N. W. 85; *Harby v. Wilson* (S. Car.), 90 S. E. 183.

<sup>20</sup> *Le Vine v. Whitehouse*, 37 Utah

sale of real estate and signs for his principal must be in writing,<sup>21</sup> but in others parol authority may be given an agent to make such a contract.<sup>22</sup>

**§ 1320. Who is party to be charged.**—The prevailing rule is that “the party to be charged” is the party, whether vendor or vendee, against whom the contract is sought to be enforced in the particular action, and that it is sufficient if the memorandum be signed by him, even though he could not enforce it against the other party who had not signed.<sup>23</sup>

**§ 1321. Vendor as party to be charged.**—If the vendor is defendant he would be the party to be charged, and in some jurisdictions it is held, or stated without qualification in the decisions, that the vendor is the party to be charged and the only one who is required to sign.<sup>24</sup>

**§§ 1324, 1325. Time when memorandum must be made.**—The memorandum is not required to be contemporaneous with the making of the contract.<sup>25</sup> It may consist of letters written at different times,<sup>26</sup> and it may be made at any time before suit is

260, 109 Pac. 2, Ann. Cas. 1912C, 407, and note; also note in 43 L. R. A. (N. S.) 410. Authorities cited in the next following sections are to the same effect.

<sup>21</sup> *Holland v. McCarthy*, 173 Cal. 597, 160 Pac. 1069; *McRae v. Ross* (Cal.), 148 Pac. 215; *Springer v. City Bank & Co. (Colo.)*, 149 Pac. 253; *Kelly v. Fischer*, 263 Ill. 184, 105 N. E. 21 (but newspaper notice and handbills signed by landowner held sufficient to authorize auctioneer to make written memorandum of sale); *Northwestern University v. Hughes*, 183 Ill. App. 236 (lease for 5 years); *Smith v. Schriver*, 91 Kans. 582, 138 Pac. 584; *Llewellyn v. Sunnyside Coal Co.*, 242 Pa. 517, 89 Atl. 575. Seller's agent can not act as agent for buyer so as to bind latter in signing memorandum for sale of goods required to be in writing: *Happ Bros. Co. v. Hunter Mfg. & Co.*, 145 Ga. 836, 90 S. E. 61.

<sup>22</sup> *Beckman v. Sonntag Inv. Co.*, 67 Fla. 293, 64 So. 948.

<sup>23</sup> *Beckwith v. Clark*, 188 Fed. 171,

110 C. C. A. 207; *Matthis v. Weir* (Del. Ch.), 84 Atl. 878; *Knapp v. Beach*, 52 Ind. App. 573, 101 N. E. 37; *Brown v. Hobbs*, 154 N. Car. 544, 70 S. E. 906; *Shillinglaw v. Sims*, 86 S. Car. 76, 67 S. E. 906; *Black v. Hanz* (Tex.), 146 S. W. 309; *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195; note in Ann. Cas. 1912C, 416.

<sup>24</sup> *Wren v. Cooksey*, 147 Ky. 825, 145 S. W. 1116; *Kaiser v. Jones*, 157 Ky. 607, 163 S. W. 741; *Lusky v. Keiser*, 128 Tenn. 705, 164 S. W. 777 (no matter whether party attempted to be held in action based on memorandum or not). See also *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939; *Gregory Co. v. Shapiro*, 125 Minn. 81, 145 N. W. 791; *Iske v. Iske*, 95 Nebr. 603, 146 N. W. 918.

<sup>25</sup> *Marks v. Cowdin*, 175 App. Div. 700, 162 N. Y. S. 567. See also *Allan v. Wescott*, 115 Maine 180, 98 Atl. 630.

<sup>26</sup> *Thomas J. Baird Inv. Co. v. Harris*, 209 Fed. 291, 126 C. C. A. 217; ante § 1303



brought.<sup>27</sup> Indeed, pleadings in the suit in which the question arises, such as answers admitting the contract alleged and not claiming the benefit of the statute, have been held sufficient to satisfy it.<sup>28</sup>

§ 1326. **Necessity for delivery of memorandum.**—There is conflict among the authorities as to whether the memorandum relied on must have been delivered. The question may depend to some extent upon the nature of the transaction and of the memorandum, circumstances under which it is produced, and the like, but it is impossible to reconcile all the authorities on any basis or distinction. A number of recent authorities hold that an undelivered deed, especially where it contains no recital that it was made in pursuance of a previous contract of sale, is not sufficient to satisfy the statute.<sup>29</sup> But there are other recent cases holding that a deed placed in escrow may be sufficient,<sup>30</sup> and quite a number applying the rule that delivery of the memorandum is unnecessary to various agreements and writings.<sup>31</sup>

§ 1328. **Taking contract out of operation of seventeenth section—Receipt and acceptance.**—Where nothing has been given as earnest or by way of payment on goods sold on a parol contract for the sale of goods within the seventeenth section of the statute, there must be both delivery and acceptance to take it out of the statute.<sup>32</sup> But where there is such delivery and acceptance as is required the statute is satisfied.<sup>33</sup>

<sup>27</sup> Gate City Bank v. Elliott (Mo.), 181 S. W. 25.

<sup>28</sup> Muller v. Brantigam, 84 N. J. Eq. 574, 94 Atl. 584. See also Mussey v. Shaw, 274 Ill. 351, 113 N. E. 605.

<sup>29</sup> Lowther v. Potter, 221 Fed. 881, 137 C. C. A. 451; Hain v. Burton, 118 Mo. App. 577, 94 S. W. 589; Sursa v. Cash, 171 Mo. App. 396, 156 S. W. 779. A deed placed in escrow is not a sufficient memorandum in writing of the contract to satisfy the statute of frauds, where it does not state the terms of sale: Main v. Pratt, 276 Ill. 218, 114 N. E. 576. See also for other cases holding delivery of the memorandum necessary: Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; Matter of Estate of Edwall, 75 Wash. 391, 134 Pac. 1041.

<sup>30</sup> Schneider v. Anderson, 75 Kans.

11, 88 Pac. 525, 121 Am. St. 356; Moore v. Ward, 71 W. Va. 393, 76 S. E. 807, Ann. Cas. 1914C, 263n.

<sup>31</sup> Ryder v. Johnson, 153 Ala. 482, 45 So. 181; Barr v. Johnson, 102 Ark. 377, 144 S. W. 527; Ames v. Ames, 46 Ind. App. 597, 91 N. E. 509; Tharaldson v. Everts, 87 Minn. 168, 91 N. W. 467.

<sup>32</sup> Van Boskerck v. Torbert, 184 Fed. 419, Ann. Cas. 1916E, 171; Gard v. Ramos, 23 Cal. App. 303, 138 Pac. 108; Beedy v. Brayman Wooden Ware Co., 108 Maine 200, 79 Atl. 721, 36 L. R. A. (N. S.) 76n, Ann. Cas. 1913B, 273; Gold v. Gross, 146 N. Y. S. 164; Friedman v. Plous, 158 Wis. 435, 149 N. W. 218.

<sup>33</sup> Munroe v. Mundy, 164 Iowa 707, 146 N. W. 819; Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316; Davis Laundry &c. Co. v. Whit-

§ 1330. **Mere words insufficient.**<sup>34</sup>

§§ 1331, 1332. **Acts constituting acceptance — Illustrations.**—Where nearly all the stock of a corporation was sold under a parol contract and delivered to the purchaser, who thereupon took possession and operated the plant for two weeks, this was held to justify a jury in finding an acceptance taking the case out of the statute.<sup>35</sup> So, the act of the buyer of goods in offering them for sale is sufficient to show an acceptance.<sup>36</sup>

§ 1333. **Acceptance of part of goods.**—Delivery and acceptance of part of the goods sold under an entire and indivisible parol contract will satisfy the statute.<sup>37</sup>

§ 1335. **Constructive delivery and acceptance.**—A symbolic delivery is sufficient in a proper case,<sup>38</sup> and there may be a sufficient constructive delivery even not by symbol.<sup>39</sup>

§ 1337. **Delivery at a place or to a person designated by the buyer.**<sup>40</sup>

§ 1340. **Question for jury.**—The question as to whether a written memorandum is sufficient to take a prior oral agreement out of the statute of frauds where the evidence is conflicting as to such agreement and its terms, is for the jury.<sup>41</sup>

more, 92 Ohio St. 44, 110 N. E. 518, Ann. Cas. 1917C, 988n; First Nat. Bank v. G. Geske & Co., 85 Wash. 477, 148 Pac. 593, Ann. Cas. 1917B, 564.

<sup>34</sup> Friedman v. Plous, 158 Wis. 435, 149 N. W. 218.

<sup>35</sup> Davis Laundry & Co. v. Whitmore, 92 Ohio St. 44, 110 N. E. 518, Ann. Cas. 1917C, 988.

<sup>36</sup> Beedy v. Brayman Wooden Ware Co., 108 Maine 200, 79 Atl. 721, 36 L. R. A. (N. S.) 76n, Ann. Cas. 1913B, 273, and note.

<sup>37</sup> Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

<sup>38</sup> Note in Ann. Cas. 1917B, 566, 567. See also Lewis-Sunas & Co. v. Kee, 27 Cal. App. 135, 148 Pac. 973.

<sup>39</sup> Wilson v. Hotchkiss, 171 Cal. 617, L. R. A. 1916F, 389n, 154 Pac. 1, Ann. Cas. 1917B, 570; Smith v. Bloom, 159 Iowa 592, 141 N. W. 32.

As to necessity of acts of buyer already in possession to show possession as owner rather than under former relation, see: Young v. Ingalsbe, 208 N. Y. 504, 102 N. E. 590.

<sup>40</sup> Munro v. Mundy, 164 Iowa 707, 146 N. W. 819; First Nat. Bank v. G. Geske & Co., 85 Wash. 477, 148 Pac. 593, Ann. Cas. 1917B, 564n.

<sup>41</sup> Kleman v. Anheuser-Busch Brewing Assn., 237 Fed. 993, 150 C. A. 643. Evidence of sale of goods, to be delivered at two stores, single, so that acceptance of those delivered at one store would take the contract out of the statute of frauds, held to make a question for the jury: Krippeendorf-Dittman Co. v. Hunt-Riddick Mercantile Co. (Mo. App.), 190 S. W. 44. See also Schneider v. Lezinsky, 162 N. Y. S. 769; Hewey v. Andrews, 82 Ore. 448, 159 Pac. 1149, 161 Pac. 108.

§ 1341. **Earnest or part payment.**—Where one orally agreed to buy the stock of another and employ him, the giving up of a position by the latter in order to go to work for the former was held to be neither part payment nor the giving of something in earnest to bind the bargain.<sup>42</sup>

<sup>42</sup> *Hewson v. Peterman Mfg. Co.*, 123 Md. 447, 91 Atl. 577, 76 Wash. 600, 136 Pac. 1158, 51 L. Ann. Cas. 1916C, 339n. See as to *R. A. (N. S.)* 398n, Ann. Cas. 1915D, 346n. For what is sufficient under Uniform Sales Act, see *Willard v. Hessling v. Welsh*, 147 N. Y. S. 44. when check is not part payment:

## CHAPTER XXXI

### IMPLIED CONTRACTS

§ 1355. **Implied and quasi contracts—Introductory.**—The nature of a quasi contract, or one implied in law, as distinguished from one implied in fact, has already been considered,<sup>1</sup> and, as already shown, it is not a true contract in the ordinary sense, but is one raised by the law regardless of the actual intention of the parties. The law supplies the intention when it imposes the duty, and if there is no duty or obligation in equity or good conscience to perform a duty, no such intention is implied and no implied contract is raised.<sup>2</sup>

§ 1357. **Duties imposed by statute.**—When one becomes a stockholder and member of a corporation there is an implied contract to pay assessments as made by the directors in accordance with the statute.<sup>3</sup>

§ 1358. **Acts of parties.**<sup>3a</sup>—It is a general rule that a party must have had some choice or opportunity to refuse before an implied contract will be raised against him, or, in other words, that no obligation will be implied in law from an act which is not voluntary.<sup>4</sup> But, although it is the general rule that a contract will not be implied against one merely because he has received some benefit where he had no opportunity to elect or refuse, it may be implied where the act from which he is benefited is the natural result of his own conduct and he voluntarily receives and retains such benefit.<sup>5</sup> Where a person quarantined by a township

<sup>1</sup> Ante § 18. See also *Lombard v. Rahilly*, 127 Minn. 449, 149 N. W. 950; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865.

<sup>2</sup> *Brown's Est. v. Stair*, 25 Colo. App. 140, 136 Pac. 1003; *Grice v. Todd* (Va.), 91 S. E. 609, 610. No implied promise to pay for half a division wall is implied against one who had no interest in the property benefited and merely consented to the adjoining owner's raising it and entering on former's property to do part

of the work: *Chesebro v. Lockwood*, 88 Conn. 219, 91 Atl. 188.

<sup>3</sup> *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244, 246.

<sup>3a</sup> [Main section cited in *Yoakum v. Gossett* (Tex. Civ. App.), 200 S. W. 582, 583.]

<sup>4</sup> *Grice v. Todd* (Va.), 91 S. E. 609, 611.

<sup>5</sup> *Equitable Trust Co. v. Wabash R. Co.*, 244 Fed. 66. For cases in which an implied contract was held to exist, see: *Pennsylvania R. Co. v.*

board requested the chairman of the board to have groceries sent to his farm from a neighboring village, it was held that such person was liable on the implied contract to pay the transportation charges, no matter whether the quarantine was legal or not.<sup>6</sup>

§§ 1359, 1360. **Contracts not implied by law where express contracts—Limits of rule.**—As a general rule the law will not raise an implied contract where there is a subsisting valid express contract covering the matter, and, in most jurisdictions, in an action on an express contract there can be no recovery on an implied contract.<sup>7</sup> But where an heir, with the knowledge and consent of the other heirs, incurred expense and performed valuable services in the adjustment and collection of funds of the estate located in a foreign country, it was held that he could recover from the other heirs for such expenses and a reasonable compensation, notwithstanding an express agreement, mutually entered into after some of the collections had been made, concerning subsequent collections and distribution, reciting a consideration of love and affection and making no mention of compensation.<sup>8</sup>

Titus, 216 N. Y. 17, 109 N. E. 857, Ann. Cas. 1917C, 862, and note (implied contract of consignee to pay freight); School Board of Lipps Dist. No. 4 of Wise County v. Saxon Lime & C. Co. (Va.), 93 S. E. 579; notes in L. R. A. 1917A, 455 (implied covenants); L. R. A. 1917B, 681; 1917D, 265 (implied contracts to pay for services); 1917D, 678 (implied contract of water company to furnish adequate supply); and cases cited in subsequent sections of this chapter. For acts from which contract has been implied in fact, see: Park-Robertson Hardw. Co. v. Copeland, 11 Ala. App. 447, 66 So. 880; E. C. Atkins & Co. v. Kirk, 187 Ill. App. 310; Schade v. Muller, 75 Ore. 225, 146 Pac. 144; Dowling v. Charleston & C. R. Co. (S. Car.), 81 S. E. 313. Where the owner of an automobile takes it to a garage to be repaired without any agreement as to compensation, the law implies a promise to pay what the repairs are reasonably worth, but does not raise an implied promise to pay for repairs at the factory where the garage owner sent it for repairs after a fire in

the garage: Helber v. Schaible, 183 Mich. 379, 150 N. W. 145. Where one is incompetent to make an express contract, such incompetency has also been held fatal to any theory of an implied contract: Curved Electrotype Plate Co. v. United States, 50 Ct. Cl. 258.

<sup>6</sup> Plymouth Tp. v. Klug, 26 N. Dak. 607, 145 N. W. 130. For further illustrations, see also notes in 50 L. R. A. (N. S.) 1223; 51 L. R. A. (N. S.) 406, 52 L. R. A. (N. S.) 172.

<sup>7</sup> Keehn v. Moist, 192 Ill. App. 520; Bierkamp v. Benthien, 173 Iowa 436, 155 N. W. 819; Yancey v. Boyce, 28 N. Dak. 187, 148 N. W. 539, Ann. Cas. 1916E, 258n; Lowe v. Jensen, 22 N. Dak. 148, 132 N. W. 661, and authorities there cited. But compare Matthews v. Myers (Ind. App.), 115 N. E. 959; Scholz v. Schenck, 174 Ind. 186, 91 N. E. 730. And see generally Ray v. Missouri & C. R. Co., 90 Kans. 244, 133 Pac. 847.

<sup>8</sup> Marney v. Cowley County Nat. Bank, 92 Kans. 129, 139 Pac. 1021, Ann. Cas. 1916B, 195n.

§ 1362. **Accounts stated.**<sup>9</sup>

§ 1363. **Work and services.**—Many cases illustrate the doctrine of this section under which a contract to pay the reasonable value of work and labor is implied where the services are rendered upon request or the benefits knowingly received and retained under such circumstances as show that there was expectation of compensation and a resulting obligation.<sup>10</sup> But no such contract is implied where there is no such knowledge or ground for believing that compensation was expected or should be made,<sup>11</sup> nor, as a rule, can there be any recovery on the quantum meruit where there is a valid express contract definitely fixing the amount of compensation.<sup>12</sup> A contract to pay what services are reasonably worth will be implied the same where they are performed and accepted under an express agreement within the statute of frauds and not taken out of it as if there were no express contract.<sup>13</sup> And where an express contract is unenforceable because too vague or invalid for some other cause, but the services are not illegal, there may be a recovery on the quantum meruit for services rendered and accepted.<sup>14</sup>

§ 1366. **Where law will not imply a promise owing to relationship of parties.**—Where the relationship of the parties is such as to indicate or raise the presumption that they lived to-

<sup>9</sup> See elaborate note in 45 L. R. A. (N. S.) 534-538; also *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, 161 Pac. 1197, L. R. A. 1917C, 445, and note; note in Ann. Cas. 1915B, 924.

<sup>10</sup> *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855; *Tennessee Coal & Co. v. Butler*, 187 Ala. 51, 65 So. 804; *Washington & Co. v. Moss*, 127 Md. 12, 96 Atl. 273; *McCurdy v. Boring*, 27 N. Dak. 1, 146 N. W. 730.

<sup>11</sup> *Brunswick v. Sims*, 14 Ga. App. 315, 80 S. E. 730; *Hill v. Alber*, 261 Ill. 124, 103 N. E. 612; *Wood v. Lewis' Estate*, 183 Mo. App. 553, 167 S. W. 666. Contract for extra compensation of household servant is not implied from fact of increase of duties by increase in size of family: *Leahy v. Cheney*, 90 Conn. 611, 98 Atl. 132, L. R. A. 1917D, 809n.

<sup>12</sup> *Fuchs v. Standard Thermometer Co.*, 178 Mich. 37, 144 N. W. 484; *Raby v. Cozad*, 164 N. Car. 287, 80

S. E. 415. But there may be recovery on implied contract where express agreement is void: *Carroll v. Palmer Mfg. Co.*, 181 Mich. 280, 148 N. W. 390. So, where minds of parties did not meet as to meaning of word used in determining compensation there may be recovery of reasonable value of services performed: *Law Reporting Co. v. Texas Grain & Co.* (Tex. Civ. App.), 168 S. W. 1001.

<sup>13</sup> *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125 Pac. 860, L. R. A. 1916D, 892, and note. Some courts, however, allow the price agreed on to be shown and a number of them hold that it even determines the measure of value. Note in L. R. A. 1916D, 892.

<sup>14</sup> *Warren v. Inter State Realty Co.*, 192 Ill. App. 438; *Rochester v. Campbell*, 184 Ind. 421, 111 N. E. 420; *Washington & Co. v. Moss*, 127 Md. 12, 96 Atl. 273; *Carroll v. Pal-*

gether as one family and a matter of mutual convenience, the law will not imply a contract to pay for services rendered in that relation.<sup>15</sup> But facts and circumstances may overcome the presumption that the services were gratuitous and show either an express contract or that the parties intended a pecuniary recompense.<sup>16</sup>

§ 1367. **Parent and child.**—Services rendered by a daughter to a mother living with her are presumed to be gratuitous and proof of a statement by the mother of a desire to compensate the daughter is not sufficient.<sup>17</sup> But, while there is a presumption that services of a child at home were gratuitous, where a father promised his daughter to pay her for household services a few months before her majority and she continued to render such services for years afterward she was held entitled to recover on the implied contract arising from performance and acceptance of the services under the circumstances.<sup>18</sup>

§ 1369. **Same subject continued—Further illustrations.**—Contrary to the decision in a Massachusetts case referred to in the original section, it has since been held by another court, with what seems to be the better reason, that a woman deceived into marriage with a man who had a wife living may recover from his estate the value of services rendered to him as upon an implied contract.<sup>19</sup>

§ 1370. **Same subject continued—During illicit cohabitation.**<sup>20</sup>

mer Mfg. Co., 181 Mich. 280, 148 N. W. 390.

<sup>15</sup> *Bolling v. Bolling's Admr.*, 146 Ky. 313, 142 S. W. 387, Ann. Cas. 1913C, 306, and note (nephew and wife living with uncle); *Allen v. Allen*, 158 Ky. 759, 166 S. W. 211; *Wood v. Lewis' Estate*, 183 Mo. App. 553, 167 S. W. 666 (cousin living in family); *Merrick v. Ditzler*, 91 Ohio St. 256, 110 N. E. 493. See also *Farmer v. Underwood*, 164 Iowa 587, 146 N. W. 18; *Taylor v. George*, 176 Mo. App. 215, 161 S. W. 1187. But compare *In re Estate of Rohrer*, 160 Cal. 574, 117 Pac. 672, Ann. Cas. 1913A, 479n.

<sup>16</sup> *Vogel v. Murphy*, 182 Ill. App.

631; *In re Pauley's Estate*, 174 Iowa 122, 156 N. W. 355; *Knight v. Martin*, 124 Minn. 191, 144 N. W. 941. See also *In re Estate of Rohrer*, 160 Cal. 574, 117 Pac. 672, Ann. Cas. 1913E, 479n.

<sup>17</sup> *Bishop v. Newman's Exr.*, 168 Ky. 238, 182 S. W. 165. See also *Norman v. Norman*, 168 Ky. 365, 182 S. W. 224.

<sup>18</sup> *Wiley v. Wiley* (Mo. App.), 182 S. W. 107.

<sup>19</sup> *Sanders v. Ragan*, 172 N. Car. 612, 90 S. E. 777, L. R. A. 1917B, 681n.

<sup>20</sup> *Gjurich v. Fieg*, 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916B, 111, and note.

§§ 1372-1374. **Money had and received.**<sup>21</sup>—The action for money had and received is based on the implied promise arising from the receipt of money which the defendant in equity and good conscience ought to pay to the plaintiff and not retain.<sup>22</sup> Privity of contract is not necessary.<sup>23</sup>

§ 1375. **When action may be maintained.**—One merely entitled to the possession of notes can not maintain an action for their value as for money had and received.<sup>24</sup> And a promise to repay money received will not ordinarily be implied, and this action can not be maintained, unless it appears that in equity and good conscience the party receiving it ought not to retain it.<sup>25</sup>

§ 1376. **Money lent.**<sup>26</sup>

§§ 1379, 1380. **Money paid—Receiving without consent of owner—Owner may proceed against one holding money.**—Where damages assessed for property taken under eminent domain stand in the place of such property, an action for money had and received may be maintained by the real owner to recover the money so paid from any one into whose hands it may have come.<sup>27</sup> So when a city clerk paid money to a subordinate in

<sup>21</sup> [Main section cited in dissenting opinion in *Steuerwald v. Richter*, 158 Wis. 597, 149 N. W. 692, 695.]

<sup>22</sup> *Knight v. Roberts*, 17 Ga. App. 527, 87 S. E. 809; *Taylor v. Currey*, 192 Ill. App. 502; *St. Louis Sanitary Co. v. Reed*, 179 Mo. App. 164, 161 S. W. 315. See also *Arkansas Nat. Bank v. Martin*, 110 Ark. 578, 163 S. W. 795; *Brown's Est. v. Stair*, 25 Colo. App. 140, 136 Pac. 1003.

<sup>23</sup> *Taylor v. Currey*, 192 Ill. App. 502; *Nat. Bank v. Equitable Trust Co.*, 227 Fed. 526, 142 C. C. A. 158; note in *Ann. Cas.* 1913A, 477, 478. For illustrative cases, see: *Lasswell Land & Lumber Co. v. Lee Wilson*, 236 Fed. 322; *Schoden v. Schaefer*, 184 Ill. App. 456; *Rommel v. Wenks*, 186 Ill. App. 369; *Smith v. Gruber Lumber Co.*, 81 Wash. 111, 142 Pac. 493.

<sup>24</sup> *Green v. Whaley*, 258 Mo. 530, 167 S. W. 575. But compare *Lee v. Coon Rapids Nat. Bank* (Iowa), 144 N. W. 630.

<sup>25</sup> *Schwank v. Schuchman*, 212 N.

Y. 352, 106 N. E. 127; *Gile v. Interstate Motor Co.*, 27 N. Dak. 108, 145 N. W. 732, L. R. A. 1915B, 109n. As to money received from third person, see and compare *Oklahoma State Bank v. Bank of Central Arkansas*, 120 Ark. 369, 179 S. W. 509, with *Brown v. Stair*, 25 Colo. App. 140, 136 Pac. 1003. As to action where property has been pledged by agent without authority, see note in *Ann. Cas.* 1913C, 1295. As to plaintiff's title or right, see *Schneider v. Yellott*, 124 Md. 92, 91 Atl. 779. As to joint action against several defendants, see *Cowart v. Fender*, 137 Ga. 536, 73 S. E. 822, *Ann. Cas.* 1913A, 932, and note.

<sup>26</sup> *Stansfield v. Dunne*, 16 Ariz. 153, 141 Pac. 736; *Merchants' Nat. Bank v. Bentel*, 166 Cal. 473, 137 Pac. 25.

<sup>27</sup> *Eyre v. Fairbault*, 121 Minn. 233, 141 N. W. 170, L. R. A. 1917A, 685 (executor of landowner at time allowed to recover from party who had obtained the money out of court).



violation of statute, the city was held entitled to recover the same in an action for money had and received.<sup>28</sup> But money which has been obtained by fraudulent means or the like can not be recovered from an innocent person to whom it was paid for a valuable consideration in the usual course of business and who is a bona fide holder.<sup>29</sup>

§ 1381. **Money voluntarily paid to another with owner's consent.**<sup>30</sup>—Money paid by one on another's debt by the procurement of such debtor, may be recovered from him in an action on the implied contract.<sup>31</sup> But the general rule is well settled that money voluntarily paid, without fraud, duress or mistake, or inequitable conduct on the party receiving it, can not be recovered, and this is generally true even though the claim on which it was paid was unfounded.<sup>32</sup>

### § 1383. Effect of protest.<sup>33</sup>

§§ 1384, 1385. **Recovery of money paid under duress or compulsion—Rule illustrated.**—Money paid under duress or unlawful coercion or compulsion may be recovered.<sup>34</sup> Duress such as would avoid a contract is generally held sufficient to make a payment involuntary, and, indeed, even less may be sufficient in particular cases.<sup>35</sup> It may consist, among other things, of oppression of person or property, and a payment made to save property from unlawful seizure or in order to obtain its release or possession unlawfully withheld is not voluntary within the meaning of

<sup>28</sup> *Milwaukee v. Reiff*, 157 Wis. 226, 146 N. W. 1130.

<sup>29</sup> *Oklahoma State Bank v. Bank of Central Arkansas*, 120 Ark. 369, 179 S. W. 509; *Benjamin v. Welda State Bank*, 98 Kans. 361, 158 Pac. 65, L. R. A. 1917A, 704n; *Texas State Bank v. First Nat. Bank* (Tex. Civ. App.), 168 S. W. 504. But see *Batson v. Alexander City Bank*, 179 Ala. 490, 60 So. 313.

<sup>30</sup> [Main section cited in *Taylor v. First Nat. Bank*, 212 Fed. 902.]

<sup>31</sup> *Bartlett v. Bank* (W. Va.), 87 S. E. 444.

<sup>32</sup> *Taylor v. First Nat. Bank*, 212 Fed. 902; *Merrill v. Gorden*, 15 Ariz. 521, 140 Pac. 496; *Williford v. Eason*, 110 Ark. 303, 161 S. W. 498; *E. D. Clough & Co. v. Boston & C. R. Co.*,

77 N. H. 222, 90 Atl. 863, Ann. Cas. 1915B, 1195n. But compare *Deniopolis v. Marengo County*, 195 Ala. 214, 70 So. 275.

<sup>33</sup> *Brunson v. Board of Directors of Levee Dist.*, 107 Ark. 24, 153 S. W. 828, 44 L. R. A. (N. S.) 293n, Ann. Cas. 1915A, 493, and note; *Helberg v. Odell*, 192 Ill. App. 266.

<sup>34</sup> *Williford v. Eason*, 110 Ark. 303, 161 S. W. 498; *Link v. Aiple & Co. Real Est. Co.*, 182 Mo. App. 531, 165 S. W. 832; *E. D. Clough & Co. v. Boston & C. R. Co.*, 77 N. H. 222, 90 Atl. 863, Ann. Cas. 1915B, 1195n.

<sup>35</sup> *E. D. Clough & Co. v. Boston & C. R. Co.*, 77 N. H. 222, 90 Atl. 863, Ann. Cas. 1915B, 1195n; *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1350.

the rule that there can be no recovery of money voluntarily paid.<sup>36</sup> The extent to which the doctrine of this section is justly carried is shown in a recent case where a prosecuting attorney, who was also acting as attorney for a husband, was alleged to have compelled an innocent man to pay money under threat of prosecution for adultery with the client's wife, stating that the wife would testify as the lawyer would tell her to, and the court held that the money so paid could be recovered.<sup>37</sup> So, payment of a tax to avoid a penalty or prevent a forfeiture or discontinuance of business is not a voluntary payment.<sup>38</sup> But there must be some danger or necessity, real or apparent, actuating or influencing the person making such payment.<sup>39</sup>

**§ 1387. Recovery of illegal taxes paid under compulsion.<sup>40</sup>**

**§§ 1388, 1390. Money paid by or under mistake—Effect of negligence.**—Money paid by or under mistake of fact may usually be recovered.<sup>41</sup> But not, ordinarily, where the party paying and seeking to recover was guilty of negligence;<sup>42</sup> nor, ordinarily, where the defendant has altered his position in reliance upon the payment so that he can not be placed in statu quo and it would be unconscionable to permit recovery.<sup>43</sup>

**§ 1391. Recovery of money paid under mistake of law.**—Money paid under mistake of law can not, ordinarily, be recovered.<sup>44</sup>

**§§ 1393, 1394. Contribution—When may be enforced.**—Contribution is enforced in a proper case on the ground of im-

<sup>36</sup> Note in Ann. Cas. 1913A, 1354-1356.

<sup>37</sup> Coon v. Metzler, 161 Wis. 328, 154 N. W. 377, L. R. A. 1916B, 667n.

<sup>38</sup> Atchison &c. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. 216, Ann. Cas. 1913C, 1050, and note.

<sup>39</sup> Hamilton v. Kentucky Title Sav. Bank &c. Co., 159 Ky. 680, 167 S. W. 898, L. R. A. 1915B, 498n. See also Voorhees v. Nelson, 189 Mich. 684, 155 N. W. 708.

<sup>40</sup> Atchison &c. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. 216, Ann. Cas. 1913C, 1050, and note.

<sup>41</sup> United States v. D'Oiler Engineering Co., 215 Fed. 209; Shoen-

han v. Merrill, 165 Iowa 384, 145 N. W. 919; Bradshaw v. Glasscock, 91 Kans. 11, 136 Pac. 933; Grand Lodge A. O. U. W. v. Tonne, 136 Minn. 72, 161 N. W. 403, L. R. A. 1917E, 344; Bone v. Friday, 180 Mo. App. 577, 167 S. W. 599; Isaacs v. Kobre, 145 N. Y. S. 919.

<sup>42</sup> Hibbs v. Beall, 41 App. D. C. 592; Rosenfeld v. Boston Mut. Life Ins. Co., 222 Mass. 284, 110 N. E. 304.

<sup>43</sup> Note in L. R. A. 1917E, 349-356. See also for case in which it was held that there was no such mistake of fact as authorized a recovery: Leavitt v. Leighton, 219 Mass. 133, 106 N. E. 634.

<sup>44</sup> Ante § 113.

plied contract to contribute ratably where one or more of the parties has paid a claim for which all were equally liable, and this doctrine finds frequent application in the case of cosureties,<sup>45</sup> cotenants,<sup>46</sup> partners,<sup>47</sup> and stockholders who have paid a corporate debt.<sup>48</sup>

§ 1397. **Use and occupation.**—An obligation to pay rent arises, without an express agreement to do so, from the mere occupancy of premises as tenant.<sup>49</sup> And one who incloses the land of another with his own and uses it as his own pasture is liable for rent to the owner thereof.<sup>50</sup>

§§ 1398, 1399. **Waiver of torts and suing on implied contracts.**—It has been stated broadly that whenever a party has obtained a pecuniary advantage from a wrong that he has done to another the latter can waive the tort and sue on the implied contract.<sup>51</sup> One of the most common illustrations of the general rule is where one has wrongfully converted money, or goods of another, especially if he has turned them into money.<sup>52</sup>

§ 1400. **Other instances in which tort may be waived and suit brought on implied contract.**—Where a bailee is guilty of a breach of duty in refusing to deliver, the bailor may waive the tort and maintain assumpsit on the implied promise of the

<sup>45</sup> *Larson v. Sleete*, 125 Minn. 267, 146 N. W. 1094, L. R. A. 1915A, 898, and note; *Yawger v. American Surety Co.*, 212 N. Y. 292, 106 N. E. 64, L. R. A. 1915D, 481, and note; *Central Banking & Co. v. United States Fidelity & Co.*, 73 W. Va. 197, 80 S. E. 121, 51 L. R. A. (N. S.) 797 (and note as to when judgment is *res adjudicata* as between sureties).

<sup>46</sup> *Willmon v. Koyer*, 169 Cal. 369, 143 Pac. 694, L. R. A. 1915B, 961, and note.

<sup>47</sup> *Webb v. Butler*, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916D, 815, and note; *Merton v. Puffer*, 157 Wis. 576, 147 N. W. 993, L. R. A. 1917A, 443, and note. But see where partnership or adventure is illegal: *Kennedy v. Lonabaugh*, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133, and note.

<sup>48</sup> *Brooke v. Boyd*, 80 Wash. 213, 141 Pac. 357, Ann. Cas. 1916B, 359, and note (and each is liable for ratable share regardless of amount of

stock owned). See also *Hall v. Gleason*, 158 Ky. 789, 166 S. W. 608.

<sup>49</sup> *Samuels v. Ottinger*, 169 Cal. 209, 146 Pac. 638, Ann. Cas. 1916E, 830.

<sup>50</sup> *Colonial & Co. v. United States Fidelity & Co.*, 73 W. Va. 197, 80 S. E. 121, 51 L. R. A. (N. S.) 797, and note to effect that one who avails himself of pasturage of another is liable on implied promise for reasonable value for use and occupation.

<sup>51</sup> *Jewell v. Nuhn*, 173 Iowa 112, 155 N. W. 174. See also note in Ann. Cas. 1913D, 228, 230. But compare *North Platte Canal & Co. v. United States*, 48 Ct. Cl. 281.

<sup>52</sup> *Haynie v. Sites*, 56 Colo. 115, 138 Pac. 42; *Katz v. Mathews*, 216 N. Y. 701, 110 N. E. 425; *State of Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. L. 219; *In re Dickinson*, 171 App. Div. 486, 157 N. Y. S. 248; *First Nat. Bank v. Bamforth*, 90 Vt. 75, 96 Atl. 600.

bailee to perform his duty.<sup>53</sup> One entitled to enforce a constructive trust may waive the tort upon which it is founded and sue in assumpsit for the value of the property wrongfully taken or withheld.<sup>54</sup> So where a carrier has wrongfully converted property the tort may be waived and suit brought on the implied promise.<sup>55</sup>

<sup>53</sup> Higdon v. Warrant Warehouse Co. (Ala. App.), 63 So. 938; Ford & Co. v. Atlantic Compress Co., 138 Ga. 496, 75 S. E. 609, Ann. Cas. 1913D, 226, and note; Darling v. Purdom, 14 Ga. App. 597, 81 S. E. 800.

<sup>54</sup> Brown v. Stair, 25 Colo. App. 140, 136 Pac. 1003.

<sup>55</sup> Southern R. Co. v. Adams, 14

Ga. App. 366, 80 S. E. 912; Sevier v. Mitchell, 72 Ore. 483, 142 Pac. 780. See also for other illustrative cases: Steverson v. W. C. Agee & Co., 9 Ala. 389, 63 So. 794; Reyer v. Blaisdell, 26 Colo. App. 387, 143 Pac. 385; Manning v. Galland-Henning Pneumatic &c. Co., 141 Wis. 199, 124 N. W. 291, 18 Ann. Cas. 976.

## CHAPTER XXXII

### LIMITS OF OBLIGATION—CONTRACTS AFFECTING THIRD PERSONS

§ 1406. **Privity of contract.**—As a general rule there must be privity of contract and before a third person can enforce or maintain an action for breach of a contract made by others he must be a party to the consideration or the contract must have been made for his benefit.<sup>1</sup>

§ 1409. **Obligation as to liability of third person.**<sup>2</sup>

§ 1412. **When third persons may enforce contracts for their benefit.**—In most jurisdictions, under the modern law, a party for whose benefit a contract is made for a valuable consideration may sue on the contract even though there is no consideration moving from him.<sup>3</sup>

<sup>1</sup> Carr v. Louisville &c. R. Co., 141 Ga. 219, 80 S. E. 716; Ridgeway v. S. F. Bowser & Co., 14 Ga. App. 300, 80 S. E. 692; Hammond v. Harris (Ga. App.), 87 S. E. 711; Nicholson v. Nicholson Coal Co., 190 Ill. App. 607; Perry v. Hayes, 215 Mass. 296, 102 N. E. 318. See also W. M. Ritter Lumber Co. v. Lowe, 75 W. Va. 714, 84 S. E. 566, L. R. A. 1916E, 718, and note.

<sup>2</sup> New York Dock Co. v. Delaware &c. R. Co., 225 Fed. 485, 140 C. C. A. 5; Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916D, 1006; Burnham v. Lincoln, 225 Mass. 408, 114 N. E. 715.

<sup>3</sup> Olson v. Ostby, 178 Ill. App. 165; Sabo v. Nimett, 178 Ill. App. 459; Bradley v. Federal Life Ins. Co., 178 Ill. App. 524; Andree v. Sheehan, 194 Ill. App. 587; Reed v. Adams Steel & Wire Works, 57 Ind. App. 259, 106 N. E. 882; Staley v. Weston, 92 Kans. 317, 140 Pac. 878; Uhrich v. Globe Surety Co. (Mo. App.), 166 S. W. 845; McDonald v. Finseth, 32 N. Dak. 400, 155 N. W. 863; Glaze v. Metcalf Thresher Co. (Okla.), 168 Pac. 219;

Mack Mfg. Co. v. Massachusetts Bonding & Ins. Co., 103 S. Car. 55, 87 S. E. 439; Union Machinery &c. Co. v. Darnell, 89 Wash. 226, 154 Pac. 183; Concrete Steel Co. v. Illinois Surety Co., 163 Wis. 41, 157 N. W. 543. See also 242 Fed. 318 (stating Oregon rule). But compare Edwards v. Thoman, 187 Mich. 361, 153 N. W. 806; Sweeney v. Houston, 243 Pa. 542, 90 Atl. 347. An agent's contract, binding his principal to pay a debt due plaintiff is a contract made "expressly for the benefit" of plaintiff, within the California code: Montgomery v. Dorn, 25 Cal. App. 666, 145 Pac. 148. See as to when purchasers of lots may enforce restrictive covenants in deed from original owner or grantor to which they are not parties: Wright v. Pfimmer, 99 Nebr. 447, 156 N. W. 1060, L. R. A. 1917A, 323, and authorities there reviewed in note; also notes to Korn v. Campbell (192 N. Y. 490, 85 N. E. 687) in 37 L. R. A. (N. S.) 12 and 127 Am. St. 925; and note to Ball v. Milliken in 37 L. R. A. (N. S.) 623.

§ 1413. **Must be a clear intent to benefit third party.**<sup>4</sup>—In order for a third party to be entitled to sue on the contract, it must clearly appear that it was made for his benefit.<sup>5</sup>

§ 1414. **Acceptance, necessity for and sufficiency of.**—Where a contract required the purchaser to assume the seller's notes held by a third person, it was held that such third person was not a party to the contract in the absence of acceptance by him of the new obligation.<sup>6</sup>

§ 1418. **Particular cases—Building contract cases.**—Building contracts and bonds requiring the payment of those who furnish labor and materials may generally be enforced by such persons as made for their benefit.<sup>7</sup>

§ 1420. **Miscellaneous cases.**—One who assumes a contract, such as the payment of his grantor's debt on purchase of land, or the like, is generally held liable to the creditor.<sup>8</sup> A bank may sue on a contract, made for its benefit by its officers, to be jointly bound on its obligation, even though a stranger to the consideration.<sup>9</sup> And a contract between a father and a third person whereby the latter agreed to take and raise a child and leave it all his property at his death, may be enforced by the child, even

<sup>4</sup> [Main section cited in *Glaze v. Metcalf Thresher Co.* (Okla.), 168 Pac. 219, 220.]

<sup>5</sup> *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543; *Kenfield Pub. Co. v. Baumgartner*, 189 Ill. App. 413; *Clark v. P. M. Hennessey Const. Co.*, 122 Minn. 476, 142 N. W. 873; *Hiner v. Washita Valley Bank*, 51 Okla. 606, 152 Pac. 112. See also *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543; *Hollister v. Sweet*, 32 S. Dak. 141, 142 N. W. 255. But compare *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543.

<sup>6</sup> *Watson v. Feibel*, 139 La. 375, 71 So. 585. See also *Title Guarantee & Trust Co. v. Haven*, 214 N. Y. 468, 108 N. E. 819.

<sup>7</sup> *Carolina Hardw. Co. v. Raleigh Banking & Co.*, 169 N. Car. 744, 86 S. E. 706 (though not made directly with them nor even known to them at the time). See also *Bradley v. McDonald*, 157 App. Div. 572, 142 N. Y. S. 702; *Baker City Mercantile Co. v.*

*Idaho Glazed Cement Pipe Co.*, 67 Ore. 372, 136 Pac. 23. Post §§ 3544, 3545, 3804. A provision in a contract for steelwork and cells of a jail that the contractor should furnish the material at such time as would be for the best interest of all contractors does not give one contracting to construct the building, but not steelwork and cells, a right to sue for damages for delay in furnishing the steelwork and cells: *Reed v. Adams Steel & Wire Works*, 57 Ind. App. 259, 106 N. E. 882.

<sup>8</sup> *Gibson v. Victor Talking Mach. Co.*, 232 Fed. 225; *Barnes v. Jones*, 111 Miss. 337, 71 So. 573; *Citizens' Bank v. Douglass*, 178 Mo. App. 664, 161 S. W. 601; *Miles v. Macon County Bank*, 187 Mo. App. 230, 173 S. W. 713; *Anguish v. Blair*, 160 App. Div. 52, 145 N. Y. S. 392; *Casselman's Admx. v. Gordon*, 118 Va. 553, 88 S. E. 58.

<sup>9</sup> *First Nat. Bank v. Doherty*, 156 Ky. 386, 161 S. W. 211.

though he did not know of it when it was made.<sup>10</sup> Where a railroad company agreed with a city to pay all damages caused by elevating and increasing the length of a bridge over a street, this was held to be for the benefit of landowners injured by such work as well as for the benefit of the municipality.<sup>11</sup> And where a switching contract was made for the benefit of the operator of certain blast furnaces on land adjoining a railroad right of way, it was held enforceable by an assignee of the landowner operating one of the furnaces.<sup>12</sup>

**§ 1421. When third persons may not enforce contract.**—In a few jurisdictions the rule that a third person for whose benefit a contract is made may enforce it does not obtain, or is adopted only to a limited extent.<sup>13</sup>

**§ 1424. Right to enforce sealed instrument.**—In Illinois an action on a contract under seal may be brought by the party for whose benefit it is made, even if he is not a party to the instrument.<sup>14</sup> But in New York it is held that no one but a party to an instrument under seal can sue or be sued thereon.<sup>15</sup>

<sup>10</sup> *Bridgewater v. Hooks* (Tex. Civ. App.), 159 S. W. 1004. See also *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108; *Hales v. Peters* (Tex. Civ. App.), 162 S. W. 386.

<sup>11</sup> *Rigney v. New York Cent. & C. Co.*, 161 App. Div. 187, 146 N. Y. S. 395.

<sup>12</sup> *Baird v. Erie R. Co.*, 210 N. Y. 225, 104 N. E. 614. See also for additional illustrations *Grimes v. Barn-dollar*, 58 Colo. 421, 148 Pac. 256; *Stein v. Deutsch*, 178 Ill. App. 615; *Ballard v. Home Nat. Bank*, 91 Kans. 91, 136 Pac. 935, L. R. A. 1916C, 161; *Boone County Lumber Co. v. Niedermeyer*, 187 Mo. App. 180, 173 S. W. 57; *Hart v. Equitable Life Assur. Society*, 172 App. Div. 659, 158 N. Y. S. 1063; *Bradley v. McDonald*, 218 N. Y. 351, 113 N. E. 340; *Harbeck v. Harbeck*, 87 Misc. 420, 149 N. Y. S. 791; *Springs v. Cole*, 171 N. Car. 418, 88 S. E. 721.

<sup>13</sup> *Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 140 C. C. A. 486; *Edwards v. Thoman*, 187 Mich. 361, 153 N. W. 806; *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779; *First M. E. Church v.*

*Isenberg*, 246 Pa. 221, 92 Atl. 141; *King v. Scott*, 76 W. Va. 58, 84 S. E. 954. In Kentucky the promisee must owe the party for whose benefit the contract is made some obligation or duty when it is made, and it is not enough that he would be benefited by performance; *Fidelity & Casualty Co. v. Martin*, 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F, 924. If the promisee's obligation to a third party does not exist at time contract is made, or grow out of it, such third party can not recover on the contract, as a beneficiary: *Dickinson v. McCoppin*, 121 Ark. 414, 181 S. W. 151. Where the only consideration moves from the promisee, and no particular fund or means of payment is placed in the hands of the promisor out of which payment is to be made, the right of action is in the promisee alone: *First M. E. Church v. Isenberg*, 246 Pa. 221, 92 Atl. 141.

<sup>14</sup> *Torpe v. Jahn*, 177 Ill. App. 85.

<sup>15</sup> *O'Grady v. Howe & Co.*, 166 App. Div. 552, 152 N. Y. S. 79; *Lockwood v. Smith*, 81 Misc. 334, 143 N. Y. S. 480; *In re Bishop's Estate*, 89 Misc. 355, 151 N. Y. S. 768.

## CHAPTER XXXIII

### ASSIGNMENTS

§ 1431. Chose in action unassignable at common law.<sup>1</sup>

§ 1432. Rule in equity.—At common law the assignment of a mere expectancy by an heir or beneficiary is invalid,<sup>2</sup> but such an assignment was often upheld in equity and is now generally held permissible either by adoption of the equity doctrine or under statutes to that effect.<sup>3</sup>

§ 1433. What may be assigned—Generally.—As a general rule in most jurisdictions contracts between private individuals, silent on the subject, may be assigned.<sup>4</sup> Thus, the courts have upheld assignments of money due or to become due,<sup>5</sup> merchandise coupons,<sup>6</sup> contracts to furnish and install grate bars, not made with the manufacturer,<sup>7</sup> contingent rights,<sup>8</sup> and claims and rights of action on contracts.<sup>9</sup>

<sup>1</sup> [Main section cited in *Milford Co. v. Short* (Del.), 101 Atl. 238, 239.]

<sup>2</sup> *Spears v. Spaw* (Ky.), 118 S. W. 275; *Stevens v. Stevens*, 181 Mich. 438, 148 N. W. 225, Ann. Cas. 1916E, 1259n; note in Ann. Cas. 1916E, 1242. See also *Hight v. Carr* (Ind.), 112 N. E. 881.

<sup>3</sup> *Field v. Camp*, 201 Fed. 682, 120 C. C. A. 140; *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L. R. A. (N. S.) 404; *Donough v. Garland*, 269 Ill. 565, 109 N. E. 1015, Ann. Cas. 1916E, 1238n; *Simmons v. Ross*, 270 Ill. 372, 110 N. E. 507; *Edler v. Frazier*, 174 Iowa 46, 156 N. W. 182; *Winslow v. Dundons*, 46 Mont. 71, 125 Pac. 136; *Blackwell v. Harrelson*, 99 S. Car. 264, 84 S. E. 233, Ann. Cas. 1916E, 1263; notes in Ann. Cas. 1913B, 446; and in Ann. Cas. 1916E, 1244. But see *Hall v. Hall*, 153 Ky. 379, 155 S. W. 753; *McCall v. Hampton*, 98 Ky. 166, 32 S. W. 406, 56 Am. St. 335, 33 L. R. A. 266; *Burton v. Campbell* (Ky.), 195 S. W. 1091.

<sup>4</sup> *Broadwell v. Imms*, 14 Ala. App. 437, 70 So. 294; *Leader Co. v. Little Rock Ry. & Co.*, 120 Ark. 221, 179

S. W. 358; *Edler v. Frazier*, 174 Iowa 46, 156 N. W. 182; *Standard Sewing Mach. Co. v. Smith*, 51 Mont. 245, 152 Pac. 38; *Marker v. Gillam* (Okla.), 154 Pac. 351; notes in Ann. Cas. 1912A, 497; 1913D, 929; 1914C, 262; notes in 43 L. R. A. (N. S.) 115, 118, 790; L. R. A. 1916F, 89.

<sup>5</sup> *J. A. Cleary & Co. v. Fawcett*, 19 Ga. App. 184, 91 S. E. 227; *Hofferberth v. Duckett*, 175 App. Div. 480, 162 N. Y. S. 167. See also *Butler v. San Francisco Gas & Co.*, 168 Cal. 32, 141 Pac. 818.

<sup>6</sup> *Pond Creek Coal Co. v. Lester*, 171 Ky. 811, 188 S. W. 907.

<sup>7</sup> *A. D. Granger Co. v. Berkeley*, 162 N. Y. S. 680.

<sup>8</sup> *Broadwell v. Imms*, 14 Ala. App. 437, 70 So. 294.

<sup>9</sup> *United States Securities Co. v. Ostenberg*, 60 Colo. 249, 152 Pac. 1163; *Ison Co. v. Atlantic & R. Co.*, 17 Ga. App. 459, 87 S. E. 754; *Millan v. Bartlett* (W. Va.), 89 S. E. 711. And agreement in connection with sale of good will not to compete: *Graca v. Rodrigues* (Cal.), 165 Pac. 1012; *Bennett v. Carmichael Produce*



§ 1434. **Assignment of public contracts—Wages and the like.**—Public contracts are sometimes unassignable even where they might be assignable if made between private parties.<sup>10</sup> But an assignment of a progress payment for municipal work done under a public contract has been held valid in a recent case, where the municipality did not object, even though the contract provided that it should not be assigned without consent of the board of public works and no such consent was obtained.<sup>11</sup> A public officer can not assign his salary before it is due, as this would be against public policy.<sup>12</sup> In the absence of any statute to the contrary, wages under an existing contract of employment may be assigned, although they are not yet earned,<sup>13</sup> but there must be an existing contract under which they may be earned,<sup>14</sup> and there are statutory provisions in many states governing the subject.<sup>15</sup>

Co. (Ind. App.), 115 N. E. 793; Public Opinion Pub. Co. v. Ransom, 34 S. Dak. 381, 148 N. W. 838, Ann. Cas. 1917A, 1010n. See as to torts: Denmin v. Powers, 96 Misc. 252, 160 N. Y. S. 636. But compare Lee v. Fisk, 222 Mass. 418, 109 N. E. 833; Brocklehurst v. Marsch, 225 Mass. 3, 113 N. E. 646. See also note in 45 L. R. A. (N. S.) 1098.

<sup>10</sup> See People v. Commercial Tel. &c. Co., 277 Ill. 265, 115 N. E. 379, L. R. A. 1917D, 704, and note; ante §§ 575, 576.

<sup>11</sup> Portuguese-American Bank v. Welles, 242 U. S. 7, 61 L. ed. 116, 37 Sup. Ct. 3.

<sup>12</sup> Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881n, Ann. Cas. 1913B, 1078, and note. See also Granger v. French, 152 Mich. 356, 116 N. W. 181, 125 Am. St. 416; Bailey v. Sibley Quarry Co., 166 Mich. 321, 129 N. W. 17; Anderson v. Branstrom, 173 Mich. 157, 139 N. W. 40, Ann. Cas. 1914D, 817n. But see, after it is earned: Roesch v. W. B. Worthen Co., 95 Ark. 482, 130 S. W. 551, 31 L. R. A. (N. S.) 374n.

<sup>13</sup> Ison Co. v. Atlantic &c. R. Co., 17 Ga. App. 459, 87 S. E. 754, and authorities cited in next following note; also Leonard v. Farrington, 124 Minn. 160, 144 N. W. 763.

<sup>14</sup> Porte v. Chicago &c. R. Co., 162 Wis. 446, 156 N. W. 469 (assignment of wages for future services good only as to earnings falling due under existing contract). To same effect, see also: Richards v. Inter Ocean Newspaper Co., 181 Ill. App. 515; Richards v. Olsen, 185 Ill. App. 395; Heller v. Lutz, 254 Mo. 704, 164 S. W. 123. See also Clanton Bank v. Robinson, 195 Ala. 194, 70 So. 270 (account must have at least a potential existence); Green v. Consolidated Wagon &c. Co. (Idaho), 164 Pac. 1016; Taylor v. Boston-Child Co. (Mass.), 117 N. E. 43.

<sup>15</sup> Wages must be earned under Georgia statute: Bowen v. King Bros., 14 Ga. App. 319, 80 S. E. 696. See also Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. 74, Ann. Cas. 1913B, 529, and note (such a statute is constitutional); Winton v. Irwin, 10 Ala. App. 390, 64 So. 525; Cleveland &c. R. Co. v. Marshall, 182 Ind. 280, 105 N. E. 570 (wife must consent); Wells v. Vandalia R. Co., 56 Ind. App. 211, 103 N. E. 360; Ex parte Hutsell (Tex. Civ. App.), 182 S. W. 458 (assignment of wages invalid unless wife joins as provided by statute).

§ 1435. **Assignment of contracts involving personal liability.**<sup>16</sup>—Contracts involving special skill or trust and confidence reposed by one party in another are not assignable.<sup>17</sup>

§ 1437. **Parties may stipulate against assignment.**—Parties may stipulate that the contract shall not be assigned and such a stipulation will usually be enforced.<sup>18</sup>

§ 1439. **Assignment of liabilities by act of parties.**<sup>19</sup>

§ 1441. **Form and elements of assignments.**—No particular form of assignment is usually required.<sup>20</sup> In the absence of any statute to the contrary, an assignment may generally be oral as well as in writing,<sup>21</sup> and there may be an equitable assignment even without any express words of assignment.<sup>22</sup> Acceptance by a contractor of orders by a subcontractor has been held a sufficient consideration for a subsequent promise to pay such sums,<sup>23</sup> and a pre-existing debt has been held sufficient consideration for an equitable assignment.<sup>24</sup>

<sup>16</sup> [Main section cited in *Todd v. Guffin*, 55 Ind. App. 605, 104 N. E. 519, 521.]

<sup>17</sup> *American Lithographic Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909; *Detroit Postage Stamp Service Co. v. Scherwach*, 179 Mich. 266, 146 N. W. 144, Ann. Cas. 1915D, 287n; *Standard Sewing Mach. Co. v. Smith*, 51 Mont. 245, 152 Pac. 38; *Glazer v. Flemington*, 85 N. J. L. 384, 91 Atl. 1068; *Nassau Hotel Co. v. Barnett & Co.*, 162 App. Div. 381, 147 N. Y. S. 283. See also *Macon Auto Co. v. Heard*, 142 Ga. 264, 82 S. E. 658; *Lord v. Wapato Irr. Co.*, 81 Wash. 561, 142 Pac. 1172; note in Ann. Cas. 1915D, 291.

<sup>18</sup> *De Vita v. Loprete*, 77 N. J. Eq. 533, 77 Atl. 536, Ann. Cas. 1912A, 362, and note; *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463, 35 L. R. A. (N. S.) 1064n, Ann. Cas. 1913A, 228, and note. But compare *Portuguese-American Bank v. Welles*, 242 U. S. 7, 61 L. ed. 116, 37 Sup. Ct. 3.

<sup>19</sup> *Walter Elec. Co. v. New York Shipbuilding Co.*, 241 Fed. 569; *Stephenson v. Germania Fire Ins. Co.*, 100 Nebr. 456, 160 N. W. 962; ante §1435.

<sup>20</sup> *Hyatt v. Foster*, 195 Ill. App. 428; *Milan v. Bartlett* (W. Va.), 89 S. E. 711. But an agreement by a borrower to pay rents to the lender, is not an assignment, giving the lender any lien on rents received and not paid over: *In re Clark Realty Co.*, 234 Fed. 576, 148 C. C. A. 342.

<sup>21</sup> *Hyatt v. Foster*, 195 Ill. App. 428; *Jemison v. Tindall* (N. J.), 99 Atl. 408; *Hofferberth v. Duckett*, 175 App. Div. 480, 162 N. Y. S. 167.

<sup>22</sup> *Venturi v. Silvio* (Ala.), 73 So. 45; *Held v. Beach-Robinson Co.*, 32 Cal. App. 93, 162 Pac. 661; *C. W. Hahl & Co. v. Hutchison* (Tex. Civ. App.), 196 S. W. 262; *Paul v. Vancouver*, 89 Wash. 331, 154 Pac. 453. But see as to what is not sufficient to constitute an equitable assignment: *Macy v. Roedenbeck*, 227 Fed. 346, 142 C. C. A. 42; *Charles Kellas & Co. v. Slack & Slack Co.*, 129 Md. 535, 99 Atl. 677; *Day v. Charlton* (Okla.), 160 Pac. 606.

<sup>23</sup> *Held v. Beach-Robinson Co.*, 32 Cal. App. 93, 162 Pac. 661.

<sup>24</sup> *Howland v. Barre Sav. Bank & Co.*, 89 Vt. 290, 95 Atl. 679.

§ 1442. **Informal assignments.**—Informal written assignments have often been upheld,<sup>25</sup> and so have informal oral assignments.<sup>26</sup>

§ 1443. **Partial assignments.**—The strict rule at common law is that there can be no assignment of only a part of a single demand or chose in action.<sup>27</sup>

§ 1444. **Partial assignments in equity.**—An assignment of a part of an entire demand or chose of action, though invalid in law except as between the parties, may be valid and enforced in equity.<sup>28</sup>

§ 1445. **Notice as between assignor and assignee and party liable.**—Notice to the debtor is necessary to vest the legal title in the assignee and bind the debtor and cut out intervening equities.<sup>29</sup> So, where there are two assignments of a chose in action to different persons, the second assignee will have priority if he is the first to notify the debtor.<sup>30</sup>

§ 1446. **Effect of notice to debtor or party liable—Rights of parties.**—After notice of the assignment the debtor can not safely pay the amount assigned except to the assignee.<sup>31</sup>

<sup>25</sup> *Myers v. Adams*, 14 Ga. App. 520, 81 S. E. 595; *Southern R. Co. v. Pitner*, 17 Ga. App. 451, 87 S. E. 754; *German Investment &c. Co. v. Rock Falls Mfg. Co.*, 193 Ill. App. 229; *Philadelphia Veneer &c. Co. v. Garrison*, 160 Ky. 329, 169 S. W. 714; *Morris v. Leach*, 82 Ore. 509, 162 Pac. 253; *Ogburn Gravel Co. v. Watson Co.* (Tex. Civ. App.), 190 S. W. 205. But compare *Duncan v. Guillet* (Colo.), 161 Pac. 299.

<sup>26</sup> *United States Fidelity &c. Co. v. United States*, 231 U. S. 237, 58 L. ed. 200, 34 Sup. Ct. 231; *Lohman v. Raymond*, 18 N. Mex. 225, 137 Pac. 375; *Hofferberth v. Duckett*, 175 App. Div. 480, 162 N. Y. S. 167.

<sup>27</sup> *National Union Fire Ins. Co. v. Denver &c. R. Co.*, 44 Utah 26, 137 Pac. 653. See also *Ison Co. v. Atlantic &c. R. Co.*, 17 Ga. App. 459, 87 S. E. 754. But see as to waiver by receiving partial assignment without objection: *Friedman v. Griffith* (Mo. App.), 196 S. W. 75.

<sup>28</sup> *Palmer v. Palmer*, 112 Maine 149,

91 Atl. 281. See also *Kentucky Lumber &c. Co. v. Montz*, 158 Ky. 328, 164 S. W. 935. And compare *Carvill v. Mirror Films*, 165 N. Y. S. 676.

<sup>29</sup> *Peters v. Goetz*, 136 Tenn. 257, 188 S. W. 1144. See also *Heller v. Lutz*, 254 Mo. 704, 164 S. W. 123, L. R. A. 1915B, 191. See also as to filing or recording assignment in New York: *Williams Engineering &c. Co. v. New York*, 175 App. Div. 571, 162 N. Y. S. 381. And compare *Leonard v. Farrington*, 124 Minn. 160, 144 N. W. 763. But debtor's acceptance to assignment is not usually required: *Philadelphia Veneer &c. Co. v. Garrison*, 160 Ky. 329, 169 S. W. 714; *Zimmerman Land &c. Co. v. Rooney Mercantile Co.* (Tex. Civ. App.), 195 S. W. 201.

<sup>30</sup> *Market Nat. Bank v. Raspberry*, 34 Okla. 243, 124 Pac. 758, L. R. A. 1916E, 79, and note.

<sup>31</sup> *Palmer v. Palmer*, 112 Maine 149, 91 Atl. 281; *Eibschutz v. Ginsberg*, 163 N. Y. S. 160.

§§ 1449, 1450. **Nature and purpose of covenant contracts—Restrictions as to use of real property—Covenants running with land.**—A parol contract as to the maintenance of a partition fence is not a covenant running with the land, and can not be enforced against a grantee who purchased without notice.<sup>32</sup>

§ 1454. **Effect of assignment.**—The unconditional acceptance of an offer of compromise involving the assignment of a chose in action operates to pass the title to the assignee immediately.<sup>33</sup> He generally succeeds to all the rights of the assignor in the matter assigned and takes it subject to defenses which would have been available against the assignor.<sup>34</sup> An assignee by allowing the assignor as his agent to collect money from the debtor does not thereby abandon or waive his rights under the assignment.<sup>35</sup> An assignment of a contract does not relieve the assignor of his obligations thereunder.<sup>36</sup> But the assignor's rights generally end with the assignment and the debtor with notice of the assignment can not escape by compromise with or payment to the assignor.<sup>37</sup>

§ 1455. **Rights of assignee—Qualified assignments.**—An assignment by purchasers of land by instalments to the vendor of

<sup>32</sup> *Bartlett v. State* (Ind.), 114 N. E. 692. See also *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622, 45 L. R. A. (N. S.) 962, and note, Ann. Cas. 1914A, 431. As to when restrictive covenants can be enforced by purchasers against other purchasers, see: *Wright v. Pfreminer*, 99 Nebr. 447, 156 N. W. 1060, L. R. A. 1917A, 323, and note; also notes in 37 L. R. A. (N. S.) 12, 623, and in 49 L. R. A. (N. S.) 357. As to covenants running with the land, see: *Horne v. Macon Tel. Pub. Co.*, 142 Ga. 489, 83 S. E. 204, Ann. Cas. 1916B, 1212, and note; post § 3887.

<sup>33</sup> *Hyatt v. Foster*, 195 Ill. App. 428. See also *O'Connell v. Worcester*, 225 Mass. 159, 114 N. E. 201. But see *Sorenson v. Kribs*, 82 Ore. 130, 161 Pac. 405.

<sup>34</sup> *Kohn v. Sacramento Elec. Gas & Co.*, 168 Cal. 1, 141 Pac. 626; *National Trust & Co. v. Polk*, 123 Ark. 24, 183 S. W. 195; *Fulton Nat. Bank v. Fulton County*, 144 Ga. 691, 87 S. E. 1023; *Citizens' Bank v. Timmons*,

19 Ga. App. 480, 91 S. E. 1050; *Cress v. Ivens*, 163 Iowa 659, 145 N. W. 325; *Worster v. Stone*, 217 Mass. 523, 105 N. E. 385. Compare *City of Richmond v. Clifford*, 182 Ind. 17, 103 N. E. 789, 105 N. E. 385. But is not personally liable for breach of warranty by the assignor, though his claim may be defeated or lessened thereby: *A. S. Cameron Steam Pump Works v. Lubbock Light & Co.* (Tex. Civ. App.), 167 S. W. 256. See also *Schaffer v. Vandewater & Co.*, 160 App. Div. 803, 145 N. Y. S. 769.

<sup>35</sup> *J. A. Cleary & Co. v. Fawcett* (Ga. App.), 91 S. E. 227.

<sup>36</sup> *Eisfeldt v. Schwartz*, 161 N. Y. S. 194.

<sup>37</sup> *Broadwell v. Imms*, 14 Ala. App. 437, 70 So. 294; *Gulf & C. R. Co. v. Stubbs* (Tex. Civ. App.), 166 S. W. 699. See also *Ballinger v. Vates*, 26 Colo. App. 116, 140 Pac. 931; *Palmer v. Palmer*, 112 Maine 149, 91 Atl. 281; *A. K. McInnis Lumber Co. v. Rather*, 111 Miss. 55, 71 So. 264.

a contract for purchase of other land as security does not give the assignee the right to take such second contract where the vendor has elected to rescind the contract for default in payments.<sup>38</sup> But an order given as security for present indebtedness operates as an assignment, even though qualified by a conditional contingency.<sup>39</sup>

**§ 1456. Implied warranties in assignments—Rights and liabilities of assignor and assignee.**—The assignee is not ordinarily liable on the contract assigned.<sup>40</sup>

**§ 1457. Title of assignee.**—The assignee, in general, gets no better title than his assignor had and assigned.<sup>41</sup>

**§ 1458. Equities of third persons.**—A surety company which completes a defaulting contractor's work is entitled to what becomes due only after completion, but the contractor assignee is entitled to what is due on a completed contract in preference to a surety company which completes a second contract between the same parties.<sup>42</sup> The assignee is also entitled in preference to a garnishing creditor to money due or to become due on a contract assigned to him of which he has given proper notice before garnishment.<sup>43</sup>

<sup>38</sup> *Miller v. Moulton*, 77 Wash. 325, 137 Pac. 491.

<sup>39</sup> *O'Connell v. Worcester*, 225 Mass. 159, 114 N. E. 201.

<sup>40</sup> *Breitung v. Calhoun*, 158 N. Y. S. 46; *Schaffer v. Vandewater & Co.*, 160 App. Div. 803, 145 N. Y. S. 769; *A. S. Cameron Steam Pump Works v. Lubbock Light & Co.* (Tex. Civ. App.), 167 S. W. 256. Of course he may become liable where he assumes its obligations or the like.

<sup>41</sup> *Suhr v. Metcalfe* (Cal. App.), 164 Pac. 407; *Fulton Nat. Bank v. Fulton County*, 144 Ga. 691, 87 S. E. 1023; *Citizens' Bank v. Timmons*, 19 Ga. App. 480, 91 S. E. 1050; *H. J. Murrell & Co. v. Edwards* (Tex. Civ. App.), 179 S. W. 532; *Paul v. Vancouver*, 89 Wash. 331, 154 Pac. 453. See also *Metropolitan Loan & Co. v. Schafer*, 44 App. D. C. 356; *Boston Safe Deposit & Co. v. Adams*, 224 Mass. 442, 113 N. E. 277, L. R. A. 1916F, 488n.

<sup>42</sup> *Aberdeen v. Equitable Surety Co.*, 92 Wash. 440, 159 Pac. 683.

<sup>43</sup> *American Trust & Co. Bank v. O'Barr*, 12 Ala. App. 546, 67 So. 794; *Dickinson v. Davis*, 171 Iowa 29, 153 N. W. 203; *El Reno Foundry & Co. v. Western Ice Co. (Okla.)*, 153 Pac. 1107; *Amerillo Nat. Bank v. Panhandle Tel. & Co.* (Tex. Civ. App.), 169 S. W. 1091; notes in L. R. A. 1916D, 361, and L. R. A. 1916E, 82 et seq. This is so although notice was given only to the garnishee and not the garnisheeing creditor: *Hall v. Kansas City Terra Cotta Co.*, 97 Kans. 103, 154 Pac. 210, L. R. A. 1916D, 361, and note. And some courts hold that notice to the garnishee is unnecessary after a good faith assignment for a valuable consideration and acceptance before garnishment proceedings are begun. Note in L. R. A. 1916E, 82 et seq.

§§ 1459, 1460. **Rights of assignees as between themselves—Priority of notice—Priority in point of time.**—The prevailing rule is that where there are several assignments of the same thing to different persons, that of the assignee who first gives notice to the debtor takes precedence.<sup>44</sup> But it is frequently stated in general terms that the first assignment in point of time prevails.<sup>45</sup>

§ 1461. **Successive assignees—Existing equities.**—A partial assignment of an account without consent of the debtor does not enable the assignee to successfully question a subsequent assignment of the entire claim nor prevent the assignor from making such subsequent assignment.<sup>46</sup>

§§ 1462-1464. **Evidence of assignment and of assignee's rights—Right of assignee to sue—Burden of proof.**—In most jurisdictions the assignee may sue in his own name, although in some he must make the assignor a party when the assignment is not in writing, and in others he is permitted to sue in the name of the assignor.<sup>47</sup> Where an assignment of money due as security for guaranty of payment and to save indorser harmless was dated on the same day as the note and guaranty, it was held that it would be presumed that the assignment was delivered on such date, although it was acknowledged afterward.<sup>48</sup> The burden is upon one alleging an assignment to him to prove such fact.<sup>49</sup>

<sup>44</sup> *In re Hawley & Co. Furnace Co.*, 233 Fed. 451; *Market Nat. Bank v. Raspberry*, 34 Okla. 243, 124 Pac. 758, L. R. A. 1916E, 79.

<sup>45</sup> *West Texas Lumber Co. v. Tom Green County* (Tex. Civ. App.), 188 S. W. 283.

<sup>46</sup> *Pickett v. School Dist.*, 193 Mo. App. 519, 186 S. W. 533.

<sup>47</sup> The matter is so largely regulated by different statutes that we cite only a few of the recent cases: In New Jersey the assignee may sue in his own name on a chose in action based on contract: *Jemison v. Tindall*, 89 N. J. L. 429, 99 Atl. 408. So in Mississippi on a cause of action for personal injury: *A. K. McInnis Lumber Co. v. Rather*, 111 Miss. 55, 71 So. 264. And in Texas on a claim against a carrier for wrongful delivery: *Wells Fargo & Co. Express v. Pugh* (Tex. Civ.

App.), 185 S. W. 61. In Kentucky the assignee of non-negotiable merchandise coupon books issued by a company to its employes can not recover thereon without joining its assignors: *Pond Creek Coal Co. v. Lester*, 171 Ky. 811, 188 S. W. 907. In the case of an assignment which carries the legal title the assignee may sue in his own name, but in case of an equitable assignment he must sue in the name of the assignor: *In re Hawley & Co. Furnace Co.*, 233 Fed. 451. See also *Illinois Finance Co. v. Interstate Rural Credit Assn.* (Del. Ch.), 101 Atl. 870.

<sup>48</sup> *Westchester Mtg. Co. v. Thomas B. McIntire, Inc.*, 174 App. Div. 525, 161 N. Y. S. 384.

<sup>49</sup> *Wakefield v. Parkhurst*, 84 Ore. 483, 165 Pac. 578 (and that the assignor parted with control over the fund alleged to be assigned). As to

Where there are successive assignees of a chose in action where only the second had given notice to the debtor and therefore held the legal title, the first has the burden of showing that the legal title was taken with knowledge of his prior equity if he claims priority over the other assignee on that ground.<sup>50</sup>

evidence generally, see: Cregier v. Sorenson v. Kribs, 82 Ore. 130, 161 Remus, 195 Ill. App. 18; Hyatt v. Pac. 405; Morris v. Leach, 82 Ore. Foster, 195 Ill. App. 428; O'Connell 509, 162 Pac. 253.  
v. Worcester, 225 Mass. 159, 114 N. <sup>50</sup> Peters v. Goetz, 136 Tenn. 257, E. 201; Hofferberth v. Duckett, 175 188 S. W. 1144.  
App. Div. 480, 162 N. Y. S. 167;

## CHAPTER XXXIV

### JOINT AND SEVERAL CONTRACTS

§§ 1472, 1473. **Joint contracts.**—A contract wherein representatives of a company agree and promise for themselves and for the said company is joint and not joint and several.<sup>1</sup> A promise by stockholders to pay the excess of corporate indebtedness over property assumed by another is joint, and a stockholder who pays a share of such excess to such person can not recover a part of his payment proportionate to reductions in the creditors' claims.<sup>2</sup> An instrument reading "we promise to pay" is joint.<sup>3</sup> A note signed by three persons is presumed, in the absence of anything to the contrary, to be joint.<sup>4</sup>

§ 1475. **Joint and several contracts.**—A note reading "we or either of us," or "I or we" promise to pay, is joint and several.<sup>5</sup> The liability of heirs and distributees on a contract to pay attorney's fees from the estate is joint and several, in the absence of anything to the contrary.<sup>6</sup>

§ 1476. **Intention of parties generally governs.**—The intention of the parties, as ascertained by the established rules of construction, governs.<sup>7</sup>

§ 1477. **Form of promise as test.**—Where the contract is unambiguous and clear there is no room for construction and it must be interpreted according to its terms and plain meaning.<sup>8</sup>

§ 1478. **Interest of parties as test.**—As a general rule a contract by which several persons obligate themselves to do the

<sup>1</sup> Kortweyllyezsy v. Manhattan Co., 162 App. Div. 285, 147 N. Y. S. 586.

<sup>2</sup> Bean v. Eyre, 70 Ore. 190, 139 Pac. 727.

<sup>3</sup> Mitner Bank & Co. v. Whipple's Estate, 61 Colo. 252, 156 Pac. 1098.

<sup>4</sup> Smith v. Doty, 91 Wash. 315, 157 Pac. 881.

<sup>5</sup> Lewenstein v. Forman, 223 Mass. 325, 111 N. E. 962; Churchill v. Miller, 90 Wash. 694, 156 Pac. 851.

<sup>6</sup> Coram v. Davis, 216 Mass. 448, 103 N. E. 1027. See also as to leases held joint: Nabors v. Producers' Oil Co., 140 La. 985, 74 So. 527, L. R. A. 1917D, 1115, and note.

<sup>7</sup> McArthur v. Board, 119 Iowa 562, 93 N. W. 580; Nabors v. Producers' Oil Co., 140 La. 985, 74 So. 527, L. R. A. 1917D, 1115.

<sup>8</sup> Rumsey v. Fox, 158 Mich. 248, 122 N. W. 526.



same thing is joint on their part, and a contract whereby something is to be done for the common benefit of the obligees is joint and several as to them.<sup>9</sup> Where grantors who are tenants in common convey and warrant, without any restriction on the covenant of warranty, it is a joint covenant.<sup>10</sup> In Oklahoma there is a presumption, under the statute, that the obligation is joint and several where all parties uniting in a promise receive some benefit from the consideration, and where an obligation, although otherwise joint, shows that each obligor is a principal debtor for only a portion of the entire amount and surety for the remainder as between the obligors, the principal debtor may treat it as a joint and several contract and sue one of them separately for such portion.<sup>11</sup>

### § 1479. Liability of joint obligors.<sup>12</sup>

§§ 1480, 1481. **Contracts of subscription.**—Subscription contracts are usually several, but they may be so made as to be joint or joint and several.<sup>13</sup>

§ 1482. **Effect of release of one joint debtor.**—The general rule is well settled that the release of one joint or joint and several debtor operates as a release of all.<sup>14</sup>

§ 1483. **As affected by intention of parties.**—A release which clearly shows that it was not intended by the parties to operate as a release of all joint debtors is generally held not to have that effect.<sup>15</sup> But some courts hold that a release of one joint tortfeasor, however it may be as to a joint debtor on a liquidated claim, will operate as a release of all even though it

<sup>9</sup> *Nabors v. Producers' Oil Co.*, 140 La. 985, 74 So. 527, L. R. A. 1917D, 1115.

<sup>10</sup> *Ragle v. Dedman*, 50 Ind. App. 359, 98 N. E. 367; *Phipps v. Sappenfield*, 54 Ind. App. 139, 102 N. E. 841.

<sup>11</sup> *Rutherford v. Holbert*, 42 Okla. 735, 142 Pac. 1099, L. R. A. 1915B, 221. But compare *Buster v. Fletcher*, 22 Idaho 172, 125 Pac. 226; *Wood v. Farmer*, 200 Mass. 209, 86 N. E. 297.

<sup>12</sup> [Main section quoted in *Phipps v. Sappenfield*, 54 Ind. App. 139, 143, 102 N. E. 841.]

<sup>13</sup> Note in L. R. A. 1915B, 224, et

seq. See also *Shelton v. Michael*, 31 Cal. App. 328, 160 Pac. 578.

<sup>14</sup> *Tancred v. First Nat. Bank*, 124 Ark. 154, 187 S. W. 160; *Ward v. Fleming*, 18 Ga. App. 128, 88 S. E. 899; *Pierson v. Berry* (N. J. Ch.), 97 Atl. 275; post § 2064.

<sup>15</sup> *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883, L. R. A. 1915E, 800n; *Walsh v. New York & C. R. Co.*, 140 App. Div. 1, 124 N. Y. S. 312; *St. Louis & C. R. Co. v. Bass* (Tex. Civ. App.), 140 S. W. 860; *J. Rosenbaum Grain Co. v. Mitchell* (Tex. Civ. App.), 142 S. W. 121.

is stipulated to the contrary or the right to proceed against the others is reserved therein.<sup>16</sup>

§ 1485. **Covenant not to sue.**—A covenant not to sue is different from an ordinary release and does not discharge other joint obligors not released.<sup>17</sup>

§ 1490. **Contribution among joint debtors.**—The doctrine of contribution applies to joint debtors, and where one of them pays the whole or more than his share of the claim on which all are jointly liable he may enforce contribution from the others.<sup>18</sup>

§ 1491. **Contribution among sureties.**<sup>19</sup>

§ 1492. **Actions on joint contracts.**—A promise made to others jointly can not be enforced as a separate obligation to one of them.<sup>20</sup> But in equity a joint contract may sometimes be treated as joint and several, and where a joint obligation to pay the obligee a certain sum of money also shows, as in the case of a subscription containing the amount each one subscribed set opposite his name, that as between the obligors each is a principal debtor only for a specified portion of the entire sum and surety as to the rest, the obligee may sue each one separately for such portion.<sup>21</sup>

§§ 1493, 1494. **Judgments on joint contracts.**—The old common-law rule that judgment could only be rendered for or against all of the joint debtors and that it could not be rendered against any not served with process or in court has been changed by statute in most, if not all, jurisdictions. Some statutes provide

<sup>16</sup> Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181; Louisville &c. R. Co. v. Allen, 67 Fla. 257, 65 So. 8, L. R. A. 1915C, 20; Farmers' Sav. Bank v. Aldrich, 153 Iowa 144, 133 N. W. 383.

<sup>17</sup> Dardanelle &c. R. Co. v. Brigham, 98 Ark. 169, 135 S. W. 869; Parry Mfg. Co. v. Crull, 56 Ind. App. 77, 101 N. E. 756, and cases there cited; Matheson v. O'Kane, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267, and note; Johnson v. Von Scholley, 218 Mass. 454, 106 N. E. 17; Musolf v. Duluth &c. Elec. Co., 108 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451n, Ann. Cas. 1913A, 1317; Judd v. Walker, 158 Mo. App. 156, 138 S. W.

655; Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 193 S. W. 1053. See also cases cited in Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883, L. R. A. 1915E, 800, 807.

<sup>18</sup> Thorsen v. Poe, 123 Ark. 77, 184 S. W. 427; Ward v. Fleming, 18 Ga. App. 128, 88 S. E. 899; Comstock v. Potter, 191 Mich. 629, 158 N. W. 102; Allen v. Garner, 45 Utah 39, 143 Pac. 228.

<sup>19</sup> Post § 3983.

<sup>20</sup> Livingston v. Pugsley, 124 Ark. 432, 187 S. W. 925.

<sup>21</sup> Rutherford v. Holbert, 42 Okla. 735, 142 Pac. 1099, L. R. A. 1915B, 221. But compare Buster v. Fletcher, 22 Idaho 173, 125 Pac. 226; Rumsey v. Fox, 158 Mich. 248, 122 N. W. 526.

that the plaintiff may proceed against those served and recover judgment against all, to be enforced out of the joint property and the separate property of those served.<sup>22</sup> Other statutes provide that when some of the joint debtors can not be served the plaintiff may proceed to judgment against those served, dismissing or continuing as to the others, or the like, as provided in the particular statute.<sup>23</sup>

§ 1495. **Actions on joint and several contracts.**—Where the contract is joint and several either one or all of the obligors may be sued.<sup>24</sup>

§ 1496. **Statutory modifications.**<sup>25</sup>

<sup>22</sup> Goldstein v. Peter Fox Sons Co., 22 N. Dak. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566n; Heaton v. Schaeffer, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540 (and it is error to render a separate individual judgment against the one served); Gessner v. Roeming, 135 Wis. 535, 116 N. W. 171.

<sup>23</sup> Warren Brick Co. v. La Garde Lime &c. Co., 12 Ga. App. 58, 76 S. E. 761; Connor v. Tailer, 33 Okla. 733, 127 Pac. 1089. Many older decisions under the two types of statutes referred to in the text and under several other statutes are reviewed in the note in 43 L. R. A. (N. S.) 540-545. See also Maston v. Ross, 185 Ill. App. 57; Taylor v. Graham, 62 Pa. Sup. Ct. 246. The statute does not change the rule that there can be only one judgment on a joint obligation: Capital City Dairy Co. v.

Plummer, 20 Ind. App. 408, 49 N. E. 963.

<sup>24</sup> Milner Bank &c. Co. v. Whipple, 61 Colo. 252, 156 Pac. 1098. Such a contract is with each promisor, and also with all jointly, so that they are all liable jointly, and each is liable upon his separate obligation, and they may be sued jointly or severally as promisee elects: Anderson v. Stayton State Bank, 82 Ore. 357, 159 Pac. 1033.

<sup>25</sup> The Oklahoma statute provides that where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several: Rutherford v. Holbert, 42 Okla. 735, 142 Pac. 1099, L. R. A. 1915B, 221. See also Shelton v. Michael, 31 Cal. App. 328, 160 Pac. 578.

## CHAPTER XXXV

### INTERPRETATION AND CONSTRUCTION

§ 1505. **Meaning of terms—Purpose.**—A “rule of construction,” it is said, governs the effect of ascertained intention, and a “rule of interpretation” governs the ascertainment of the meaning of the parties.<sup>1</sup>

§ 1506. **No room for construction where contract is unambiguous.**—A plain and unambiguous contract leaves no room for construction.<sup>2</sup> The courts will try to give a contract such construction as will make it certain, but can not change its terms or make a new contract.<sup>3</sup>

<sup>1</sup> In re Union Trust Co., 89 Misc. 69, 151 N. Y. S. 246. The object of all rules of interpretation is to discover the intention of the parties as expressed in the contract, which should be considered as an entirety: *Simmons v. Groom*, 167 N. Car. 271, 83 S. E. 471. See also *Schmohl v. Travelers' Ins. Co.* (Mo. App.), 177 S. W. 1108.

<sup>2</sup> *E. H. Stanton Co. v. Rochester German Underwriters' Agency*, 206 Fed. 978; *Hongkong & Whampoa Dock Co. v. United States*, 50 Ct. Cl. 213; *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424; *Streator Clay Mfg. Co. v. Henning-Vineyard Co.* (Iowa), 155 N. W. 1001; *Gans v. Aetna Life Ins. Co.*, 214 N. Y. 326, 108 N. E. 443, L. R. A. 1915F, 703n; *Kanaskat Lumber & Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15; *Tacoma Mill Co. v. Northern Pac. R. Co.*, 89 Wash. 187, 154 Pac. 173. Where a writing is unambiguous, it should be so interpreted as to carry into effect the intention of the parties expressed by the language used, and, ordinarily, in such a case resort can not be had to extrinsic matters: *Ault v. Clark* (Ind. App.), 112 N. E. 843; *Makuen v. Elder*, 170 N. Car. 510, 87 S. E. 334; *City Messenger & Co. v. Postal Tel. Co.*, 74 Ore. 433, 145 Pac. 657; *Harrington v. Law* (R. I.), 90 Atl.

660; *Trumbauer v. Rust*, 36 S. Dak. 301, 154 N. W. 801; *Corbin v. Booker* (Tex. Civ. App.), 184 S. W. 696; *Burt v. Stringfellow*, 45 Utah 207, 143 Pac. 234. See also *Day v. United States*, 48 Ct. Cl. 128; *Butte Water Co. v. Butte*, 48 Mont. 386, 138 Pac. 195.

<sup>3</sup> *Pacific Hardw. & Co. v. United States*, 49 Ct. Cl. 327; *Jones v. Lanier* (Ala.), 73 So. 535; *Continental Casualty Co. v. Bows* (Fla.), 72 So. 278; *R. F. Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703; *Washington & C. R. Co. v. Moss*, 127 Md. 12, 96 Atl. 273; *Hartman v. Chicago & C. R. Co.*, 192 Mo. App. 271, 182 S. W. 148; *Cohen v. Walworth*, 95 Misc. 479, 158 N. Y. S. 1081; *Northern Irr. Co. v. Watkins* (Tex. Civ. App.), 183 S. W. 431; *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah 544, 155 Pac. 337, L. R. A. 1916D, 728n. Where the language is unequivocal, although the parties may have failed to express their real intention, there is no room for construction: *Commons v. Snow*, 194 Ill. App. 569; *Pierce-Fordyce Oil Assn. v. Warner Drilling Co.* (Tex. Civ. App.), 187 S. W. 516. Where it appears in the contract that a party intends to bind himself, trivial inaccuracies will be disregarded, and the intent of the parties effectuated if it can be ascertained: *Isler v. Isler*, 110 Miss. 419, 70 So. 455.

§ 1507. Rules of construction generally.<sup>4</sup>—The existing law enters into and forms part of the contract.<sup>5</sup>

§ 1508. Rules of construction generally—Intention of parties.<sup>5a</sup>—The prime object is to ascertain and give effect to the intention of the parties.<sup>6</sup> The courts in trying to ascertain the intention will endeavor to place themselves in the position of the

\* [Main section cited in *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244, 246.]

<sup>5</sup> *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244; *Marshall v. Popert*, 28 Cal. App. 551, 153 Pac. 247, 156 Pac. 881; *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436n; *Simons v. Kosciusko Building, Loan & Assn.*, 180 Ind. 333, 103 N. E. 2; *Hogston v. Bell (Ind.)*, 112 N. E. 883; *Hagenback v. Leppert (Ind. App.)*, 117 N. E. 531, 533; *Board of Education v. Littrell*, 173 Ky. 78, 190 S. W. 465; *Lorando v. Gethro (Mass.)*, 117 N. E. 185; *People v. Metropolitan Surety Co.*, 211 N. Y. 107, 105 N. E. 99; *Post v. Burger*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1915B, 158; *Ward v. Union Trust Co.*, 172 App. Div. 569, 159 N. Y. S. 54; *Rose v. Bristol*, 174 App. Div. 15, 160 N. Y. S. 335; *Muller v. McCann*, 50 Okla. 621, 151 Pac. 621; *Knight v. Clinkscales*, 51 Okla. 508, 152 Pac. 133; *Farley v. Board of Education (Okla.)*, 162 Pac. 797; *Weight v. Bailey*, 45 Utah 584, 147 Pac. 899; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819. Where the subject-matter of a contract is exclusively a federal one, and congress has enacted a law for its complete regulation, the presumption is that the parties contracted with reference to the act of congress, and not with reference to the state law: *Missouri & C. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42. A contract must be construed by ascertaining the real intention of the parties and the form or name given a written instrument is not controlling; so if the real transaction is a sale its character can not be changed by designating it as a lease or putting it in that form: *In re Assessment of Aurora Gaslight & C. Co. (Ind. App.)*,

113 N. E. 1012. Rights and duties may be granted and imposed by implication to effectuate the true and obvious purpose of the contract: *Thompson-Starrett Co. v. Plunkett*, 89 Vt. 177, 94 Atl. 845.

<sup>5a</sup> [Main section cited in *Withington v. Gypsy Oil Co. (Okla.)*, 172 Pac. 635.]

<sup>6</sup> *McCormick v. Badham*, 191 Ala. 339, 67 So. 609; *Tate v. Cody-Henderson Co.*, 11 Ala. App. 350, 66 So. 837; *Hastings Industrial Co. v. Copeland*, 114 Ark. 415, 169 S. W. 1185; *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622; *Schwab v. Bridge (Cal. App.)*, 149 Pac. 603; *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883, L. R. A. 1915E, 800n; *Geithman v. Eichler*, 265 Ill. 579, 107 N. E. 180; *Mutual Life Ins. Co. v. Devine*, 180 Ill. App. 422; *Heirsch v. Lorimer & C. Co.*, 196 Ill. App. 564; *Elsev v. Fidelity & Casualty Co. (Ind. App.)*, 109 N. E. 413; *Robbins v. Brazil Syndicate & C. Co. (Ind. App.)*, 114 N. E. 707; *American Liability Co. v. Bowman (Ind. App.)*, 114 N. E. 992; *Big Muddy Coal & C. Co. v. St. Louis-Carterville Coal Co.*, 176 Mo. App. 407, 158 S. W. 420; *Uhrich v. Globe Surety Co. (Mo. App.)*, 166 S. W. 845; *In re Whitlow's Estate*, 184 Mo. App. 229, 167 S. W. 463; *Gilbert v. Waccamaw Shingle Co.*, 167 N. Car. 286, 83 S. E. 337; *Union Trust Co. v. Shelby Downard Asphalt Co. (Okla.)*, 156 Pac. 903; *Nelson v. Reynolds (Okla.)*, 158 Pac. 301; *Bubb v. Parker & C. Oil Co.*, 252 Pa. 26, 97 Atl. 114; *McKay v. Louisville & C. R. Co.*, 133 Tenn. 590, 182 S. W. 874; *Rankin v. Rhea (Tex. Civ. App.)*, 164 S. W. 1095; *Loutzenhiser v. Peck*, 89 Wash. 435, 154 Pac. 814. "The prima facie duty of a court in construing a contract is to ascertain and effectuate the intention of the parties as shown by the language of the instrument, their relation to each other, and the sub-

parties and to understand the language in the sense in which they used it.<sup>7</sup>

**§ 1509. Rules of construction generally—Words understood in their ordinary meaning.**—Words in a contract are presumed, in the absence of anything to the contrary, to have been used in their ordinary sense and to be given their usual and ordinary meaning.<sup>8</sup>

**§ 1510. Rules of construction generally—Language used evidences the intent.**<sup>8a</sup>—The courts will not ordinarily modify or enlarge the effect of the language used,<sup>9</sup> and the fact that a party has made a hard or improvident bargain does not ordinarily warrant the court in binding the other party by interpo-

ject-matter of the contract": *Great Northern R. Co. v. United States*, 236 Fed. 433, 149 C. C. A. 485. The form and names of instruments are not controlling: *In re Assessment of Aurora Gaslight & Co. Co.* (Ind. App.), 113 N. E. 1012; *Hurst v. Winchester Bank*, 154 Ky. 358, 157 S. W. 685; *Drovers' Deposit Nat. Bank v. Tichenor*, 156 Wis. 251, 145 N. W. 777.

<sup>7</sup> *Jorgensen v. Tuolumne County*, 205 Fed. 612, 123 C. C. A. 628; *Maloney v. Maryland Casualty Co.* 113 Ark. 174, 167 S. W. 845; *Jewel Tea Co. v. Watkins*, 26 Colo. App. 494, 145 Pac. 719; *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722; *R. F. Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703; *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762. The intent of one of the parties can not guide the construction: *Klock Produce Co. v. Roberts*, 90 Wash. 260, 155 Pac. 1044.

<sup>8</sup> *E. H. Stanton Co. v. Rochester German Underwriters' Agency*, 206 Fed. 978; *Vinton Petroleum Co. v. Sun Co.*, 230 Fed. 105, 144 C. C. A. 403; *McCarthy v. Pacific Mut. Life Ins. Co.*, 178 Ill. App. 502; *E. A. Strout Farm Agency v. McTeer*, 111 Maine 169, 88 Atl. 411; *Wainscott v. Haley*, 185 Mo. App. 45, 171 S. W. 983; *Schmohl v. Travelers' Ins. Co.*, (Mo. App.), 177 S. W. 1108; *Mecca Realty Co. v. Kellogg's Toasted Corn Flakes Co.*, 166 App. Div. 74, 151 N. Y. S. 750; *Cream of Wheat Co. v. Arthur H. Crist Co.*, 166 App. Div. 870, 152 N. Y. S. 407; *Brown v. Coppage* (Okla.), 153 Pac. 817; *Interior*

*Warehouse Co. v. Dunn*, 80 Ore. 528, 157 Pac. 806; *William M. Roylance Co. v. Descalzi*, 243 Pa. 180, 90 Atl. 55; *Gulf Refining Co. v. Brown-Lloyd Co.* (Tex. Civ. App.), 167 S. W. 162; *Smith v. Ramsey*, 116 Va. 530, 82 S. E. 189; *Hall v. Philadelphia Co.*, 72 W. Va. 573, 78 S. E. 755. But clear intent rather than literal meaning may prevail, and in order to give effect to the intention of the parties to a contract, and enforce its performance as they mutually understood it, where the intent is clearly apparent, effect must be given to it in that sense, though violence be done thereby to its words: *Roberts v. Howe*, 178 Ill. App. 1; *McCarthy v. Pacific Mut. Life Ins. Co.*, 178 Ill. App. 502; *B. Siegel Co. v. Wayne Circuit Judge*, 183 Mich. 145, 149 N. W. 1015; *Marshall v. Sackett & Co.*, 166 App. Div. 141, 151 N. Y. S. 1045; *Cream of Wheat Co. v. Arthur H. Crist Co.*, 166 App. Div. 870, 152 N. Y. S. 407; *Neal v. Camden Ferry Co.*, 166 N. Car. 563, 82 S. E. 878; *Simmons v. Groom*, 167 N. Car. 271, 83 S. E. 471. See also *Little Cahaba Coal Co. v. Aetna Life Ins. Co.* (Ala.), 68 So. 317.

<sup>8a</sup> [Main section cited in *Withington v. Gypsy Oil Co.* (Okla.), 172 Pac. 637.]

<sup>9</sup> *Loyalton Elec. Light Co. v. California Pine Box & Co.*, 22 Cal. App. 75, 133 Pac. 323; *Jackson v. Marshall*, 178 Ill. App. 27; *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680; *Northern Irr. Co. v. Dodd* (Tex. Civ. App.), 162 S. W. 946.

lating or implying terms in construction.<sup>10</sup> But whatever is implied is as much a part of the contract as anything else, and circumstances and the nature of the contract may sometimes require terms to be implied.<sup>11</sup> The language used is looked to primarily, and if it is unambiguous and shows the clear intent of the parties resort to other means of construction is not only unnecessary but improper.<sup>12</sup> But the literal meaning of a particular word or clause is not always controlling.<sup>13</sup>

**§§ 1511-1513. Rules of construction generally—Technical and commercial terms—Intent governs.**—Technical words must usually be given their technical meaning.<sup>14</sup> But not where they are clearly intended to have a different meaning.<sup>15</sup>

**§ 1514. Rules of construction generally—Whole instrument looked to.**<sup>16</sup>—Words should not be construed separate and apart from the context, but the whole contract should be construed together and effect given, if it can reasonably be done, to every part.<sup>17</sup>

<sup>10</sup> Thompson-Starrett Co. v. Southern Bldg. Corp., 40 App. D. C. 459; Rankin v. Rhea (Tex. Civ. App.), 164 S. W. 1095; Johnson v. Geddes (Utah), 161 Pac. 910; Kanaskat Lumber &c. Co. v. Cascade Timber Co., 80 Wash. 561, 142 Pac. 15. See also United States Fidelity &c. Co. v. French Mut. Gen. Soc. of Mut. Ins., 212 Fed. 620, 129 C. C. A. 156.

<sup>11</sup> Wheeling &c. R. Co. v. Carpenter, 218 Fed. 273, 134 C. C. A. 69; Luther v. Bash (Ind. App.), 112 N. E. 110; Carper v. United Fuel Gas Co. (W. Va.), 89 S. E. 12.

<sup>12</sup> Cottrell v. Michigan United Trac. Co., 184 Mich. 221, 150 N. W. 857; Finger v. Goode, 169 N. Car. 72, 85 S. E. 137; Harney v. Wirtz, 30 N. Dak. 292, 152 N. W. 803; Union Trust Co. v. Shelby Downard Asphalt Co. (Okla.), 156 Pac. 903. See also Myers v. Philip Carey Co., 17 Ga. App. 535, 87 S. E. 825. But their spoken words and actions govern and not their mental attitude: Woburn Nat. Bank v. Woods, 77 N. H. 172, 89 Atl. 491.

<sup>13</sup> Belch v. Schott, 171 Mo. App. 357, 157 S. W. 658; Pickard v. William J. Burns Detective Agency (Mo. App.), 187 S. W. 614; Taylor v.

Buffalo Collieries Co. (W. Va.), 79 S. E. 27. Implications from words of a contract yield to express provisions manifesting a contrary intention: Berry v. Humphreys, 76 W. Va. 668, 86 S. E. 568.

<sup>14</sup> Weinreich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 Pac. 667.

<sup>15</sup> Mill Wood & Coal Co. v. Flint River Cypress Co., 16 Ga. App. 636, 85 S. E. 943; Hill v. Philo, 155 N. Y. S. 922.

<sup>16</sup> [Main section cited in American Bonding Co. v. United States Fidelity &c. Co. (Md.), 102 Atl. 369, 371.]

<sup>17</sup> Canadian Northern R. Co. v. Northern Mississippi R. Co., 209 Fed. 758, 126 C. C. A. 482; Merrill-Ruckgaber Co. v. United States, 49 Ct. Cl. 553; Ackerlind v. United States, 49 Ct. Cl. 635; P. Sanford Ross, Inc. v. United States, 50 Ct. Cl. 168; Hongkong & Whampoa Dock Co., Ltd. v. United States, 50 Ct. Cl. 213; Birmingham Waterworks Co. v. Windham (Ala.), 67 So. 424; Pittsburgh Steel Co. v. Wood, 109 Ark. 537, 160 S. W. 519; English v. Shelby, 116 Ark. 212, 172 S. W. 817; Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W.

§ 1515. **Rules of construction generally—Construing particular clauses.**—Each clause should be considered together with the others and all harmonized if it can reasonably be done.<sup>18</sup> Conflicting clauses should be reconciled so far as possible in order to effectuate the general purpose and intent,<sup>19</sup> and it is only when they are so antagonistic or repugnant that no reasonable interpretation or construction will reconcile and render them effective that any part must perish.<sup>20</sup> Where it is impossible to reconcile conflicting clauses, specific clauses usually control general ones,<sup>21</sup> and the first of two irreconcilably repugnant clauses ordinarily prevails over the subsequent one.<sup>22</sup>

622; McCampbell, Obear, 27 Cal. App. 97, 148 Pac. 942; New Brantner Extension Ditch Co. v. Kramer, 57 Colo. 218, 141 Pac. 498, Ann. Cas. 1916B, 1225; Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 145 Pac. 719; Ross v. Savage, 66 Fla. 106, 63 So. 148; Tillman v. Webb, 17 Ga. App. 620, 87 S. E. 904; Mutual Life Ins. Co. v. Devine, 180 Ill. App. 422; Haberer v. Kunzman, 194 Ill. App. 306; Heirsch v. Lorimer & Co., 196 Ill. App. 564; McGaw v. Hanway, 120 Md. 197, 87 Atl. 666, Ann. Cas. 1915A, 601; Hathaway v. Stone, 215 Mass. 212, 102 N. E. 461; Hapke v. Davidson, 180 Mich. 138, 146 N. W. 624; Thomson Elec. Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496, 157 N. W. 67; Cutler v. Spens, 191 Mich. 603, 158 N. W. 224; Miles v. Macon County Bank, 187 Mo. App. 230, 173 S. W. 713; Watkins v. Donnell, 192 Mo. App. 640, 179 S. W. 980; Butte Water Co. v. Butte, 48 Mont. 386, 138 Pac. 195; First Nat. Bank v. Jones, 219 N. Y. 312, 114 N. E. 349; Lefler Bros. v. C. W. Lane & Co., 167 N. Car. 267, 83 S. E. 463; Lamont Gas & Co. v. Doop, 39 Okla. 427, 135 Pac. 392; Union Trust Co. v. Shelby Downard Asphalt Co. (Okla.), 156 Pac. 903; Smith v. Clinkscales (S. Car.), 85 S. E. 1064; Friedheim v. Walter H. Hildie Co., 104 S. Car. 378, 89 S. E. 358; Sparkman v. Davenport (Tex. Civ. App.), 160 S. W. 410; Burt v. Stringfellow, 45 Utah 207, 143 Pac. 234.

<sup>18</sup> National Fireproofing Co. v. Imperishable Silo Co. (Ind. App.), 112 N. E. 403; Home Mut. Fire Ins. Co. v. Pittman, 111 Miss. 420, 71 So. 739; Jackson County Light & Co. v. Independence, 188 Mo. App. 157, 175 S. W. 86; Gilfillan v. Bartlesville, 46 Okla. 428, 148 Pac. 1012; Brooks v. Moss (Tex. Civ. App.), 175 S. W. 791. See also Manchester Sawmills Co. v. A. L. Arundel Co., 197 Ala. 505, 73 So. 24.

<sup>19</sup> Finke v. Finke, 37 S. Dak. 46, 156 N. W. 595; Thompson v. Waits (Tex. Civ. App.), 159 S. W. 82; Hendricks v. Roley, 184 Ill. App. 164.

<sup>20</sup> Rushing v. Manhattan Life Ins. Co., 224 Fed. 74, 139 C. C. A. 520. But particular clauses are subordinate to the general intent, and words wholly inconsistent with the purpose and main intention should be rejected: Harney v. Wirtz, 30 N. Dak. 292, 152 N. W. 803. And where effect can not be given to all its provisions, owing to the provisions being contradictory, the contract in that particular fails, and the parties must resort to the common-law rule: Noel Con-t. Co. v. United States, 50 Ct. Cl. 98. See also Thompson v. Watts (Tex. Civ. App.), 159 S. W. 82.

<sup>21</sup> English v. Shelby, 116 Ark. 212, 172 S. W. 817.

<sup>22</sup> Smith v. Clinkscales (S. Car.), 85 S. E. 1064; Dustin v. Interstate Business Men's Acc. Assn., 37 S. Dak. 635, L. R. A. 1917B, 319n, 159 N. W. 395.



§ 1516. Rules of construction generally—*Noscitur a sociis*.<sup>23</sup>

§§ 1517-1519. Rules of construction generally—*Surrounding circumstances*.—Where a contract is ambiguous the court in determining the intention of the parties should usually consider not only the language used but also the nature and purpose of the contract and the surrounding circumstances throwing light on such intention.<sup>24</sup> In case of doubt preliminary negotiations may be considered.<sup>25</sup>

§ 1520. Subsidiary rules of construction—*Construction upholding contract preferred*.—A contract should be so construed, if it can reasonably be done, as to uphold its validity and give it effect as intended, and such construction will be preferred over one that is equally open but will have the opposite effect.<sup>26</sup>

<sup>23</sup> State v. Western Union Tel. Co. (Ala.), 72 So. 99.

<sup>24</sup> Ferguson v. Omaha &c. R. Co., 227 Fed. 513, 142 C. C. A. 145; Roller v. George H. Leonard & Co., 229 Fed. 607, 143 C. C. A. 629; Ryan v. Ohmer, 244 Fed. 31; Roach v. McDonald, 187 Ala. 64, 65 So. 823; Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622; New Brantner Extension Ditch Co. v. Kramer, 57 Colo. 218, 141 Pac. 498, Ann. Cas. 1916B, 1225n; Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 145 Pac. 719; Tilden v. Hubbard, 25 Idaho 677, 138 Pac. 1133; Sauve v. Title Guaranty &c. Co., 29 Idaho 146, 158 Pac. 112; Adams v. Gordon, 265 Ill. 87, 106 N. E. 517; Mutual Life Ins. Co. v. Devine, 180 Ill. App. 422; Streator Clay Mfg. Co. v. Henning-Vineyard Co. (Iowa), 155 N. W. 1001; Owens v. Georgia Life Ins. Co., 165 Ky. 507, 177 S. W. 294; Newman v. Supreme Lodge K. of P., 110 Miss. 371, 70 So. 241, L. R. A. 1916C, 1051; Big Muddy Coal &c. Co. v. St. Louis Carterville Coal Co., 176 Mo. App. 407, 158 S. W. 420; Jackson County Light &c. Co. v. Independence, 188 Mo. App. 157, 175 S. W. 86; Giersa v. Creech (Mo. App.), 181 S. W. 588; Chapman v. George R. Read Co., 83 Misc. 16, 144 N. Y. S. 412; Clausen v. Title Guaranty & Surety Co., 168 App. Div. 569, 153 N. Y. S. 835; Faust v. Rohr, 166 N. Car. 187, 81 S. E. 1096; Simmons

v. Groom, 167 N. Car. 271, 83 S. E. 471; McMahan v. Black Mountain R. Co., 170 N. Car. 456, 87 S. E. 237; Bank of Union v. Redwine, 171 N. Car. 559, 88 S. E. 878; Southern R. Co. v. Bacon, 126 Tenn. 169, 159 S. W. 602; McKay v. Louisville &c. R. Co., 133 Tenn. 590, 182 S. W. 874; St. Louis &c. R. Co. v. Hicks (Tex. Civ. App.), 158 S. W. 192; Stone v. Robinson (Tex. Civ. App.), 180 S. W. 135; Elswick v. Deskins, 75 W. Va. 109, 83 S. E. 283; Wallis v. First Nat. Bank, 155 Wis. 306, 143 N. W. 670; Polebitzke v. John Week Lumber Co., 163 Wis. 322, 158 N. W. 62. But this is permissible solely for the purpose of aiding in the true construction of the written instrument and not for the purpose of adding to or taking from any of its provisions: Alaska Treadwell Gold Mining Co. v. Alaska Gastineau Mining Co., 214 Fed. 718, 131 C. C. A. 24; Salter v. Ives, 171 Cal. 790, 155 Pac. 84.

<sup>25</sup> E. H. Stanton Co. v. Rochester German Underwriters' Agency, 206 Fed. 978. A contract by a railroad company to improve a certain street over which the county then had jurisdiction, will be presumed to have been made with reference to the facts and the law existing at that time: Ettor v. Tacoma, 77 Wash. 267, 137 Pac. 820.

<sup>26</sup> Cole Motor Car Co. v. Hurst, 228 Fed. 280, 142 C. C. A. 572; Amer-

§ 1521. **Subsidiary rules of construction—Reasonable construction will be adopted.**<sup>27</sup>—Contracts should be given a reasonable construction, and where a contract is fairly susceptible of two constructions, one of which will make it rational and such as was probably intended and the other of which will make it unfair or an improbable agreement, the former will be preferred.<sup>28</sup>

§§ 1522-1524. **Subsidiary rules of construction—Constructing several instruments together.**—Where one instrument by reference to another makes it a part of the contract they should be construed together.<sup>29</sup> So, even where there is no such

ican Tie & Timber Co. v. Naylor Lumber Co., 190 Ala. 319, 67 So. 246; Weinreich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, 151 Pac. 667; Daniel v. Calkins, 31 Cal. App. 514, 160 Pac. 1082; Jewel Tea Co. v. Watkins, 26 Colo. App. 494, 145 Pac. 719; Mill Wood & Coal Co. v. Flint River Cypress Co. (Ga. App.), 85 S. E. 943; First Nat. Bank v. Doherty, 156 Ky. 386, 161 S. W. 211; Millen v. Potter, 190 Mich. 262, 157 N. W. 101; National Bank of Commerce v. Flanagan Mills & Co., 268 Mo. 547, 188 S. W. 117; Finley v. School Dist. No. 1, 51 Mont. 411, 153 Pac. 1010; New York Cent. & Co. R. Co. v. General Elec. Co., 153 N. Y. S. 478; Maxwell v. Faust Co., 90 Misc. 702, 154 N. Y. S. 224; Torrey v. Cannon, 171 N. Car. 519, 88 S. E. 768; Johnson v. Rhode Island Ins. Co., 172 N. Car. 142, 90 S. E. 124; Trumbauer v. Rust, 30 S. Dak. 301, 154 N. W. 801; Crawford v. Seattle & Co. R. Co., 86 Wash. 628, 150 Pac. 1155; Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N. W. 1058; Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N. W. 516. But the court can not make a new contract, or bind the parties beyond the fair meaning of the language used: Old Colony St. R. Co. v. Brockton & Co. R. Co., 218 Mass. 84, 105 N. E. 866.

<sup>27</sup> [Main section cited in Houston & Co. R. Co. v. Diamond & Co. Brick Co. (Tex. Civ. App.), 188 S. W. 32, 33.]

<sup>28</sup> Little Cahaba Coal Co. v. Aetna Life Ins. Co., 192 Ala. 42, 68 So. 317, Ann. Cas. 1917D, 863n; Eldridge v. Mowry, 24 Cal. App. 183, 140 Pac.

978; Savage v. Smith, 170 Cal. 472, 150 Pac. 353; MacDonald v. Aetna Indemnity Co., 90 Conn. 226, 96 Atl. 926; Clark v. Paddock, 24 Idaho 142, 132 Pac. 795, 46 L. R. A. (N. S.) 475n; R. F. Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703; B. Siegel Co. v. Wayne Circuit Judge, 183 Mich. 145, 149 N. W. 1015; Big Muddy Coal & Co. v. St. Louis Carterville Coal Co., 176 Mo. App. 407, 158 S. W. 420; Raynor v. New York & Co. Trac. Co., 149 N. Y. S. 151; Fairbanks, Morse & Co. v. Twin City Supply Co., 170 N. Car. 315, 86 S. E. 1051; Union Trust Co. v. Shelby Downard Asphalt Co. (Okla.), 156 Pac. 903; Bingell v. Royal Ins. Co., 240 Pa. 412, 87 Atl. 955; Rankin v. Rhea (Tex. Civ. App.), 164 S. W. 1095; Hairston v. Hill, 118 Va. 339, 87 S. E. 573.

<sup>29</sup> Fisk Rubber Co. v. Muller, 42 App. D. C. 49; Gray v. Cotton, 166 Cal. 130, 134 Pac. 1145; United Iron Works v. Outer Harbor Dock & Co., 168 Cal. 81, 141 Pac. 917; Baseleon v. M. M. Baker & Co., 182 Ill. App. 611; Levin v. Strempler, 194 Ill. App. 299; Hemwall Automobile Co. v. Michigan Ave. Trust Co., 195 Ill. App. 407; Cleaney v. Dougherty, 135 La. 346, 65 So. 485; W. T. Tilden Co. v. Densten Hair Co., 216 Mass. 323, 103 N. E. 916; Louis F. Kleeman Co. v. New Amsterdam Casualty Co., 177 Mo. App. 397, 164 S. W. 167; Berger Mfg. Co. v. Crates, 178 Mo. App. 218, 165 S. W. 1163; American Sign Co. v. Rundback, 161 N. Y. S. 228; Aetna Life Ins. Co. v. Bradford, 45 Okla. 70, 145 Pac. 316; Twiggs v.

express reference, two instruments executed at the same time by and between the same parties, and relating to the same transaction, should be construed together.<sup>30</sup>

§ 1525. **Subsidiary rules—Instruments partly written and partly printed.**—Where written parts of a contract are irreconcilably inconsistent with printed parts of it, the former prevail.<sup>31</sup> And, under this rule, a typewritten clause prevails over a printed clause where they can not be reconciled and both given effect.<sup>32</sup>

Williams, 98 S. Car. 431, 82 S. E. 676; Cary v. Holt (Va.), 91 S. E. 188; Smith v. Board of Education (W. Va.), 85 S. E. 513. But see Meredith v. Bitter Root Valley Irr. Co. (Mont.), 141 Pac. 643. Reference in a subcontract to the general contract for a particular purpose makes the general contract a part of the former only for such purpose: Guerini Stone Co. v. P. J. Carlin Const. Co., 240 U. S. 264, 60 L. ed. 636, 36 Sup. Ct. 300.

<sup>30</sup> Bragg v. Cumming, 25 Cal. App. 199, 143 Pac. 82; Bragg v. Martenstein, 25 Cal. App. 804, 143 Pac. 79; Gibbs v. Wallace, 58 Colo. 364, 147 Pac. 686; Interstate Lumber Co. v. Whitfield-Baker Co., 16 Ga. App. 667, 85 S. E. 976; Ervin v. Cline, 59 Ind. App. 242, 109 N. E. 214; Cutler v. Spens, 191 Mich. 603, 158 N. W. 224; Nat. Bank of Commerce v. Flanagan Mills & Co., 268 Mo. 547, 188 S. W. 117; Snedaker v. Munday, 55 Pa. Sup. Ct. 581; Gordon v. Churchill, 34 S. Dak. 411, 148 N. W. 848; Rankin v. Rhea (Tex. Civ. App.), 164 S. W. 1095; Ferguson v. Dodd (Tex. Civ. App.), 183 S. W. 391; Wadsworth v. Powell (Tex. Civ. App.), 191 S. W. 169. Where plaintiffs and defendant became parties to conditional subscription contracts at the time that defendant, one of the prospective incorporators of a corporation, signed an agreement for a lease of a certain machine, the two instruments should be considered together in determining whether defendant was personally bound: Belding v. Vaughan, 108 Ark. 306, 157 S. W. 400. A contract by stockholders of a corporation to advance additional capital, and a con-

temporaneous contract by creditors of the company to extend the time of payment in consideration thereof, should be considered together in construing them and determining priorities of the parties on insolvency of the company: Roberts v. Vonnegut (Ind. App.), 104 N. E. 321. A deed, bill of sale, notes for part of purchase-price, and a mortgage on the property conveyed, executed simultaneously, should all be construed together as one and the same agreement: Dicken v. Cruse (Tex. Civ. App.), 176 S. W. 655. Two instruments, though not executed at the same time, referring to the same subject-matter and showing on their face that each was executed to carry out the intent of the other, both should be construed together as one contract: Brake v. Blain (Okla.), 153 Pac. 158. But compare Medical Society of South Carolina v. Gilbreth, 208 Fed. 899; Stebbins v. Myers, 143 N. Y. S. 396.

<sup>31</sup> Lipschitz v. Napa Fruit Co., 223 Fed. 698, 139 C. C. A. 228; Morris v. Rhode Island Ins. Co., 181 Ill. App. 500; Urbany v. Carroll, 176 Iowa 217, 157 N. W. 852; Grand Lodge A. O. U. W. v. State Bank, 93 Kans. 310, 144 Pac. 257; Fagan v. Ulrich, 166 App. Div. 342, 152 N. Y. S. 37; West v. Tilley (Okla.), 157 Pac. 283; American Nat. Ins. Co. v. Van Dusen (Tex. Civ. App.), 185 S. W. 634; Eighme v. Holcomb, 84 Wash. 145, 146 Pac. 391.

<sup>32</sup> Soucy v. Louis Obert Brewing Co., 180 Ill. App. 69; Producers' Oil Co. v. Snyder (Tex. Civ. App.), 190 S. W. 514.

§ 1526. **Repugnant provisions must be irreconcilable.**—The rule that courts should give effect to all the terms of a contract applies where a contract is partly written and partly printed as well as in other cases, and the written part will ordinarily prevail over the printed part only when they can not reasonably be reconciled.<sup>33</sup>

§ 1527. **Construction of words and figures.**—Where an amount is stated in both words and figures, the words usually prevail over the figures.<sup>34</sup>

§ 1528. **Subsidiary rules—Doubtful words construed against party using them.**<sup>35</sup>—Uncertain, ambiguous and doubtful words are construed against the party preparing the instrument or choosing and using such words.<sup>36</sup>

§ 1529. **Construction of grants by government.**—Grants of franchises and the like by the government or its municipalities are to be construed strictly as against the grantee and liberally in favor of the public.<sup>37</sup>

<sup>33</sup> Eastern Bridge &c. Co. v. Curtis Bldg. Co., 89 Conn. 571, 94 Atl. 921; Soucy v. Louis Obert Brewing Co., 180 Ill. App. 69; Gabbert v. William Seymour Edwards Oil Co., 76 W. Va. 718, 86 S. E. 671.

<sup>34</sup> Romine v. Haag (Mo.), 178 S. W. 147.

<sup>35</sup> [Main section cited in State v. Sapulpa (Okla.), 160 Pac. 489, 491.]

<sup>36</sup> Pacific Hardw. &c. Co. v. United States, 48 Ct. Cl. 399; Hongkong & Whampoa Dock Co., Ltd. v. United States, 50 Ct. Cl. 213; Bijur Motor Lighting Co. v. Eclipse Mach. Co., 237 Fed. 89; Iowa State Traveling Men's Assn. v. Ruge, 242 Fed. 762; Ramsey v. Mineral Creek Mining Co., 4 Alaska 739; Ford v. Fix, 112 Ark. 1, 164 S. W. 726; Clark v. J. R. Watkins Medical Co., 115 Ark. 166, 171 S. W. 136; Ruffin v. Lilienthal, 26 Cal. App. 701, 148 Pac. 233; Asmusen v. Post Printing &c. Co., 26 Colo. App. 416, 143 Pac. 396; Hansell-Elcock Co. v. Frankfort Marine Accident &c. Ins. Co., 177 Ill. App. 500; Barnes v. Independent Peerless Pattern Co., 180 Ill. App. 330; Maney Milling Co. v. Baker-Wignall & Co., 186 Ill. App. 390; Wier v. American Locomotive Co., 215 Mass. 303, 102 N. E. 481;

Home Mut. Fire Ins. Co. v. Pitman, 111 Miss. 420, 71 So. 739; Belch v. Schott, 171 Mo. App. 357, 157 S. W. 658; Flory v. Supreme Tribe of Ben Hur, 98 Nebr. 160, 152 N. W. 295; Marshall v. Sackett &c. Co., 166 App. Div. 141, 151 N. Y. S. 1045; McElraevy &c. Co. v. St. Joseph's Home for Girls, 143 N. Y. S. 235; Halpern v. Langrock Bros. Co., 153 N. Y. S. 985; Bank of Union v. Redwine, 171 N. Car. 559, 88 S. E. 878; Spande v. Western Life Indemnity Co., 68 Ore. 171, 136 Pac. 1189; Hyland v. Oregon Hassam Paving Co., 74 Ore. 1, 144 Pac. 1160, L. R. A. 1915C, 823, Ann. Cas. 1916E, 941n; St. Louis &c. R. Co. v. Hicks (Tex. Civ. App.), 158 S. W. 192; Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co. (Tex. Civ. App.), 167 S. W. 816; In re Eighth Ave. in City of Seattle, 82 Wash. 398, 144 Pac. 533.

<sup>37</sup> Washington-Oregon Corp. v. Chehalis, 202 Fed. 591; Birmingham Waterworks Co. v. Hernandez (Ala.), 71 So. 443; Ex parte Russell, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; State v. Des Moines City R. Co., 159 Iowa 259, 140 N. W. 437; People v. Detroit United R. Co., 162 Mich. 460, 127 N. W. 748, 125 N. W.

§ 1531. **Subsidiary rules—Language to be understood in sense in which promisor knew or had reason to believe other party understood it.**—Other things being equal, doubtful language is to be understood in the sense in which the promisor knew or had reason to believe that the other party understood it.<sup>38</sup>

§ 1532. **Subsidiary rules—General and particular words—Ejusdem generis.**<sup>39</sup>—Specific words generally control general ones, especially under the doctrine of *ejusdem generis*.<sup>40</sup> But this doctrine applies only where there is ambiguity or uncertainty as to the meaning and intention and not as against a clear intention to the contrary.<sup>41</sup>

§ 1534. **Subsidiary rules—Punctuation and grammar.**—Punctuation and grammar are to be given consideration, especially where the instrument appears to have been drawn by an educated and intelligent draftsman, but they are not controlling and are of little if any importance except where the intention is not otherwise apparent and they may shed light upon it.<sup>42</sup>

700; *State v. Water Supply Co.*, 19 N. Mex. 36, 140 Pac. 1059, Ann. Cas. 1916E, 1290. Under the Oklahoma statute, in contracts between a public officer or body and a private party, the language of the contract should be most strongly construed against the latter: *State v. Sapulpa* (Okla.), 160 Pac. 489.

<sup>38</sup> *Ryan v. Ohmer*, 244 Fed. 31; *Torrey v. Cannon*, 171 N. Car. 519, 88 S. E. 768; *Spande v. Western Life Indemnity Co.*, 68 Ore. 171, 136 Pac. 1189; *Byron v. First Nat. Bank*, 75 Ore. 296, 146 Pac. 516; *Dublin Electric & Co. v. Thompson* (Tex. Civ. App.), 166 S. W. 113; *McNeer v. Chesapeake & C. R. Co.* (W. Va.), 86 S. E. 887. Where a contract is ambiguous and doubtful in meaning, that meaning should prevail against either party in which he knew, or had reason to believe, that the other party understood it: *Weishut v. Layton* (Del. Super.), 93 Atl. 1057. See also *Campbell v. Hobbs*, 97 Nebr. 833, 151 N. W. 929.

<sup>39</sup> [Main section quoted in *Jones v. Island Creek Coal Co.* (W. Va.), 91 S. E. 391, 394.]

<sup>40</sup> *Hollerbach v. United States*, 233 U. S. 165, 58 L. ed. 898, 34 Sup. Ct.

553; *Jewel Tea Co. v. Watkins*, 26 Colo. App. 494, 145 Pac. 719; *E. H. Emery & Co. v. American Ins. Co.*, 177 Iowa 4, 158 N. W. 748. A particular description following a general description controls the latter: *Myers v. Wood*, 173 Mo. App. 564, 158 S. W. 909; *Moore v. Wood*, 173 Mo. App. 578, 158 S. W. 913. Where a particular purpose is sought by a contract and the language is clear and certain, no general terms will extend the meaning beyond that definitely expressed: *Taylor v. Buffalo Collieries Co.*, 72 W. Va. 353, 79 S. E. 27. See also as to application of this doctrine in construing statutes; *Hills v. Joseph*, 229 Fed. 865, 144 C. C. A. 147; *Henderson v. McMaster*, 104 S. Car. 268, 88 S. E. 645.

<sup>41</sup> *Verbeck v. Peters*, 170 Iowa 610, 153 N. W. 215; *Washington & C. Ry. v. Westinghouse Elec. & C. Co.* (Va.), 89 S. E. 131. See also *Crabtree v. State*, 123 Ark. 68, 184 S. W. 430; *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 Atl. 999, Ann. Cas. 1917D, 33n.

<sup>42</sup> *Allen v. United States Fidelity & C. Co.*, 269 Ill. 234, 109 N. E. 1035; *General Accident & C. Assn. Co. v. Louisville Home Tel. Co.*, 175 Ky. 96,

§§ 1535, 1536. **Subsidiary rules—Rejecting and interpolating words—Limits of rule.**—As a general rule meaning must be given to all the words used if it can reasonably be done, and words should neither be omitted nor interpolated,<sup>43</sup> but where there is an obvious and inadvertent omission of what was clearly intended, it will be supplied in a proper case,<sup>44</sup> and words may be rejected when they are meaningless or contrary to the clear intent and meaning of the entire instrument and can not be reconciled therewith.<sup>45</sup>

§ 1537. **Practical construction.**<sup>46</sup>—Where a contract is ambiguous, the practical construction given to it by the parties is of great, and often of controlling, weight.<sup>47</sup>

§ 1541. **Must be the act of both parties.**—A construction by one party and not the other is not within the rule that a practical construction by parties will govern, nor is such a construction by one consumer or beneficiary of a contract between a city

193 S. W. 1031, L. R. A. 1917D, 952n. See also *People v. Crawley*, 274 Ill. 139, 113 N. E. 119. The maxim, "*Mala grammatica non vitiat chartam*," is applied to an instrument prepared by one unskilled in language and when grammatical construction is at variance with the intent, as indicated by the whole instrument, but if it is prepared by an educated, intelligent draftsman, grammatical construction and arrangement will be considered and may be important: *Bank of Union v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

<sup>43</sup> *United States Fidelity & Co. v. French Mut. Gen. Society Co.*, 212 Fed. 620, 129 C. C. A. 156; *Caledonia Coal Co. v. Consolidated Coal Co.* 181 Mich. 431, 148 N. W. 187; *Burt v. Stringfellow*, 45 Utah 207, 143 Pac. 234; *Board of Education v. Wright-Osborn Co. (Utah)*, 164 Pac. 1033; *Smith v. Ramsey*, 116 Va. 530, 82 S. E. 189; *Karaskat Lumber & Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15; *Polebitzke v. John Week Lumber Co.*, 163 Wis. 322, 158 N. W. 62; ante §§ 1510, 1514.

<sup>44</sup> *Pacific Surety Co. v. Toye*, 224 Mass. 98, 112 N. E. 653.

<sup>45</sup> *Edwards v. Jefferson Standard Life Ins. Co. (N. Car.)*, 92 S. E. 695. See also *United States v. Southern Pac. Co.*, 230 Fed. 270. An unintentional

omission of the scrivener in failing to strike out a name and insert the name intended will not defeat the clear intention of the parties: *Tillman v. J. E. Webb & Co.*, 17 Ga. App. 620, 87 S. E. 904.

<sup>46</sup> [Main section quoted in *Smith v. Frantz*, 59 Ind. App. 269, 109 N. E. 407, 410.]

<sup>47</sup> *Bunday v. Huntington*, 224 Fed. 847, 140 C. C. A. 415; *In re Thomas*, 231 Fed. 513; *Bransford v. Regal Shoe Co.*, 237 Fed. 67, 150 C. C. A. 269; *Corinth Bank & Co. v. King*, 182 Ala. 403, 62 So. 704; *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424; *Jefferson Plumbers & Co. v. Peebles (Ala.)*, 71 So. 413; *Birmingham Waterworks Co. v. Hernandez (Ala.)*, 71 So. 443; *Mobile County v. Linch (Ala.)*, 73 So. 423; *Farrell v. Greenlee County*, 15 Ariz. 106, 136 Pac. 637, 49 L. R. A. (N. S.) 380n; *Clark v. J. R. Watkins Medical Co.*, 115 Ark. 166, 171 S. W. 136; *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622; *J. R. Watkins Medical Co. v. Williams*, 124 Ark. 539, 187 S. W. 653; *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951; *Rosenbaum Estate Co. v. Robert Dollar Co.*, 31 Cal. App. 576, 161 Pac. 10; *New Brantner Extension Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498,

and a water company binding upon other consumers or beneficiaries who have not assented or acquiesced therein.<sup>48</sup>

§ 1542. **Contract must be ambiguous.**<sup>49</sup>—Practical construction by the parties can have no weight as against the manifest intent and effect of a contract, and it is only where the contract is ambiguous, uncertain or of doubtful meaning that practical construction controls.<sup>50</sup>

Ann. Cas. 1916B, 1225n; Sorrells v. Sigel-Campion Live Stock Commission Co., 27 Colo. App. 154, 148 Pac. 279; Holmes v. Stearns Lumber & Co., 66 Fla. 259, 63 So. 449; Reeves v. Daniel, 143 Ga. 569, 85 S. E. 756; Geithman v. Eichler, 265 Ill. 579, 107 N. E. 180; Finch v. Theiss, 267 Ill. 65, 107 N. E. 898; Gillett v. Teel, 272 Ill. 106, 111 N. E. 722; Sholl Bros. v. Peoria & C. R. Co., 196 Ill. App. 306; Vandalia R. Co. v. Terre Haute Vitrified Brick Co., 183 Ind. 551, 108 N. E. 953; William H. Armstrong Co. v. Lieber, 54 Ind. App. 447, 103 N. E. 19; Patterson v. State Bank, 55 Ind. App. 331, 102 N. E. 880; American Sheet & Plate Co. v. Yonan, 59 Ind. App. 700, 109 N. E. 922; Jochimsen v. Johnson, 173 Iowa 553, 156 N. W. 21; Nicholl v. Wetmore, 174 Iowa 132, 156 N. W. 319; Chesapeake & C. R. Co. v. Peed, 155 Ky. 696, 160 S. W. 472, Ann. Cas. 1915C, 460n; Dalzell v. Dalzell, 170 Ky. 297, 185 S. W. 1107; J. B. Levert Co. v. John T. Moore Planting Co., 135 La. 77, 64 So. 987; W. T. Tilden Co. v. Densten Hair Co., 216 Mass. 323, 103 N. E. 916; Klemik v. Henriksen Jewelry Co., 128 Minn. 490, 151 N. W. 203; Knisely v. Leathe (Mo.), 178 S. W. 453; Cady v. Travelers' Ins. Co., 93 Nebr. 634, 142 N. W. 107; Wilhoit v. Stevenson, 96 Nebr. 751, 148 N. W. 963; Van Dyke v. Anderson (N. J. Ch.), 91 Atl. 593; Furman v. Feibleman & Lehman Co., 88 N. J. L. 711, 96 Atl. 886; Fraser v. State Savings Bank, 18 N. Mex. 340, 137 Pac. 592; Atlantic, Gulf & C. Co. v. Woodmere Realty Co., 156 App. Div. 351, 142 N. Y. S. 953; Jarvie v. Arbuckle, 163 App. Div. 199, 148 N. Y. S. 189; Jacob Dold Packing Co. v. Kings County Refrigerating Co., 176 App. Div. 407, 162 N. Y. S. 1035; Rheims v. Dolly, 93 Misc. 500, 157 N.

Y. S. 213; Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748n; Guthrie Mill & C. Co. v. Howe Grain & C. Co. (Okla.), 157 Pac. 290; Kelly v. Harris (Okla.), 162 Pac. 219; Leiter v. Dwyer Plumbing & C. Co., 66 Ore. 477, 133 Pac. 1180; Tustin v. Philadelphia & C. Iron Co., 250 Pa. 425, 95 Atl. 595; Equitable Gas Co. v. Limegrover, 54 Pa. Super. Ct. 250; Herndon v. Wardlaw, 100 S. Car. 1, 84 S. E. 112; State v. Board of Trust of Vanderbilt University, 129 Tenn. 279, 164 S. W. 1151; Plummer v. Simms (Tex. Civ. App.), 177 S. W. 1037; Corbin v. Booker (Tex. Civ. App.), 184 S. W. 696; Douglass v. Morrisville, 89 Vt. 393, 95 Atl. 810; Hairston v. Hill, 118 Va. 339, 87 S. E. 573; Lovett v. West Virginia Central Gas Co., 73 W. Va. 40, 79 S. E. 1007.

<sup>48</sup> State v. Water Supply Co., 19 N. Mex. 36, 140 Pac. 1056, L. R. A. 1915A, 246n, Ann. Cas. 1916E, 1290n. A written sales contract is not subject to be varied by the buyer's construction of it: Stanley v. Weber Implement & C. Co. (Mo. App.), 190 S. W. 372. But the construction and acts of one party may justify giving the contract such a construction against him: Miller v. Pepperling, 185 Mo. App. 222, 170 S. W. 328. See, however, Boeing v. Fordney, 184 Mich. 153, 150 N. W. 852.

<sup>49</sup> [Main section cited in Lemcke v. Hendrickson, 60 Ind. App. 323, 330, 110 N. E. 591.]

<sup>50</sup> Lesamis v. Greenberg, 225 Fed. 449, 140 C. C. A. 481; Twin Tree Lumber Co. v. Ensign, 163 Ala. 113, 69 So. 525; Lemcke v. Hendrickson, 60 Ind. App. 323, 110 N. E. 691; Comptograph Co. v. Burroughs Adding Mach. Co. (Iowa), 159 N. W. 465; Clarke v. Rogers, 159 Ky. 762, 169 S. W. 485; Rea v. Pennsylvania

§ 1543. **Entire and severable contracts.**<sup>51</sup>—An entire contract is said to be one in which the consideration is entire on both sides,<sup>52</sup> and an indivisible contract is said to be one whose constituent parts can not be separated.<sup>53</sup> It is entire where it contemplates that all its parts and the consideration shall be common each to the other and interdependent.<sup>54</sup> The distinguishing mark of a divisible contract is that it admits of the apportionment of the consideration on either side so as to correspond to the unascertained consideration on the other side, but this is not necessarily conclusive where there are opposing marks.<sup>55</sup> Whether a contract is entire or divisible usually depends upon the intention of the parties as ascertained from the language of the whole contract, together with the surrounding circumstances, when necessary, in accordance with the established rules of construction.<sup>56</sup>

§ 1544. **Contract consisting of several distinct items.**—Ordinarily, in the absence of anything controlling to the contrary, where the part to be performed by one party consists of several distinct items and the price is apportioned to each item, or is left to be implied by law so apportioned, the contract is severable.<sup>57</sup> But it has been held that a contract between a trust company and an experienced trust officer for his employment at a certain salary and the sale to him of stock in the company at less than its value, with the object of building up the company's business can not be divided into a separate agreement of employment and a separate agreement of sale.<sup>58</sup>

§ 1545. **Illustrations of entire contracts.**—A contract placing land in the hands of an agent for sale and giving him an

Canal Co. 245 Pa. 589, 91 Atl. 1053; Fass v. South Atlantic Life Ins. Co., 105 S. Car. 107, 89 S. E. 558; Salisbury v. Brooks (W. Va.), 94 S. E. 117.

<sup>51</sup> [Main section quoted in Stanley v. Sumrell (Tex. Civ. App.), 163 S. W. 699.]

<sup>52</sup> In re Hellams, 223 Fed. 460.

<sup>53</sup> Garon v. Credit Foncier Canadien, 37 R. I. 273, 92 Atl. 561.

<sup>54</sup> Dunn v. T. J. Cannon Co. (Okla.), 151 Pac. 1167. See also Del Curto v. Billingsley (Tex. Civ. App.), 169 S. W. 393.

<sup>55</sup> Producers' Coke Co. v. Hillman, 243 Pa. 313, 90 Atl. 144.

<sup>56</sup> Crawford v. Surety Inv. Co., 91 Kans. 748, 139 Pac. 481; Elliott Supply Co. v. Green (N. Dak.), 160 N. W. 1002; Producers' Coke Co. v. Hillman, 243 Pa. 313, 90 Atl. 144. See also Stanley v. Sumrell (Tex. Civ. App.), 163 S. W. 699.

<sup>57</sup> Brown v. Exeter Mach. Works, 60 Pa. Super. Ct. 365. A contract to drive piling, make an excavation, remove an embankment, and provide a pump, at separate stipulated prices, is severable rather than entire: Parkersburg &c. Sand Co. v. Smith, 76 W. Va. 246, 85 S. E. 516.

<sup>58</sup> Williams v. Butler (Ind. App.), 105 N. E. 387.



option to purchase is entire and indivisible, so that a breach of either the agency or option part is a breach of the entire contract.<sup>59</sup> A contract to plow and sow is entire.<sup>60</sup> So, a contract for sale of land and personalty for a single consideration is entire and indivisible.<sup>61</sup> And a contract for services to be rendered for a definite period for a stipulated salary is entire and not divisible, even though the salary is payable in monthly instalments, and the contract is breached by the refusal of the employer to permit the employé to perform his part.<sup>62</sup>

**§ 1546. Examples of severable contracts.**—A contract to buy automobiles and for the appointment of the buyer as sales agent together with a bill of sale has been held a separable or divisible contract.<sup>63</sup> So, a contract to convey land to a certain party and, on completion of the sale, to pay a commission for it, has been held divisible.<sup>64</sup> Where a memorandum for sale of a large number of coats provided that they should be shipped as wanted and it was shown that cash was to be paid for each shipment, the court refused to say as a matter of law that the contract was entire and indivisible.<sup>65</sup> And where a woman agreed, for compensation, to care for and support her mother until her death, it was held that the contract was not so entire as to preclude a recovery for services rendered until the mother died.<sup>66</sup> A contract to pay for infringement of patent, and, if the validity of the patent should be established by litigation, to pay greater royalties, has been held separable so far as the consideration was concerned.<sup>67</sup> And where a farm lease, otherwise in the ordinary

<sup>59</sup> *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042.

<sup>60</sup> *Waite v. C. E. Shoemaker & Co.*, 50 Mont. 264, 146 Pac. 736.

<sup>61</sup> *Waite v. Stanley*, 88 Vt. 407, 92 Atl. 633.

<sup>62</sup> *Jameson v. Board of Education (W. Va.)*, 89 S. E. 255, L. R. A. 1916F, 926 (authorities on both sides of the question of constructive service and right to recover on count in *indebitatus assumpsit* are cited in principal and dissenting opinion). See also for other illustrative cases: *Hartsell v. Turner (Ala.)*, 71 So. 658; *White v. Sailors*, 17 Ga. App. 550, 87 S. E. 831; *Trainor v. Chicago Sandoval Coal Co.*, 194 Ill. App. 118 (contract for services and material

held entire and not severable, although payments were provided for on account, where no time was fixed for acceptance of work and payment); *Hochberg Contracting Co. v. F. & P. Auto Transp. Co.*, 158 N. Y. S. 879.

<sup>63</sup> *Wilcox v. Badger Motor Car Co.*, 99 Nebr. 189, 155 N. W. 891.

<sup>64</sup> *Leonard v. Kendall (Tex. Civ. App.)*, 190 S. W. 786. See also *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056.

<sup>65</sup> *H. Leonard Simmons Co. v. Goldfarb*, 150 N. Y. S. 547.

<sup>66</sup> *Lima v. Campbell*, 219 Mass. 253, 106 N. E. 858.

<sup>67</sup> *Comptograph Co. v. Burroughs Adding Mach. Co. (Iowa)*, 159 N. W. 465.

form, provided in addition for purchase by the lessor of the tenant's share of corn raised, and the parties performed all the conditions except that as to the purchase of corn, the contract was held severable and the latter stipulation not to be dependent upon the others.<sup>68</sup>

§ 1547. **Dependent and independent promises.**—Whether stipulations or promises are dependent or independent is determined by a proper interpretation or construction of the contract in accordance with the intent of the parties.<sup>69</sup> Where a thing is to be done by one party as the consideration for a thing to be done by the other, and the promises are to be performed at the same time, they are mutual and dependent.<sup>70</sup>

§ 1548. **Alternative stipulations and options.**—Contracts which are optional as to one party are strictly construed against him and in favor of the party bound.<sup>71</sup> A contract which amounts to a waiver of a right to purchase by a party rather than an option to receive a money consideration or to purchase does not put such party to an election.<sup>72</sup>

§ 1549. **Rules as to time—Performance.**—Where a contract for building material did not specify any time of payment, the price to be paid was held not due and payable until delivery and acceptance of such material.<sup>73</sup> Ordinarily a provision in a building contract specifying a definite time within which the building must be completed refers to the building proper and does

<sup>68</sup> Stanley v. Sumrell (Tex. Civ. App.), 163 S. W. 697.

<sup>69</sup> McCormick v. Badham, 191 Ala. 339, 67 So. 609; Statesville Flour Mills Co. v. Wayne Distributing Co., 171 N. Car. 708, 88 S. E. 771.

<sup>70</sup> McCormick v. Badham, 191 Ala. 339, 67 So. 609. For definition of independent covenant, see: Big Run Coal Co. v. Employers' Indemnity Co., 163 Ky. 596, 174 S. W. 25. For examples of independent covenants or stipulations, see: Fresno Canal & Co. v. Perrin, 170 Cal. 411, 149 Pac. 805; International Text-Book Co. v. Martin, 221 Mass. 1, 108 N. E. 469. For examples of dependent covenants or stipulations, see: Bryne v. Dorey, 221 Mass. 399, 109 N. E. 146; Lipscher v. Ebling Brewing Co., 83 Misc. 30, 144 N. Y. S. 214; Comanche

v. Hoff (Tex. Civ. App.), 170 S. W. 135.

<sup>71</sup> Warner v. Page (Okla.), 159 Pac. 264.

<sup>72</sup> Skinner v. Fisher, 120 Ark. 91, 178 S. W. 922. See also for contract held not a mere option agreement: Sulzer v. Moyer, 161 Wis. 435, 154 N. W. 700. For an option contract under which a party was held to forfeit a large sum for failure to exercise it, see: Syenite Trap Rock Co. v. Williams, 167 App. Div. 774, 153 N. Y. S. 74.

<sup>73</sup> In re Hellams, 223 Fed. 460. When a building contract specifies no time for payment, it is not usually required until performance is completed: Rosen v. Bonagur, 143 N. Y. S. 1059; Empire Lighting Fixture Co. v. Browning, 93 Misc. 489, 157 N.

not include a sidewalk in front of it.<sup>74</sup> So, such a provision does not ordinarily apply to extra work, even though the possibility that it may be required is recognized and a price fixed for it.<sup>75</sup> Under a provision in a contract between a theatrical company and theater owner for settlement at the end of each performance or at such other times as may be mutually agreed, either party may demand settlement at the end of each performance.<sup>76</sup>

**§ 1550. Computation of time from a particular day or event.**<sup>77</sup>—The general rule in computing time from a designated day or event is to exclude such day and include the last day of the period specified.<sup>78</sup> Where no time for performance is specified, a reasonable time is implied or presumed.<sup>79</sup> Where it

Y. S. 284. Even though the time limit in a subcontract for the furnishing of materials is waived, it is the duty of the subcontractor to complete his contract within a reasonable time thereafter: *Harty & Co. v. Carden-Callahan Co.*, 192 Ill. App. 281.

<sup>74</sup> *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371. For construction of building contract for payments on certificates of architect and meaning of "final payment," see: *Young Men's Christian Assn. v. United States Fidelity & Co.*, 90 Kans. 332, 133 Pac. 894, L. R. A. 1915C, 170. See also *Rosenthal v. Turner*, 192 Ill. App. 9; *Dreyfus v. American Bonding Co.*, 136 La. 491, 67 So. 342.

<sup>75</sup> *Raymond Concrete Pile Co. v. Hartman Furniture & Carpet Co.*, 187 Ill. App. 426. See also *New York State Nat. Bank v. Whitehall Water Power Co.*, 161 App. Div. 304, 146 N. Y. S. 769.

<sup>76</sup> *Comstock Amusement Co. v. Opera Ball Co.*, 93 Ohio St. 46, 112 N. E. 150. For other cases upon the general subject, see: *Taylor v. Simi Const. Co.*, 23 Cal. App. 308, 137 Pac. 1095; *Turner v. Howze*, 28 Cal. App. 167, 151 Pac. 751; *Mettler v. Vance*, 30 Cal. App. 499, 158 Pac. 1044; *Matt v. Matt*, 182 Ill. App. 312; *Hulse v. Michigan Sugar Co.*, 186 Mich. 599, 152 N. W. 1048; *Barnum v. White*, 128 Minn. 58, 150 N. W. 227; *Ottumwa Bridge Co. v. Corrigan*, 251 Mo. 667, 158 S. W. 39; *Redington v. Hartford*, 85 N. J. L. 704, 90 Atl. 284; *Lord v. Miller*, 86 Wash. 436, 150 Pac. 631;

*Hotsinpiller v. Hotsinpiller*, 72 W. Va. 823, 79 S. E. 936.

<sup>77</sup> [Main section cited in *Potter County v. Boesen* (Tex. Civ. App.), 191 S. W. 787, 791, and in *Gault v. Dunlap* (Tex. Civ. App.), 188 S. W. 1020, 1021; and quoted in *York v. Sun Ins. Office* (Ind. App.), 113 N. E. 1021, 1023.]

<sup>78</sup> *Gault v. Dunlap* (Tex. Civ. App.), 188 S. W. 1020. But see *Meridian Life Ins. Co. v. Milam*, 172 Ky. 75, 188 S. W. 879, L. R. A. 1917B, 103n. Fractions of a day are not usually considered: *Meridian Life Ins. Co. v. Milam*, 172 Ky. 75, 188 S. W. 879, L. R. A. 1917B, 103n; *Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866.

<sup>79</sup> *R. Guastavino Co. v. United States*, 50 Ct. Cl. 115; *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 219 Fed. 477, 135 C. C. A. 189; *In re Hellams*, 223 Fed. 460; *Burpee v. Guggenheim*, 226 Fed. 214; *Farrow v. Sturdivant Bank*, 184 Ala. 208, 63 So. 973; *Pratt Consol. Coal Co. v. Short*, 191 Ala. 378, 68 So. 63; *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254; *Brookings Lumber & Co. v. Manufacturers' Automatic Sprinkler Co.*, 173 Cal. 679, 161 Pac. 266; *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371; *Roush v. Illinois Oil Co.*, 180 Ill. App. 346; *Raymond Concrete Pile Co. v. Hartman Furniture & Carpet Co.*, 187 Ill. App. 426; *Weber Chimney Co. v. Brunswick-Balke-Collender Co.*, 195 Ill. App. 9; *Ryan v. Litchfield*, 162 Iowa 609, 144 N. W. 313; *Western*

is agreed that a debt due at the time shall be paid upon the happening of a specified event in the future and it does not happen, the law will imply a promise to pay within a reasonable time.<sup>80</sup> What is a reasonable time is generally a question for the jury under the circumstances of the particular case;<sup>81</sup> but where the facts are undisputed and but one reasonable inference can be drawn, the question is one of law for the court.<sup>82</sup>

### § 1551. Time—Time at law generally of the essence.—

At law, provisions as to time are generally regarded as of the essence of a contract and required to be complied with, especially where it appears that time is of such importance that the parties would not have contracted without such a provision,<sup>83</sup> and time may be of the essence even though there is no express provision

*Securities Co. v. Atlee*, 168 Iowa 650, 151 N. W. 56; *Knipe v. Troika*, 92 Kans. 549, 141 Pac. 557; *Greenstreet v. Cheatum*, 99 Kans. 290, 161 Pac. 596; *Reinforced Concrete Co. v. Boyes*, 180 Mich. 609, 147 N. W. 577; *McCall v. Atchley*, 256 Mo. 39, 164 S. W. 593; *Simon v. Etgen*, 213 N. Y. 589, 107 N. E. 1066; *Northrup v. Scott*, 85 Misc. 515, 148 N. Y. S. 846; *Mitchell v. Heinrich Aeroplane Co.*, 95 Misc. 222, 158 N. Y. S. 728; *Wimpie Elec. Co. v. Columbus Circle Const. Corp.*, 98 Misc. 242, 162 N. Y. S. 969; *Fayou v. Jekyll*, 157 N. Y. S. 880; *Holden v. Royal*, 169 N. Car. 676, 86 S. E. 583; *Leeper Bros. Lumber Co. v. Gunter (Okla.)*, 160 Pac. 606; *Ehinger v. John Baizley Ironworks*, 248 Pa. 309, 93 Atl. 1074; *Markley v. Godfrey*, 254 Pa. 99, 98 Atl. 785; *Johnson v. Mansfield (Tex. Civ. App.)*, 166 S. W. 927; *Jefferson Cotton Oil & Co. v. Pridgen (Tex. Civ. App.)*, 172 S. W. 739; *Boesen v. Potter County (Tex. Civ. App.)*, 173 S. W. 462; *Smith Sand & Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163.

<sup>80</sup> *Voight v. Voight*, 96 Nebr. 465, 148 N. W. 83.

<sup>81</sup> *Harty & Co. v. Carden-Callahan Co.*, 192 Ill. App. 281; *George J. Wanstrath Real Estate Co. v. Wenz*, 185 Mo. App. 162, 170 S. W. 345; *Holden v. Royal*, 169 N. Car. 676, 86 S. E. 583. See also *Potter v. Boesen*

(*Tex. Civ. App.*), 191 S. W. 787. The question of what is reasonable time for exercise of an option is usually for the jury: *Paulson v. Weeks*, 80 Ore. 468, 157 Pac. 590.

<sup>82</sup> *Farrow v. Sturdivant Bank*, 184 Ala. 208, 63 So. 973; *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254; *York v. Sun Ins. Office (Ind. App.)*, 113 N. E. 1021, 1023; *Reinforced Concrete Co. v. Boyes*, 180 Mich. 609, 147 N. W. 577; *Kiser v. Denney*, 99 Nebr. 3, 154 N. W. 835; *Markley v. Godfrey*, 254 Pa. 99, 98 Atl. 785. See also *Potter County v. Boesen (Tex. Civ. App.)*, 191 S. W. 787.

<sup>83</sup> *Watson v. Feibel (La.)*, 71 So. 585. See also *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. 882. Time will be presumed to be of the essence when both parties knew that the ultimate purpose of the contract could not be accomplished without strict performance as to time, but it is not of the essence of a contract to furnish and erect the steel construction for a building, where the contractor was required to await the progress of others on the building, and the convenience of the architect in correcting discrepancies in the plans or in the work of others: *Ottumwa Bridge Co. v. Corrigan*, 251 Mo. 667, 158 S. W. 39.

to that effect.<sup>84</sup> It usually depends upon the intention of the parties.<sup>85</sup>

§ 1552. **Time—Relative to sale of goods.**<sup>86</sup>—Time specified for shipment or delivery is of the essence of a contract for the sale and delivery of goods where no right of property passes by the bargain from the vendor to the purchaser.<sup>87</sup>

§ 1553. **Conditions precedent.**<sup>88</sup>—Before one party to a contract can require the other to perform an act under it, the former must fulfil or comply with all conditions precedent thereto imposed upon him thereby.<sup>89</sup> A condition precedent in an escrow agreement must be strictly complied with.<sup>90</sup>

§ 1554. **When time is not of the essence.**—Time is not ordinarily of the essence of a contract unless expressly so provided or clearly so intended.<sup>91</sup>

§§ 1555, 1556. **Time not generally regarded in equity as of the essence.**—In equity the rule is not so strict as it is at law in regarding time as of the essence of a contract, but even in equity if it clearly appears from the terms of the stipulation and the subject-matter and circumstances that the parties intended to make time of the essence and that they must have contemplated

<sup>84</sup> Meier Dental Mfg. Co. v. Smith, 237 Fed. 563, 150 C. C. A. 445. But see Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036.

<sup>85</sup> Mitchell v. Probst (Okla.), 152 Pac. 597; Phillis v. Gross, 32 S. Dak. 438, 143 N. W. 373.

<sup>86</sup> [Main section cited in Gault v. Dunlap (Tex. Civ. App.), 188 S. W. 1020, 1022.]

<sup>87</sup> Sunshine Cloak &c. Co. v. Roquette, 30 N. Dak. 143, 152 N. W. 359, L. R. A. 1916E, 932, and note; Fountain City Drill Co. v. Lindquist, 22 S. Dak. 7, 114 N. W. 1008. See also Connell Bros. Co. v. H. Diedrichson Co., 213 Fed. 737, 130 C. C. A. 251; Bamberger Bros. v. Burrows, 145 Iowa 441, 450, 124 N. W. 333, 337; Nelson v. Imperial Trading Co., 69 Wash. 442, 125 Pac. 777.

<sup>88</sup> See as to what is a condition precedent: Metropolitan Life Ins. Co. v. Goodman, 10 Ala. App. 446, 65 So. 449; Northwestern Nat. Life Ins. Co. v. Ward (Okla.), 155 Pac.

524; also see post § 1578 as to when performance is a condition precedent.

<sup>89</sup> Sunshine Cloak &c. Co. v. Roquette, 30 N. Dak. 143, 152 N. W. 359, L. R. A. 1916E, 932.

<sup>90</sup> Thornhill v. Olson, 31 N. Dak. 81, 153 N. W. 442, L. R. A. 1916A, 493, and note. See also Sharp v. Kilborn, 64 Ore. 371, 130 Pac. 735; Hanby v. First Nat. Bank (Tex. Civ. App.), 163 S. W. 415.

<sup>91</sup> Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748n. One who contracts to assume a lease on condition that the other party should "clean walls and ceiling and put plumbing in condition, if necessary," when it vacated the premises, is not freed from liability merely because such work was not done exactly at the time stated: E. C. Atkins & Co. v. Kirk, 187 Ill. App. 310. See also St. Louis Fire &c. Metal Works v. Viviano, 194 Mo. App. 440, 185 S. W. 218.

the consequences of a failure of performance in that regard, it will usually be considered as of the essence and enforced in equity as well as in law.<sup>92</sup>

**§ 1557. Where the property is subject to fluctuations in value.**<sup>93</sup>—Where the property which is the subject-matter of a contract is of such a character that it is subject to sudden and frequent or great fluctuations in value, time is usually of the essence, even though it is not expressly so provided.<sup>94</sup>

**§§ 1559, 1560. Rules as to penalties and liquidated damages.**—The intention of the parties as shown by the language, subject-matter and circumstances usually determines whether a stipulation as to an amount to be paid upon failure of performance of an obligation under a contract is to be regarded as a penalty or as liquidated damages;<sup>95</sup> but the language used is not controlling, and a stipulation has sometimes been treated as providing liquidated damages though called a penalty therein and often as a penalty although called liquidated damages in the stipulation.<sup>96</sup> The courts are inclined to treat it as a penalty and to allow only such damages as are shown to have been actually sustained whenever the reason and justice of the case require it.<sup>97</sup> But if the actual damages can not well be measured and ascertained, and the amount stipulated for is reasonable, it will gen-

<sup>92</sup> Meier Dental Mfg. Co. v. Smith, 237 Fed. 563; Bennie v. Becker-Franz Co., 14 Ariz. 580, 134 Pac. 280; Olympia Min. & Mill. Co. v. Kerns, 24 Idaho 481, 135 Pac. 255; Telegraphphone Corp. v. Telegraphphone Co., 103 Maine 444, 69 Atl. 767.

<sup>93</sup> [Main section cited in Gault v. Dunlap (Tex. Civ. App.), 188 S. W. 1020, 1022.]

<sup>94</sup> Gault v. Dunlap (Tex. Civ. App.), 188 S. W. 1020.

<sup>95</sup> Sun Printing & Pub. Assn. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. 240; United States v. Bethlehem Steel Co., 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. 450; Bilz v. Powell, 50 Colo. 482, 117 Pac. 344, 38 L. R. A. (N. S.) 847n; Gougar v. Buffalo Specialty Co., 26 Colo. App. 8, 141 Pac. 511; Eikenberry v. Thorn (Ind. App.), 112 N. E. 112; Norman v. Vickery, 60 Tex. Civ. App. 449, 128

S. W. 452; Witherspoon v. Duncan, 62 Tex. Civ. App. 361, 131 S. W. 660. See also Raymond v. Edelrock, 15 N. Dak. 231, 107 N. W. 194.

<sup>96</sup> Webster v. Bosanquet, L. R. (1912) App. Cas. 394, Ann. Cas. 1912C, 1018, and note on page 1023. See also Eikenberry v. Thorn (Ind. App.), 112 N. E. 112; Decker v. Pierce, 191 Mich. 64, 157 N. W. 384.

<sup>97</sup> Eikenberry v. Thorn (Ind. App.), 112 N. E. 112; Evans v. Moseley, 84 Kans. 322, 114 Pac. 374, 50 L. R. A. (N. S.) 889, and note; Mount Airy Milling & Co. v. Runkles, 118 Md. 371, 84 Atl. 533, L. R. A. 1915E, 373, and note; Madler v. Silverstone, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. (N. S.) 1n. See also Illinois Surety Co. v. United States, 229 Fed. 527, 143 C. C. A. 595.

erally be construed and treated as stipulated damages.<sup>98</sup> On the other hand, if the actual damages are easily ascertained and the stipulated sum is unreasonable, or if the principal agreement contains provisions for the performance or nonperformance of acts of different degrees of importance and the stipulated sum is to be paid for violation of a minor one the same as for a violation of the more important ones, it will usually be treated as a penalty.<sup>99</sup> A provision for stipulated damages for delay in the completion of a contract contemplates its performance and does not apply to its abandonment or total failure to perform.<sup>1</sup>

### § 1561. Stipulations in building contracts.<sup>2</sup>

§§ 1564, 1565. **Province of court and jury in construing contracts.**—The construction of a written contract is usually for the court.<sup>3</sup> But where a contract is ambiguous and extrinsic evidence must be resorted to, its construction is a mixed question

<sup>98</sup> Chicago &c. R. Co. v. Dockery, 195 Fed. 221, 115 C. C. A. 173; United States v. Rubin, 233 Fed. 125; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775; Bradshaw v. Millikin (N. Car.), 92 S. E. 161, L. R. A. 1917E, 880; Krausse v. Greenfield (Ore.), 123 Pac. 392; York v. York R. Co., 229 Pa. 236, 78 Atl. 128; Webster v. Bosanquet, L. R. (1912) App. Cas. 394, Ann. Cas. 1912C, 1018, and note.

<sup>99</sup> Union Pac. R. Co. v. Mitchell-Crittenden Tie Co., 190 Fed. 544, 111 C. C. A. 396; Moore v. Kline, 26 Colo. App. 334, 143 Pac. 262; Floding v. Floding, 137 Ga. 531, 73 S. E. 729; J. I. Case Threshing Co. v. Souders (Ind.), 96 N. E. 177; Sanders v. McKim, 138 Iowa 122, 115 N. W. 917; Evans v. Moseley, 84 Kans. 322, 114 Pac. 374, 50 L. R. A. (N. S.) 889n; J. I. Case Threshing Mach. Co. v. Fronk, 105 Minn. 39, 117 N. W. 229; Summet v. Morris County Trac. Co., 85 N. J. L. 193, 88 Atl. 1048, L. R. A. 1915E, 385n; Childs v. Moore (Okla.), 157 Pac. 333; Madler v. Silverstone, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. (N. S.) 1n; note in L. R. A. 1915E, 374.

<sup>1</sup> Rainier v. Masters, 79 Ore. 534, 154 Pac. 426, 155 Pac. 1197, L. R. A. 1916E, 1175; Garey v. Pasco, 89 Wash. 382, 154 Pac. 433; Lembke v. Chin Wing, (1912) 17 B. C. 218, 4

D. L. R. 431. See also Shields v. John Shields Const. Co., 81 N. J. Eq. 286, 86 Atl. 958.

<sup>2</sup> See post § 3712.

<sup>3</sup> Titus v. Whiteside, 228 Fed. 965; New York &c. Coke Co. v. Meyersdale Coal Co., 236 Fed. 536, 149 C. C. A. 588; Baskett Lumber & Mfg. Co. v. Gravlee (Ala. App.), 73 So. 291; Pittsburgh Steel Co. v. Wood, 109 Ark. 537, 160 S. W. 519; Capitol Food Co. v. Mode (Ark.), 165 S. W. 637; Clark v. J. R. Watkins Medical Co., 115 Ark. 166, 171 S. W. 136; Carroll v. Cohen (Del. Super.), 91 Atl. 1001; Schofield-Burkett Const. Co. v. Rich, 16 Ga. App. 321, 85 S. E. 285; Empire Mills Co. v. Burrell Engineering &c. Co., 18 Ga. App. 224, 89 S. E. 530; Rosenbaum Bros. v. Devine, 271 Ill. 354, 111 N. E. 97; Overland Motor Co. v. Tennant, 195 Ill. App. 6; Errant v. Columbia Western Mills, 195 Ill. App. 14; Scarlett v. National Live Stock Ins. Co., 193 Ill. App. 488; Prudential Ins. Co. v. Sellers, 54 Ind. App. 326, 102 N. E. 894; Comptograph Co. v. Burroughs Adding Mach. Co. (Iowa), 159 N. W. 465; Carrington v. Graves, 121 Md. 567, 89 Atl. 237; Phoenix Pad Mfg. Co. v. Roth, 127 Md. 540, 96 Atl. 762; Pettingill Andrews Co. v. Schrafft, 214 Mass. 469, 102 N. E. 308; Waldstein v

of law and fact for the jury under proper instructions.<sup>4</sup> Where there is doubt as to what the parties agreed on or as to their intention and the meaning of the contract under all the circumstances the question is properly left to the jury.<sup>5</sup> The court in the interpretation of an instrument in a foreign language is not bound by the translation of a party.<sup>6</sup>

§ 1566. **Oral contracts.**—The question as to what contract the parties made and its construction, when oral, is usually

Dooskin, 220 Mass. 232, 107 N. E. 927; Cutler v. Spens, 191 Mich. 603, 158 N. W. 224; Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203; Fellows v. Dorsey, 171 Mo. App. 289, 157 S. W. 995; Brautigam v. Dean & Co., 85 N. J. L. 549, 89 Atl. 760; Decker v. George W. Smith & Co., 88 N. J. L. 630, 96 Atl. 915; Keinath v. Reed (N. Mex.), 137 Pac. 841; Elwood v. Goldman, 217 N. Y. 585, 112 N. E. 421; Marshall v. Sackett & Co., 166 App. Div. 141, 151 N. Y. S. 1045; Morrison v. Parks, 164 N. Car. 197, 80 S. E. 85; Barkley v. Atlantic Coast Realty Co., 170 N. Car. 481, 87 S. E. 219; J. Rosenbaum Grain Co. v. Higgins, 40 Okla. 181, 136 Pac. 1073; Brown v. Davidson, 42 Okla. 598, 142 Pac. 387; Brown v. Coppadge (Okla.), 153 Pac. 817; Pressley v. Sallisaw (Okla.), 154 Pac. 660; Comanche Mercantile Co. v. Wheeler & Co. Mercantile Co. (Okla.), 155 Pac. 583; City Messenger & Co. v. Postal Telegraph Co., 74 Ore. 433, 145 Pac. 657; Dahlstrom v. Hudelson, 80 Ore. 520, 157 Pac. 798; Muller v. Rittersville Hotel Co., 240 Pa. 79, 87 Atl. 424; Crelier v. Mackey, 243 Pa. 363, 90 Atl. 158; Lipper Mfg. Co. v. Morris & Co., 58 Pa. Super Ct. 611; Batesburg Cotton Oil Co. v. Southern R. Co., 103 S. Car. 494, 88 S. E. 360; Bailey v. Spalding-Livingston Investments Co., 43 Utah 535, 136 Pac. 962.

<sup>4</sup> John Sommer Faucet Co. v. Commercial Casualty Ins. Co., 89 N. J. L. 693, 99 Atl. 342; Arlington Heights Realty Co. v. Citizens' & Light Co. (Tex. Civ. App.), 160 S. W. 1109. See also Dunaway v. Roden (Ala. App.), 71 So. 70; Ludden & Co. Southern Music House v. Dairy & Supply Co., 17 Ga. App. 581, 87 S. E. 823; Cutler v. Spens, 191 Mich. 603, 158 N. W. 224;

Foltmer v. First Methodist Episcopal Church, 127 Minn. 129, 148 N. W. 1077; Lamb v. Norcross Bros. Co., 208 N. Y. 427, 102 N. E. 564. Where letters constitute the contract between the parties, the court should construe it and state its terms and legal effect to the jury: Radford v. Practical Premium Co., 125 Ark. 199, 188 S. W. 562.

<sup>5</sup> Luse v. Martin, 215 Fed. 28; Sellers v. Dickert, 185 Ala. 206, 64 So. 40; Dunaway v. Roden (Ala. App.), 71 So. 70; Wadin v. Czuczka, 16 Ariz. 371, 146 Pac. 491; Torrey v. Shea, 29 Cal. App. 313, 155 Pac. 820; Earley v. Hall, 89 Conn. 606, 95 Atl. 2; Pidcock v. Nace, 15 Ga. App. 794, 84 S. E. 226; Hening v. Whaley, 18 Ga. App. 208, 89 S. E. 166; Baker v. Sappington, 16 Ga. App. 94, 84 S. E. 592; W. L. Wisenbaker & Co. v. West Yellow Pine Co. (Ga. App.), 86 S. E. 46; Tomasek v. Edwardsville, 183 Ill. App. 493; Reif v. Commercial Cabinet Co., 185 Ill. App. 577; Becker v. Churdan, 175 Iowa 159, 157 N. W. 221; Royer v. Western Silo Co., 99 Kans. 309, 161 Pac. 654; Thompson v. Boyd, 158 Ky. 750, 166 S. W. 215; Blocher v. Mayer Bros. Co., 127 Minn. 241, 149 N. W. 285; O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865; Paine & Co. v. United States Fidelity & Guaranty Co., 135 Minn. 9, 159 N. W. 1075; Furman v. Feibleman & Co., 88 N. J. L. 711, 96 Atl. 886; Patterson v. Shaffer, 61 Pa. Super Ct. 315; Plummer v. Simms (Tex. Civ. App.), 177 S. W. 1037; Taplin v. Harris, 88 Vt. 15, 90 Atl. 956; Douglass v. Morrisville, 89 Vt. 393, 95 Atl. 810; Culver v. Culliton, 77 Wash. 457, 137 Pac. 1000; Kiebertz v. Seattle, 84 Wash. 196, 146 Pac. 400; Rhein v. Burns, 162 Wis. 309, 156 N. W. 138.

<sup>6</sup> Haberly v. Haberly, 27 Cal. App.



for the jury.<sup>7</sup> But where the facts are undisputed and the interpretation clear it is for the court to interpret the contract and determine its legal effect.<sup>8</sup>

139, 149 Pac. 53. But where words of latent ambiguity, technical terms, or terms which by custom and usage are used in a contract in a sense other than their ordinary meaning, it is usually for the jury to determine the

sense in which they are used: Wilkes v. Stacy, 113 Ark. 556, 169 S. W. 796.

<sup>7</sup> Smyth v. Tennison, 24 Cal. App. 519, 141 Pac. 1059.

<sup>8</sup> McNeer v. Chesapeake &c. R. Co., 76 W. Va. 803, 86 S. E. 887.

## CHAPTER XXXVI

### COVENANTS AND CONDITIONS

§ 1575. **Generally—When words construed as covenant and when as condition.**—No contract will be so construed as to inflict unreasonable hardship unless the terms clearly impose it, and, while the intention of the parties governs, if it is doubtful whether a provision is a condition which would divest an estate or a covenant, the breach of which would merely create a liability for damages, the courts will hold it to be a covenant.<sup>1</sup>

§ 1576. **Kinds of covenants—Dependent and independent—Mutual.**—When a thing is to be done by one of the parties as the consideration of a thing to be done by the other and the covenants are to be performed at the same time they are mutual and dependent.<sup>2</sup> The intention of the parties is to be regarded in determining whether covenants are dependent or not, rather than any arbitrary rule applied to the order or time in which the acts are to be done or the arrangement of the covenants.<sup>3</sup>

§ 1577. **Time of performance.**<sup>4</sup>

§ 1578. **Covenants construed as dependent.**—Where mutual covenants go to the whole consideration on both sides, they are dependent.<sup>5</sup> Covenants whereby one party agrees to purchase and the other to sell and deliver are mutual and dependent, and neither party, without performance or tender, can demand performance of the other.<sup>6</sup> So, an undertaking by the vendor in consideration of a contract for sale of land to construct a railroad

<sup>1</sup> Carper v. United Fuel Gas Co. (W. Va.), 89 S. E. 12, L. R. A. 1917A, 171, 177.

<sup>2</sup> McCormick v. Badham, 191 Ala. 339, 67 So. 609.

<sup>3</sup> Southern Colonization Co. v. Derfler (Fla.), 75 So. 790, L. R. A. 1917F, 744. Dependency of covenants is determined, not merely from particular words or phrases, but also from the nature of the transaction and object of the parties shown by the contract: Orr v. Greiner, 254 Pa. 308, 98 Atl. 951. One

employing another to construct a pipe line over a fixed route has been held to impliedly covenant that he possessed or would obtain the right to construct the line over such route, so that the contractor would not be required to procure such right: Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 134 Pac. 989.

<sup>4</sup> Busch v. Stromberg, 217 Fed. 328, 332, 333, 133 C. C. A. 244.

<sup>5</sup> Long v. Addix, 184 Ala. 236, 63 So. 982.

<sup>6</sup> Watts v. Balch, 182 Ill. App. 377.

at a certain place near it is a dependent covenant, and failure to perform it entitles the other party to a rescission of the contract.<sup>7</sup>

§ 1579. **Examples of covenants construed as independent.**—A covenant of an irrigation company to furnish water continuously for twenty years and that of landowners to pay annually therefor have been so far independent that the failure of landowners to make annual payments will not prevent their recovery for the failure of the company to furnish water.<sup>8</sup> A promise to pay for a course of instruction in instalments is not dependent upon receiving the instruction where it was not to be completed until after the payments had been made.<sup>9</sup>

§ 1580. **Mutual promises—Reliance on remedy or condition.**—Mutual promises going to the entire consideration so that one is the consideration for the other are usually dependent and the performance of the one is a condition precedent to the enforcement of the other where it appears that such performance was relied on rather than the remedy.<sup>10</sup>

§§ 1581, 1582. **Conditions in insurance policies—Suicide.**<sup>11</sup>

§§ 1583-1585. **Examples of conditions precedent and of provisions held conditions not precedent in cases of vendor**

<sup>7</sup> Southern Colonization Co. v. Derfler (Fla.), 75 So. 790. But a sale of lots with a statement that a railroad company would build its depot opposite the lots, is not a contractual obligation in the nature of a covenant to erect the depot: Ore City Co. v. Rogers (Tex. Civ. App.), 190 S. W. 226. See also for other covenants or conditions held conditions precedent: E. I. Du Pont de Nemours Powder Co. v. Schlottman, 218 Fed. 353, 134 C. C. A. 161; Bair v. School Dist. No. 141, 94 Kans. 144, 146 Pac. 347; Coram v. Davis, 216 Mass. 448, 103 N. E. 1027; Hodgdon v. Peet, 122 Minn. 286, 142 N. W. 808; Brooklyn Savings & Loan Assn. Co. v. Tousley, 35 Ohio Cir. Ct. 613, judgment affirmed Touseley v. Brooklyn Savings & Loan Assn., 80 Ohio St. 737, 89 N. E. 1126; Weinberg v. Shulman, 53 Pa. Super. Ct. 64. But compare Clapp v. Gilt Edge Consol. Mines Co., 33 S. Dak. 123, 144 N. W. 721.

<sup>8</sup> Fresno Canal & Irr. Co. v. Perrin, 170 Cal. 411, 149 Pac. 805.

<sup>9</sup> International Text Book Co. v. Martin, 221 Mass. 1, 108 N. E. 469. Money advanced pending the completion of a loan, where its retention out of the loan is authorized, must be repaid, though the loan was not completed, when the circumstances indicate it was to be repaid no matter whether the loan was completed or not: Knuppenberg v. Lee, 74 Wash. 636, 134 Pac. 508.

<sup>10</sup> Watts v. Balch, 182 Ill. App. 377; Rosenthal Paper Co. v. National Folding Box & Co., 175 App. Div. 606, 162 N. Y. S. 814; Sunshine Cloak & Co. v. Roquette, 30 N. Dak. 143, 152 N. W. 359, L. R. A. 1916E, 932. See also Long v. Addix, 184 Ala. 236, 63 So. 982; Metropolitan Life Ins. Co. v. Goodman, 10 Ala. App. 446, 65 So. 449; Yerger v. Simmons, 136 La. 280, 67 So. 3; Northwestern Nat. Life Ins. Co. v. Ward (Okla.), 155 Pac. 524.

<sup>11</sup> See post §§ 4132, 4133, 4199, 4304, 4369, 4371, 4372.

**and purchaser—Miscellaneous.**—The furnishing of an abstract by the vendor showing a good title, or a “merchantable” or “marketable” title, is often made a condition precedent.<sup>12</sup> When the time for furnishing the abstract is not specified, it must be furnished within a reasonable time.<sup>13</sup> A contract to deliver a warranty deed within a certain time after the title has been examined and found good does not require the vendor to furnish an abstract; and where the contract to deliver a warranty deed is limited to a fixed time, it can not be specifically enforced by the purchaser, if, through inability to raise the purchase-money, or the like, he is unable to perform the conditions on his part until after such time.<sup>14</sup> Parties may stipulate that if the title is not good the contract shall be inoperative and the consideration refunded, and thus fix the exclusive remedy.<sup>15</sup> Where the contract provides for a deed after the payment of the purchase-price the purchaser can not rescind for alleged defects in the vendor’s title when he has not paid or tendered the purchase-price.<sup>16</sup> A contract for securing an option on land, where the compensation is dependent upon a satisfactory title to all of it, is not separable, and proportionate compensation can not be awarded if there is failure of title to a material part of it.<sup>17</sup> Some courts have held that where in an executory contract the vendor covenants, among other things, to make improvements, such covenant is independent and the remedy for its breach is an action for damages and not rescission.<sup>18</sup> But the weight of recent authority is to the contrary,<sup>19</sup> although where the contract has been executed it seems

<sup>12</sup> *Martin v. Roberts*, 127 Iowa 218, 102 N. W. 1126; *Lillienthal v. Bierkamp*, 133 Iowa 42, 110 N. W. 152; *Reynolds v. Lynch*, 98 Minn. 58, 107 N. W. 145; *Drury v. Mickelberry*, 144 Mo. App. 212, 129 S. W. 237; *Alling v. Vander Stucken* (Tex. Civ. App.), 194 S. W. 443. See also *Buswell v. D. W. Kerr Co.*, 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837; *Grow v. Taylor*, 23 N. Dak. 469, 137 N. W. 451; *Wilson v. Korte*, 91 Wash. 30, 157 Pac. 47.

<sup>13</sup> *Martin v. Roberts*, 127 Iowa 218, 102 N. W. 1126; *Buswell v. O. W. Kerr Co.*, 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837.

<sup>14</sup> *Turn Verein Eiche v. Kionka*, 255 Ill. 392, 99 N. E. 684, 43 L. R. A. (N. S.) 44n.

<sup>15</sup> *Nostdal v. Morehart*, 132 Minn. 351, 157 N. W. 584.

<sup>16</sup> *Ward v. James*, 84 Ore. 375, 164 Pac. 370. See also *Abbott v. Fellows* (Maine), 100 Atl. 657.

<sup>17</sup> *McDennis v. Finch*, 197 Ala. 76, 72 So. 352. But compare *Sage Land & Co. v. McCowen*, 30 Cal. App. 126, 157 Pac. 244.

<sup>18</sup> *Cheney v. Bierkamp*, 58 Colo. 321, 145 Pac. 691; *Crampton v. McLaughlin*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823n. But compare *Ihrke v. Continental Life Ins. & Co.*, 91 Wash. 342, 157 Pac. 866, L. R. A. 1916F, 430.

<sup>19</sup> *Laser v. Forbes*, 105 Ark. 166, 150 S. W. 691; *Laser v. Fowler*, 114 Ark. 574, 170 S. W. 223; *Miller v. Beck*, 72 Ore. 140, 142 Pac. 603; *Mc-*

that there can ordinarily be no rescission in such a case.<sup>20</sup> Time is not ordinarily of the essence of a contract for sale of land and where it is not so made or fixed a reasonable time is usually allowed each party for performance.<sup>21</sup>

§ 1586. Conditions as to arbitration—Waiver.<sup>22</sup>

§§ 1587, 1588. Conditions and acts to be performed in sales of goods—Conditions to passing title.—In the absence of anything to the contrary the presumption or implication of law is that a sale is for cash.<sup>23</sup> The delivery of goods according to the contract is ordinarily a condition precedent to the right to sue for the price,<sup>24</sup> and the buyer's obligation to pay the price usually arises upon the passing of title to him.<sup>25</sup> Where the contract is executory and conditioned on payment at delivery no title passes until such payment is made.<sup>26</sup> Time of delivery may be made of the essence of the contract, and where such is the case it usually constitutes a condition precedent.<sup>27</sup> Indeed, time of delivery is generally regarded as of the essence and a condition precedent in executory contracts for sale of personal property where no right of property passes by the bargain from the vendor to the purchaser.<sup>28</sup> But, although time is made of the essence, yet

Millan v. American Suburban Corp., 136 Tenn. 53, 188 S. W. 615, L. R. A. 1917B, 401n. See also Aurand v. Perry Town Lot & Co. (Iowa), 159 N. W. 779.

<sup>20</sup> McMillan v. American Suburban Corp., 136 Tenn. 53, 188 S. W. 615, L. R. A. 1917B, 401n. But compare Tennant Land Co. v. Nordeman, 148 Ky. 361, 146 S. W. 756. See as to agreement by vendor to repurchase or resell or permit rescission at option of vendee: Hokanson v. Western Empire Land Co., 132 Minn. 74, 155 N. W. 1043, L. R. A. 1917C, 761, and note.

<sup>21</sup> Smith v. Berkau, 123 Ark. 90, 184 S. W. 429; Longinotti v. McShane (Tex. Civ. App.), 184 S. W. 598; Slade v. Crum (Tex. Civ. App.), 193 S. W. 723; Banning v. Commercial Orchards Co., 90 Wash. 554, 156 Pac. 547; Garrison v. Newton (Wash.), 165 Pac. 90. But see where made of the essence: Bowers v. Bennett (Idaho), 164 Pac. 93; Charlton v. Sheil, 158 N. Y. S. 944.

<sup>22</sup> For provision held collateral and not a condition precedent, see: Aktieselskabet & Co. Kompagnet v. Rederiaktiebolaget Atlanten, 232 Fed. 403; and see generally, note in 47 L. R. A. (N. S.) 337-445.

<sup>23</sup> Ballard v. First Nat. Bank (Mo. App.), 195 S. W. 559.

<sup>24</sup> H. C. Schrader Co. v. A. Z. Baily Grocery Co. (Ala. App.), 74 So. 749; Central Lumber & Co. v. Reyburn (Mo. App.), 195 S. W. 576.

<sup>25</sup> Lieb Packing Co. v. Trockle, 136 Minn. 345, 162 N. W. 449. Title may not pass until goods are weighed and accepted: Crescent Cotton Oil Co. v. Union Gin & Co. (Tenn.), 195 S. W. 770.

<sup>26</sup> Groves v. Warren, 164 N. Y. S. 925.

<sup>27</sup> Weinstein v. Spalding Cloak Co. (Mo. App.), 193 S. W. 994; Mogilensky v. Abramson, 164 N. Y. S. 700.

<sup>28</sup> Sunshine Cloak & Co. v. Roquette, 30 N. Dak. 143, 152 N. W. 359, L. R. A. 1916E, 932, and note, and numerous cases there cited.

where delivery is to be made on or about a certain day, it is sufficient if delivery is made within a reasonable time after such day.<sup>29</sup> As a general rule, where the time to perform a covenant on one side in a contract of sale is to arrive before performance of a covenant on the other side, the former is not dependent upon the latter.<sup>30</sup>

**§§ 1590, 1591. Sales of goods—Delivery by instalments.**—Under the sales act adopted in Connecticut and some other states, a vendor is not bound to await the expiration of the period in which the contract was to be performed, when the other party has repudiated it or manifested his inability to perform his obligations thereunder or committed a material breach thereof, and the vendor, in such case, may elect to accept such repudiation as an anticipatory breach and rescind the contract.<sup>31</sup> And even in the absence of such a statute the prevailing rule in this country is to the same effect, at least where the contract appears to be entire, and the repudiation goes to all of it, but, as shown in the original section there is considerable conflict among the authorities on the general subject.<sup>32</sup> The weight of authority is also to the effect that, at least where the contract is severable or apportionable, the seller, upon failure of the purchaser to pay an instalment due, may maintain an action on the quantum meruit for the reasonable value of instalments delivered, and in some jurisdictions the contract price may be recovered.<sup>33</sup> But under a contract for sale of a set of books at a stated price for the set, a certain number delivered at once and the rest as published, to be paid for in instalments, the contract is entire and the seller can not enforce payment of the full contract price on the purchaser's failure to pay some of the instalments, where the seller is also in default in withholding several of the books after such default of the purchaser.<sup>34</sup>

<sup>29</sup> Passow v. Harris, 29 Cal. App. 559, 156 Pac. 997.

<sup>30</sup> First Nat. Bank v. Callahan Min. Co., 28 Idaho 627, 155 Pac. 673.

<sup>31</sup> Wetkopsky v. New Haven Gas-light Co., 90 Conn. 286, 96 Atl. 950. See also Home Pattern Co. v. Mertz, 86 Conn. 494, 501, 86 Atl. 19; Churchill Grain & Co. v. Newton, 88 Conn. 130, 89 Atl. 1121.

<sup>32</sup> Post §§ 2027-2030, 5081, 5096. See also Phosphate Min. Co. v. At-

lantic Oil & Co. (Ga. App.), 93 S. E. 532; Bare v. Victoria Coal & Co., 73 W. Va. 632, 80 S. E. 941. And compare Krebs Hop Co. v. Livesley, 59 Ore. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758n.

<sup>33</sup> Note in 43 L. R. A. (N. S.) 1009, 1010. See also Webster v. Moore, 108 Md. 572, 71 Atl. 466.

<sup>34</sup> Rodgers v. Wise, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009n (the court also said that the

§ 1592. Insolvency of buyer.<sup>35</sup>

§§ 1593, 1594. **Conditional sales—Form and construction of contract.**—A conditional sale, as commonly understood, is a transaction whereby possession is delivered to the buyer but the property remains in the seller until payment of the price.<sup>36</sup> If a contract under which the owner of personal property delivers it to another to sell contemplates that the title shall never pass to the latter and imposes no obligation on him to pay the purchase-price it is not a conditional sale.<sup>37</sup> Where there is doubt as to whether the transaction is a conditional sale or a pledge the courts are inclined to treat it as a pledge.<sup>38</sup> The intention of the parties, as shown by the entire instrument, including its nature and purpose, and extrinsic circumstances in a proper case, is controlling, in general, but the character and effect of the transaction are to be determined by its real nature, result, and legal effect rather than what the parties may call it.<sup>39</sup> Unless otherwise provided by statute, a conditional sale may be verbal.<sup>40</sup>

§ 1595. **Transfer of rights under conditional sale.**—As between the parties, a contract of conditional sale retaining title in the vendor is not invalidated by a provision giving the purchaser the right to sell at retail in the usual course of business, and while a buyer in good faith from the latter in the regular course of business gets a good title, the original seller retains title as against creditors of the original purchaser and his trustee in bankruptcy, unless the matter is otherwise determined by statute such as a recording law and failure to comply with it.<sup>41</sup>

seller could have delivered all the books and sued for the full amount of the unpaid purchase-price or treated the contract as breached by the purchaser and sued for damages for such breach). See also *Harris Lumber Co. v. Wheeler Lumber Co.*, 88 Ark. 491, 115 S. W. 168, 171. But compare *Krebs Hop Co. v. Livesley*, 59 Ore. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758n.

<sup>35</sup> See post § 2042.

<sup>36</sup> *Kingman Plow Co. v. Joyce*, 194 Mo. App. 367, 184 S. W. 490.

<sup>37</sup> *Norris v. Boston Music Co.*, 129 Minn. 198, 151 N. W. 971, L. R. A. 1917B, 615. See generally as to distinction between conditional sales and consignments and agency contracts:

*Ferry Co. v. Hall*, 188 Ala. 178, 66 So. 104, L. R. A. 1917B, 620, and note.

<sup>38</sup> *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

<sup>39</sup> *Mishawaka Woolen Mfg. Co. v. Westveer*, 191 Fed. 465, 112 C. C. A. 109; *Mitchell Wagon Co. v. Poole*, 235 Fed. 817; *Ferry & Co. v. Hall*, 188 Ala. 178, 66 So. 104, L. R. A. 1917B, 620n, 624; *McKenzie v. Roper Wholesale Grocery Co.*, 9 Ga. App. 185, 70 S. E. 981; *Wasey v. Whitcomb*, 167 Mich. 58, 132 N. W. 572; *Re Harris*, 214 Fed. 482; note in L. R. A. 1917B, 626, 627.

<sup>40</sup> *Shook v. Levi*, 240 Fed. 121.

<sup>41</sup> *Bryant v. Swofferd Bros. Dry Goods Co.*, 214 U. S. 279, 53 L. ed.

§ 1596. **Rights of the parties on default.**—The conditional vendor, on breach by the vendee, may disaffirm the contract and retake the property or he may sue on the contract for the price.<sup>42</sup> And it has been held that he may sue for an instalment of the price, and afterward take the property if he is unable to obtain payment.<sup>43</sup>

§ 1597. **Waiver of forfeiture and title.**—The vendor in a conditional sale may waive the right to retake the property, and whether he has done so or not is usually a question for the jury.<sup>44</sup> The taking of a renewal note containing a reservation of title in the seller where it is not received in payment of the prior note containing such a reservation does not operate as a waiver thereof nor vest title in the buyer either as to himself or as to intervening mortgagees or creditors.<sup>45</sup>

§ 1598. **Risk of loss—Destruction of the property.**—The great weight of authority is to the effect that the risk of loss or destruction of the property while in the possession of the payee is in him and, though without his fault, such loss or destruction before payment does not relieve him from the obligation to pay the purchase-price.<sup>46</sup>

997, 29 Sup. Ct. 614; *Ludvig v. American Woolen Co.*, 231 U. S. 522, 58 L. ed. 345, 34 Sup. Ct. 161; *Flint Wagon Works v. Maloney*, 3 Boyce (Del.) 137, 81 Atl. 502; *Andre v. Murray*, 179 Ind. 576, 101 N. E. 81, L. R. A. 1917B, 667; *Ann. Cas.* 1916A, 87, 90, and note; *Praeger v. Emerson & Co. Implement Co.*, 122 Md. 303, 89 Atl. 501, *Ann. Cas.* 1916A, 1255, and note; *Mishawaka Woolen Mfg. Co. v. Stanton*, 188 Mich. 237, 154 N. W. 48, L. R. A. 1917B, 651n. But compare *John Deere Plow Co. v. Mowry*, 222 Fed. 1, 137 C. C. A. 539; *In re Stoughton Wagon Co.*, 231 Fed. 676, 145 C. C. A. 562; *Walter A. Wood Mowing & Co. v. Croll*, 231 Fed. 679, 145 C. C. A. 565; and note in *Ann. Cas.* 1916A, 92.

<sup>42</sup> *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78, *Ann. Cas.* 1917D, 462n; *Eilers Music House v. Douglass*, 90 Wash. 683, 156 Pac. 937, L. R. A. 1916E, 613. See also cases cited in next following note.

<sup>43</sup> *Ratchford v. Cayuga & Co. Warehouse Co.*, 217 N. Y. 565, 112 N. E. 447,

L. R. A. 1916E, 615. But compare *C. W. Raymond Co. v. Kahn*, 124 Minn. 426, 145 N. W. 164, 51 L. R. A. (N. S.) 251n; *Chase & Co. v. Kelly*, 125 Minn. 317, 146 N. W. 1113, L. R. A. 1916A, 912, and note; *Eilers Music House v. Douglass*, 90 Wash. 683, 156 Pac. 937, L. R. A. 1916E, 613; *Francis v. Bohart*, 76 Ore. 1, 143 Pac. 920, 147 Pac. 755, L. R. A. 1916A, 922, and note.

<sup>44</sup> *Jones v. Savin (Del.)*, 97 Atl. 591.

<sup>45</sup> *Carlton Supply Co. v. Battle*, 142 Ga. 605, 83 S. E. 225, L. R. A. 1916A, 926n. See also *Beall v. Hudson County Water Co.*, 185 Fed. 179; *In re Rector*, 220 Fed. 645, 136 C. C. A. 253; *Hollenberg Music Co. v. Bankston*, 107 Ark. 337, 154 S. W. 1139; *National Cash Register Co. v. Riley*, 7 Penn. (Del.) 355, 74 Atl. 362.

<sup>46</sup> *Hollenberg Music Co. v. Barron*, 100 Ark. 403, 140 S. W. 582, 36 L. R. A. (N. S.) 594n, *Ann. Cas.* 1913C, 659n; *Exposition Arcade Corp. v. Lit Bros.*, 113 Va. 574, 75 S. E. 117, *Ann. Cas.* 1913D, 335n. But the parties



§ 1599. **Recording.**<sup>47</sup>

§ 1600. **Miscellaneous matters concerning conditional sales.**—A conditional vendee in possession may maintain an action for injury to it or for its conversion by a third person.<sup>48</sup> And an action by the seller to recover property conditionally sold will not be enjoined where the purchaser has not paid for it and it is being sold on foreclosure of a mechanic's lien for repairs.<sup>49</sup>

§§ 1601, 1602. **Architect's or engineer's certificate**—Illustrations.<sup>50</sup>

§ 1603. **Promise conditional on approval of promisor.**—In contracts of employment for services to be performed to the satisfaction of the employer or the like, especially where the services are such as involve personal taste, convenience, or preference, the employer may usually determine for himself in good faith whether the services are satisfactory, and it is held that he has a right to discharge an employé under such a contract when he honestly deems the services unsatisfactory, no matter whether a jury might think he ought to be satisfied or not.<sup>51</sup>

§ 1604. **Cases holding that right of approval must be exercised reasonably.**—Some courts hold that, in ordinary cases, a recovery can not be defeated by arbitrarily or unreasonably stating that the work is not done to the satisfaction of the promisor, and that it is enough if he ought to be satisfied.<sup>52</sup>

may agree as to which shall bear the loss: *Moon v. Wright* (Ga.), 78 S. E. 141; *Whigham v. Hall*, 8 Ga. App. 509, 70 S. E. 23.

<sup>47</sup> For a list of states in which contracts of conditional sale are required to be recorded, and decisions as to the effect of the statutes, see note in *Ann. Cas.* 1916A, 1273-1280. And see as to when assignee or receiver can or can not complain of failure to record: *Malmo v. Washington Rendering & Co.*, 79 Wash. 534, 140 Pac. 569, L. R. A. 1917C, 440, and note.

<sup>48</sup> *Stotts v. Puget Sound Trac. & Co.*, 94 Wash. 339, 162 Pac. 519, L. R. A. 1917D, 214, and note.

<sup>49</sup> *Baughman Automobile Co. v. Emanuel*, 137 Ga. 354, 73 S. E. 511, 38 L. R. A. (N. S.) 97n. See also *Charleston Hardw. Co. v. Warner*

*Elevator & Co.* (W. Va.), 90 S. E. 674, L. R. A. 1917C, 75.

<sup>50</sup> The subject of these sections is fully treated elsewhere. Post §§ 3641-3644, 3707, 3708, 3730-3732. See also *Bergen Mfg. Co. v. Huggins*, 242 Fed. 853; *State v. Seattle*, 93 Wash. 593, 161 Pac. 478. The owner may waive or render the architect's certificate unnecessary by discharging the architect and putting it beyond his power to give a certificate: *Catanzano v. Jackson* (Ala.), 73 So. 510.

<sup>51</sup> *American Music Stores v. Kussell*, 232 Fed. 306, 146 C. C. A. 354, L. R. A. 1916F, 882, and note; *Schmaud v. Jandorf*, 175 Mich. 88, 140 N. W. 996, 44 L. R. A. (N. S.) 680 and note; *Ann. Cas.* 1915A, 746n. See also *Jones v. Lanier* (Ala.), 73 So. 535, 536.

<sup>52</sup> *McCartney v. Badovinac* (Colo.),

§ 1605. **Cases holding right of approval absolute—Good faith.**—The weight of authority is to the effect that if the contract clearly appears to require the work to be done to the satisfaction or approval of the promisor without limitation or qualification, it is for him to determine that matter, and such determination is conclusive so long as he acts honestly and in good faith.<sup>53</sup>

§§ 1606, 1607. **Failure to fully perform—Substantial performance—Building contracts.**<sup>54</sup>

§ 1608. **Personal services.**—There is sharp conflict of authority as to whether one who has agreed to work for a certain time and abandoned his work without cause, can recover on the quantum meruit for services or work performed prior to such abandonment, and whether he can recover on such a count for the unearned portion where the employer has refused to permit him to go on with the work. The authorities on both sides are reviewed in a recent case in majority and minority opinions and it is held in the majority opinion that such a contract is entire and indivisible, even though the stipulated salary is payable in instalments, that the contract is broken by a refusal of the employer to permit the employé to perform his part, that the employé can bring but one action and can not elect to treat the contract as still in force and recover on an indebitatus count, and that judgment in one action is a bar to a subsequent one.<sup>55</sup>

§§ 1609, 1610. **Conditions in subscriptions—Subscriptions to stock.**—When a charitable or benevolent society or institution accepts a subscription made on specified conditions it obligates itself to comply therewith, and noncompliance with such a condition precedent will defeat recovery on the subscription.<sup>56</sup> But a substantial compliance is generally sufficient.<sup>57</sup> An uncondi-

160 Pac. 190, L. R. A. 1917A, 1146; Hanaford v. Stevens & Co. (R. I.), 98 Atl. 209. See also post § 1881.

<sup>53</sup> Waldt v. Goowin Mfg. Co., 165 App. Div. 244, 150 N. Y. S. 831; Kramer v. Wien, 92 Misc. 159, 155 N. Y. S. 193; Diggle v. Ogston Motor Co., 112 L. T. (N. S.) 1029, 84 L. J. (1915) K. B. (N. S.) 2165. See also cases cited in note to § 1603 ante; and post § 3710.

<sup>54</sup> The subject of these sections is

fully treated post §§ 3693-3703. See also post §§ 1878, 1879.

<sup>55</sup> Jameson v. Board of Education (W. Va.), 89 S. E. 255, L. R. A. 1916F, 926.

<sup>56</sup> St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 Atl. 145; note in 48 L. R. A. (N. S.) 802 et seq.

<sup>57</sup> Note in 48 L. R. A. (N. S.) 803 et seq.

tional subscription for shares of stock in a corporation to be formed inures to its benefit when formed and makes the subscriber a stockholder.<sup>58</sup> A condition precedent in a subscription, at least where the corporation is already formed, must be complied with in order to hold the subscriber or give him the rights or impose on him the liabilities of a stockholder thereunder.<sup>59</sup> But a subscription on a condition subsequent may give the stockholder a right of action against the corporation for its failure to perform the condition.<sup>60</sup>

§ 1611. **Conditions subsequent in deed—Subsequent defeasance.**—A condition may be created by reference to another instrument, and the words “this conveyance is upon the condition,” etc., are usually held to create it, but they may be controlled by other words.<sup>61</sup> An estate upon condition may be created without the use of such word, where it clearly appears from the language and purpose that such was the intent of the parties.<sup>62</sup> Courts are reluctant to enforce a forfeiture and, in case of ambiguity or doubt, will usually hold a provision in a deed to be a covenant rather than a condition that would cause a forfeiture.<sup>63</sup> Where a condition subsequent is created by apt and sufficient words, the estate conveyed remains defeasible until the condition is performed, destroyed, or barred by the statute of limitations or estoppel, and, where it is clearly apparent that the parties intended that a breach should operate as a forfeiture, a court of equity may take jurisdiction, not to declare a forfeiture,

<sup>58</sup> *Campbell v. Raven*, 176 Mich. 208, 142 N. W. 355; *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

<sup>59</sup> *Wood v. Universal Adding Mach. Co.*, 166 Ill. App. 346; *Foote v. Geilick*, 166 Mich. 636, 132 N. W. 473. See also *Broadus v. Russell*, 160 Ala. 353, 49 So. 327; *Alexander v. North Carolina &c. Trust Co.*, 155 N. Car. 124, 155 S. E. 124, 71 S. E. 69; *Portland Pub. Market &c. Co. v. Woodworth*, 67 Ore. 327, 135 Pac. 529. And see as to waiver of condition: *Hughes Mfg. &c. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871; *Stone v. Monticello Const. Co.*, 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (N. S.) 978; *Sherrod v. Duffy*, 160 Mich. 488, 125 N. W. 336, 136 Am. St. 451.

<sup>60</sup> *Bobzin v. Gould Balance Valve Co.*, 140 Iowa 744, 118 N. W. 40. See also as to valid conditions subsequent: *Allen v. Commercial Nat. Bank*, 191 Fed. 97, 111 C. C. A. 577; *Mulliken v. Hazeltine*, 160 Mo. App. 9, 141 S. W. 712.

<sup>61</sup> *South Memphis Land Co. v. Memphis Interurban Co.*, 135 Tenn. 353, 186 S. W. 454.

<sup>62</sup> *Southern Colonization Co. v. Derfler* (Fla.), 75 So. 790; *Walker v. Marcellus & Co.*, 166 N. Y. S. 354.

<sup>63</sup> *Jakel v. Seeck*, 79 Ore. 489, 154 Pac. 424, 155 Pac. 1192. See also *First Presb. Church v. Bailey* (Del. Ch.), 97 Atl. 583.

but to quiet title where there has already been a forfeiture for non-performance of a condition subsequent.<sup>64</sup>

**§ 1612. Surety's bond signed under condition.**<sup>65</sup>

**§ 1613. Time of performance—Reasonable time.**—Where the time within which an option is to be exercised or a condition performed is not specified or limited in the agreement, the general rule is that a reasonable time is implied or understood.<sup>66</sup>

**§ 1614. Waiver — Miscellaneous.** — As has already been shown in sections relating to covenants or conditions in particular kinds of contracts and transactions, full performance, time of performance and various other conditions and defaults may be waived.<sup>67</sup> And waiver may be either express or implied, and be by conduct as well as by words.<sup>68</sup>

<sup>64</sup> *Ross v. Sanderson* (Okla.), 162 Pac. 709, L. R. A. 1917C, 879. But many courts hold that breach of a condition subsequent does not of itself revert the estate and that a re-entry or some act equivalent thereto is necessary to have that effect: *Firth v. Los Angeles Pac. Land Co.*, 28 Cal. App. 399, 152 Pac. 935; *Hart v. Lake*, 273 Ill. 60, 112 N. E. 286; *Huffman v. Ricketts*, 60 Ind. App. 526, 111 N. E. 322, and other cases cited in note in L. R. A. 1917C, 882. See further upon the general subject of this section, *Ross v. Sanderson* (Okla.), 162 Pac. 709, and post §§ 3872-3876.

<sup>65</sup> See post §§ 3495, 3939. As to effect of failure of principal to sign,

see: *Brown v. Melloon*, 170 Iowa 49, 152 N. W. 75, Ann. Cas. 1917C, 1070, and note.

<sup>66</sup> *Paulson v. Weeks*, 80 Ore. 468, 157 Pac. 590; *Brooks v. Trustee Co.*, 76 Wash. 589, 136 Pac. 1152, 50 L. R. A. (N. S.) 594, and note. Numerous authorities to the same effect have already been cited in other sections. See ante, §§ 1549, 1550, 1552, 1553.

<sup>67</sup> See, for instances, ante §§ 1597, 1601, 1609, 1610; also post §§ 1888, 2284, 4998.

<sup>68</sup> *Ford Motor Co. v. Johnson*, 18 Ga. App. 365, 89 S. E. 430; *Price v. Ransche* (Mo.), 186 S. W. 968; *Moore v. Kelley* (Okla.), 157 Pac. 81; post §§ 4175-4177.

## CHAPTER XXXVII

### PAROL EVIDENCE

§ 1620. **Merger of negotiations in written contract.**—The general rule that all prior negotiations are merged in the written contract finally agreed upon and apparently complete and unambiguous, and that parol evidence is not admissible to add to or vary its terms, is well settled.<sup>1</sup> And this rule obtains even though the written contract consists of more than one instrument, such as letters.<sup>2</sup>

§ 1621. **Extrinsic evidence not admissible to contradict or vary written contracts—General rule.**<sup>3</sup>—It is likewise well settled, as a general rule, that parol evidence is not admissible to contradict or vary the terms of a written instrument, either by attempting to show prior negotiations or a contemporaneous oral agreement.<sup>4</sup>

§§ 1622-1624. **Rule illustrated—Transfer of real property—Insurance contracts—Bills and notes.**—The general rule excluding parol evidence has found illustration and application in

<sup>1</sup> California Bridge &c. Co. v. United States, 50 Ct. Cl. 40; Kinney v. McNabb, 44 App. D. C. 340; Valentine v. Shepherd (Ariz.), 168 Pac. 643; Kreitz v. Gallenstein, 170 Ky. 16, 185 S. W. 132; Boswell v. Hostetter, 129 Md. 53, 98 Atl. 222; Boeing v. Fordney, 184 Mich. 153, 150 N. W. 852; Roden v. Williams, 100 Nebr. 46, 158 N. W. 360, L. R. A. 1917A, 415; Schwartzman v. Creveling, 85 N. J. Eq. 402, 96 Atl. 896; Mountcastle v. Miller (Okla.), 166 Pac. 1057; Leavitt & Co. v. Dimick (Ore.), 168 Pac. 292; Gill v. Ruggles (S. Car.), 89 S. E. 503. The general rule is too well settled to justify the citation of any great number of the many authorities here, especially as those cited in the next section are to substantially the same effect.

<sup>2</sup> Rail River Coal Co. v. Paisley, 233 Fed. 337, 147 C. C. A. 273.

<sup>3</sup> [Main section cited in Locke v.

Murdock, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267, 270.]

<sup>4</sup> Houge v. St. Paul Fire &c. Ins. Co. (Iowa), 156 N. W. 862; Commercial Nat. Bank v. Hutchison Box &c. Co., 98 Kans. 350, 158 Pac. 44; Fechheimer v. Goldnamer, 169 Ky. 243, 183 S. W. 541; Kansas City Breweries Co. v. Haffey, 193 Mo. App. 349, 186 S. W. 36; Schwartzman v. Creveling, 85 N. J. Eq. 402, 96 Atl. 896; Holt Mfg. Co. v. Brotherton, 91 Wash. 354, 157 Pac. 849. Many other authorities might be cited to the same effect, but the general rule is well settled and the only questions of difficulty are as to what is such a contradiction or variance and as to whether a particular case comes within the general rule or some exception. See Corn v. McDowell (Mo. App.), 185 S. W. 235; Locke v. Murdock, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267, 270.

many cases of contracts in regard to real estate,<sup>5</sup> and also in cases of insurance,<sup>6</sup> and bills and notes.<sup>7</sup>

§ 1625. **Contemporaneous contracts—To defeat validity or legal effect of note.**—As shown in a subsequent section, parol evidence is frequently admitted where it goes to the existence and validity of the alleged contract,<sup>8</sup> but “one party can not by parol set up in the guise of a separate contract something which devitalizes the writing and changes or aborts the stated purposes thereof, and the fact, if it be a fact, that a written contract is merely one ‘to make a contract,’ can not be shown by parol so as to contradict or vary the writing.”<sup>9</sup> A note can not be avoided by parol evidence that it was given in satisfaction of the maker’s liability as accommodation indorser of prior notes and upon condition that the payee should primarily pursue the makers of the original notes and that if anything should be collected from them it should be credited on such note.<sup>10</sup> In a recent case it is said that it may be shown by the maker of a note, as against the payee, that prior to delivery its payment was made conditional whenever the condition or contingency affects the consideration so that there is a failure of consideration, as where there is a stipulation that the note shall take effect only on such condition or contingency and it fails, but that such evidence is not admissible unless it goes to show such failure of consideration; and the court held that where money was advanced to a party

<sup>5</sup> *Williams v. Johnson*, 177 Mich. 500, 143 N. W. 627, L. R. A. 1916E, 217, and note; *Hutchinson v. Westbrook*, 191 Mich. 484, 158 N. W. 135; *Schwartzman v. Crevcling*, 85 N. J. Eq. 402, 96 Atl. 896 (inadmissible to show agreement that contract was to cover more property than specified); *Abney v. Twombly* (R. I.), 97 Atl. 806; *Reese Howell Co. v. Brown*, 48 Utah 142, 158 Pac. 684; *Vermont Marble Co. v. Eastman* (Vt.), 101 Atl. 151; *Hoster’s Committee v. Zollman* (Va.), 94 S. E. 164.

<sup>6</sup> Post §§ 4037, 4038, 4112. Where a policy makes payment of the first premium a condition of its becoming effective and contains no recital of such payment parol evidence is admissible to show that it was not paid: *Lyke v. American Nat. Assur. Co.* (Mo. App.), 187 S. W. 265.

<sup>7</sup> *Hesch v. Dennis*, 194 Ill. App. 663 (maker can not show by parol that the note was payable on a contingency); *Stevens v. Inch*, 98 Kans. 306, 158 Pac. 43; *Colvin v. Goff*, 82 Ore. 314, 161 Pac. 568, L. R. A. 1917C, 300n; *Baldwin v. Coyle & Co.* (Tex. Civ. App.), 185 S. W. 426; *Union Bank v. Commercial Securities Co.*, 163 Wis. 470, 157 N. W. 510. See also post §§ 2838-2846.

<sup>8</sup> See post §§ 1632, 1636; also *Strickland v. Farmers’ Supply Co.*, 14 Ga. App. 661, 82 S. E. 161; *First State Bank v. Kelly*, 30 N. Dak. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044, and note.

<sup>9</sup> *Bijur Motor &c. Co. v. Eclipse Mach. Co.*, 243 Fed. 600, 604.

<sup>10</sup> *Prosisie v. Phillips*, 41 App. D. C. 226.

who had been convicted of crime in order to enable him to prosecute his appeal and his note was taken for such money, parol evidence was not admissible to show an agreement that the maker should be liable only in case the conviction was reversed.<sup>11</sup>

**§ 1627. Miscellaneous illustrations.**—Parol evidence is not admissible to show that an instrument not purporting to be a guaranty was intended or understood by a party to be a guaranty,<sup>12</sup> and warranties expressed or implied in a contract of sale can not be contradicted or varied by parol.<sup>13</sup> So, a written sales contract can not be contradicted by parol evidence as to time, place or medium of payment or performance of other conditions.<sup>14</sup> And parol evidence that more work and materials were to be furnished than specified in a building contract is inadmissible.<sup>15</sup>

**§ 1628. Rule applies to what is implied by law as part of contract.**<sup>16</sup>

**§ 1629. Limitations and qualifications of general rule.**—As shown in sections immediately following, there are several exceptions to the general rule excluding parol evidence, or qualifications and limitations in its application. Thus, while parol evidence, as a general rule, is inadmissible, in the absence of fraud, mistake or ambiguity, to contradict or vary a covenant in a deed for real estate, most of the courts make an exception or limit the rule by admitting parol evidence to show the true consideration and by holding that it is not applicable as between the grantee and a third person.<sup>17</sup> So, parol evidence that an instrument was not to be delivered or not to become effective as a contract until the happening of some contingency or condition that

<sup>11</sup> Colvin v. Goff, 82 Ore. 314, 161 Pac. 568, L. R. A. 1917C, 300n.

<sup>12</sup> Title Guaranty & Co. v. Lip-pincott, 252 Pa. 112, 97 Atl. 201.

<sup>13</sup> Bond v. Perrin, 145 Ga. 200, 88 S. E. 954. See also Hamilton Iron & Co. v. Groveland Min. Co., 233 Fed. 388, 147 C. C. A. 324; United Iron Works v. Outer Harbor Dock & Co., 168 Cal. 81, 141 Pac. 917.

<sup>14</sup> Gerber v. Probey, 44 App. D. C. 392; Hickman Ebbert Co. v. Asa W. Allen Co., 111 Miss. 161, 71 So. 310; R. L. Burke Music Co. v. Miller (Mo. App.), 187 S. W. 141 (where contract is for payment in money it can not be

shown that payment was to be made in some other way). See also Riley v. International Banana & Co., 185 Ill. App. 629; Hickman v. Richardson, 92 Kans. 716, 142 Pac. 964.

<sup>15</sup> Miller v. Hamilton, 216 Fed. 131, 132 C. C. A. 375.

<sup>16</sup> Smith Sand & Co. v. Corbin, 81 Wash. 494, 142 Pac. 1163.

<sup>17</sup> See note in L. R. A. 1916E, 321, reviewing authorities as to admissibility of parol evidence to affect scope of covenant in conveyance of real property; also note in L. R. A. 1916A, 592, as to inapplicability of rule to strangers.

never occurred, is usually admitted.<sup>18</sup> And parol evidence of a distinct, valid prior or contemporaneous independent or collateral agreement is likewise admissible in a proper case where it does not contradict or vary the terms of the writing.<sup>19</sup>

§ 1630. **Rule does not ordinarily apply to strangers.**—The general rule excluding parol evidence does not ordinarily apply to strangers.<sup>20</sup> Thus, it does not apply to prevent showing that a bill of sale to an agent was intended merely to enable him to transfer title to a purchaser, and not to make the agent an owner, as against a claim of a creditor of the agent levying execution on the property,<sup>21</sup> and such evidence has also been held admissible on behalf of the holder of a mortgage, in an action by the owner of the land to quiet title, for the purpose of adding to the deed under which the plaintiff holds, a showing of the true agreement between the parties to the deed in regard to the assumption of the mortgage by the plaintiff.<sup>22</sup> Many other illustrative cases in support of this exception, involving contracts of almost every description, are cited in the note already referred to.<sup>23</sup> The only class of cases in which the general rule excluding parol evidence seems to apply as between a party to the contract and a stranger is where the latter bases his claim upon the contract, as where it is directly founded thereon or primarily created by it or the relation thus established.<sup>24</sup>

§ 1631. **Incomplete writings.**—Where the contract is partly in writing and partly in parol the general rule in question does not apply to exclude parol evidence to show the contract.<sup>25</sup> And so, whenever the writing shows on its face that it is incom-

<sup>18</sup> First Nat. Bank v. Kelly, 30 N. Dak. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044, and note.

<sup>19</sup> Locke v. Murdock, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267, and note; also note in Ann. Cas. 1916E, 966.

<sup>20</sup> Knudsen v. Wacker & Co. Malting Co., 182 Ill. App. 296; Ransom v. Wickstrom, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588, and note citing many authorities.

<sup>21</sup> Ransom v. Wickstrom, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588n.

<sup>22</sup> Fitzgerald v. Flanagan, 155 Iowa

217, 135 N. W. 738, Ann. Cas. 1914C, 1104n.

<sup>23</sup> Note in L. R. A. 1916A, 592-612.

<sup>24</sup> Ransom v. Wickstrom, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588, 590, and note on pages 613-617.

<sup>25</sup> Moore v. Ohl (Ind. App.), 116 N. E. 9; Canfield Lumber Co. v. Kint Lumber Co., 148 Iowa 207, 127 N. W. 70; Corn v. McDowell (Mo. App.), 185 S. W. 235; Strickland v. Johnson, 21 N. Mex. 599, 157 Pac. 142 (oral part may be proved by parol but not to dispute part in writing where contract is an entire one); O. K. Trans-



plete, and, perhaps, where it is ambiguous and doubtful whether it is complete, and when read in the light of surrounding circumstances properly considered it appears to be incomplete, parol evidence is admissible to present the entire contract.<sup>26</sup>

§ 1632. **Existence and validity of contract.**—The general rule is not violated by proper parol evidence merely going to the existence or validity of the alleged contract, for the general rule presupposes the existence of a valid written contract, and does not exclude evidence going to that very question.<sup>27</sup>

§§ 1633-1635. **Collateral and independent agreements.**<sup>28</sup>—Parol evidence of a distinct valid parol agreement is not excluded by the general rule, whether independent or collateral, when it in no way contradicts or alters the written contract.<sup>29</sup> But, as already shown, such evidence is not admissible even to add terms or matters where the written contract appears to be complete and merge them therein, even though it may make no express provision in regard to them.<sup>30</sup> It is held by some courts, in well-considered opinions, that evidence of a parol contemporaneous agreement not to engage for a certain time in the same place in a business sold, where the bill of sale is silent on the subject, is admissible,<sup>31</sup> but the weight of authority seems to be to

fer &c. Co. v. Neill (Okla.), 159 Pac. 272, L. R. A. 1917A, 58. But compare Miller v. Monine, 167 Iowa 287, 149 N. W. 229.

<sup>26</sup> Watson v. Smith (Ga. App.), 82 S. E. 633; Gault v. Hunt, 183 Ill. App. 77; Lyman B. Brooks Co. v. Wilson, 218 Mass. 205, 105 N. E. 607; Mosby v. Smith, 194 Mo. App. 20, 186 S. W. 49; Smith v. Bond (Okla.), 155 Pac. 1116; Fenner v. Smyth, 62 Pa. Super. Ct. 538. See also Orvis v. British Am. Cotton Co., 242 Fed. 835; Rawlings v. Ufer (Okla.), 161 Pac. 183.

<sup>27</sup> Selma Sav. Bank v. Harlan, 167 Iowa 673, 149 N. W. 882; Hindenlang v. Mahon, 225 Mass. 445, 114 N. E. 684; Woodard v. Walker, 192 Mich. 188, 158 N. W. 846; Coffman v. Malone, 98 Nebr. 819, 154 N. W. 726, L. R. A. 1917B, 258, and note; Colonial Jewelry Co. v. Brown, 38 Okla. 44, 131 Pac. 1077; Kuhn v. Buhl, 251 Pa. 348, 96 Atl. 997, Ann. Cas. 1917D, 415n. See also State v.

Regent Laundry Co. (Mo. App.), 190 S. W. 951, 953.

<sup>28</sup> [Main section quoted in Locke v. Murdoch, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267, 270.]

<sup>29</sup> Charles Mulvey Mfg. Co. v. McKinney, 184 Ill. App. 476; Locke v. Murdoch, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267. See also Buerger v. Mabry (Ala. App.), 73 So. 135; Hartford Nat. Bank v. Rutledge, 124 Md. 46, 91 Atl. 790; Kohlberg v. Awbrey (Tex. Civ. App.), 167 S. W. 828.

<sup>30</sup> See ante §§ 1620, 1622-1624, 1627, 1628. See also Brossear v. Jacobs Pharmacy Co. (Ga.), 93 S. E. 293; Riley v. International Banana &c. Co., 185 Ill. App. 629; Ogooshevitz v. Arnold (Mich.), 163 N. W. 946; Green v. Watts (N. J.), 90 Atl. 667.

<sup>31</sup> Locke v. Murdoch, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267n. See also Webber v. Smith, 24 Cal. App. 51, 140 Pac. 37.

the contrary, at least where the written contract covers the good will of the business.<sup>32</sup> It is also held in a recent case that where a contract for the payment of money is silent as to the place of payment, the law implies that it is to be paid at the creditor's residence, office, or place of business, if within the state, and that evidence of an oral agreement as to the time and place of payment at the debtor's office is not admissible,<sup>33</sup> but the prevailing rule seems to be that such evidence is usually admissible where the written contract is silent on the subject.<sup>34</sup> So, it is generally held inadmissible to show a prior or contemporaneous oral agreement as to the time of delivery of goods and that unless they could be delivered within a certain time the contract should be of no effect,<sup>35</sup> although the contrary is held in a recent case.<sup>36</sup>

§§ 1636-1639. **Conditions precedent.**—To show that a writing in the form of a contract was never a real contract, as that it was delivered to take effect only on the happening of a certain condition and that such condition has not happened, does not in any true sense contradict or vary the terms of a written contract, and parol evidence to such effect is admissible as showing that the writing never became operative as a contract.<sup>37</sup> As between the parties to a note, an oral condition on which it was delivered, that it should be effective and payable only on the happening of a certain event, may be shown.<sup>38</sup>

<sup>32</sup> *Wessel v. Havens*, 91 Nebr. 426, 136 N. W. 70, Ann. Cas. 1913C, 1377, and note; also note in L. R. A. 1917B, 276, et seq.

<sup>33</sup> *State v. Kenosha Home Tel. Co.*, 158 Wis. 371, 148 N. W. 877, Ann. Cas. 1916E, 365n.

<sup>34</sup> Note in Ann. Cas. 1916E, 367. See also *Standard Roller Bearing Co. v. Bergdoll*, 214 Fed. 175.

<sup>35</sup> *Roughton v. Brookings Lumber &c. Co.*, 26 Cal. App. 752, 148 Pac. 539; *Fish Bros. Wagon Co. v. Adams* (Tex. Civ. App.), 146 S. W. 704. See also *Samuel H. Clute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048; *American Bridge Co. v. American Dist. Steam Co.*, 107 Minn. 140, 119 N. W. 783.

<sup>36</sup> *Bowser & Co. v. Fountain*, 128 Minn. 198, 150 N. W. 795, L. R. A. 1916B, 1036n. See also *Stephens-Adams Mfg. Co. v. Bigelow*, 86 N. J. L. 707, 92 Atl. 398.

<sup>37</sup> *Vardeman v. Bruns* (Mo. App.), 199 S. W. 710; *First Nat. Bank v. Kelly*, 30 N. Dak. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044, and note. See also *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820; *Waukeo Sav. Bank v. Jones* (Iowa), 159 N. W. 691; *Bowser v. Fountain*, 128 Minn. 198, 150 N. W. 795, L. R. A. 1916B, 1036n; *Musser v. Musser*, 92 Nebr. 387, 138 N. W. 599; *Rex Petroleum Co. v. Black Panther Oil &c. Co.* (Okla.), 166 Pac. 1083.

<sup>38</sup> *Hamilton v. Hannus* (Tex. Civ. App.), 185 S. W. 938. So it may be shown that it was not to become effective unless also executed by another person as co-maker: *First Nat. Bank v. Kelly*, 30 N. Dak. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044n. But compare *Colvin v. Goff*, 82 Ore. 314, 161 Pac. 568, L. R. A. 1917C, 300n.

§ 1640. **Subsequent agreements.**—A written contract may be modified or its terms altered by a subsequent valid oral agreement, and this may be shown in a proper case.<sup>39</sup>

§ 1641. **Object—Purpose—Intent.**—Evidence of a party as to what was intended by a written instrument is usually inadmissible.<sup>40</sup> But the object or purpose for which a written contract was made may often be shown without violating the rule excluding parol evidence to contradict or vary the terms of a written contract.<sup>41</sup>

§ 1642. **Consideration.**—Parol evidence is admissible as a general rule to show the true consideration of a written contract notwithstanding a recital of a certain consideration therein.<sup>42</sup> But where the consideration stated in the written contract is not merely by way of recital, but is contractual, as when it is in mutual obligations set forth as part of the contract, parol evidence of a collateral agreement varying such obligations is not admissible.<sup>43</sup>

<sup>39</sup> *Brickey v. Continental Gin Co.*, 113 Ark. 15, 166 S. W. 744; *Seals v. Davis* (Cal. App.), 142 Pac. 905; *Troth v. Millville Bottle Works*, 89 N. J. L. 219, 98 Atl. 435; *McKinney v. Matthews*, 166 N. Car. 576, 82 S. E. 1036; *Wakefield v. Supple*, 82 Ore. 595, 160 Pac. 376. See also *Ketteringham v. Eureka Homestead Soc.*, 140 La. 176, 72 So. 916; *Achenbach v. Stoddard*, 253 Pa. 338, 98 Atl. 604; *St. Louis & C. R. Co. v. Roberts* (Tex. Civ. App.), 189 S. W. 559.

<sup>40</sup> *Georgia Home Ins. Co. v. Hoskins*, 71 Fla. 282, 71 So. 285. See also *Northwestern Lumber Co. v. Grays Harbor & C. R. Co.*, 208 Fed. 624; *Miller v. Miller*, 91 Kans. 1, 136 Pac. 953, L. R. A. 1915A, 671n, Ann. Cas. 1917A, 918n; *Calloway v. McKnight*, 180 Mo. App. 621, 163 S. W. 932.

<sup>41</sup> *Storey v. Storey*, 214 Fed. 973; *Blizzard Bros. v. Growers' Canning Co.* (Iowa), 148 N. W. 973; *Campbell v. Hayden*, 181 Mo. App. 681, 168 S. W. 363; *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, 88 Atl. 827; *Rushing v. Citizens' Nat. Bank* (Tex. Civ. App.), 162 S. W. 460. See also *Arizona Copper Estate v. Watts*, 237 Fed. 585.

<sup>42</sup> *London v. G. L. Anderson Brass Works* (Ala.), 72 So. 359; *Lay v. Gainer* (Ark.), 196 S. W. 919; *Royer v. Kelly* (Cal.), 161 Pac. 1148; *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954; *Lenox v. Earls* (Mo. App.), 185 S. W. 232; *Erickson v. Wifer* (N. Dak.), 157 N. W. 592; *Chapman v. Schroeder* (Wis.), 165 N. W. 295. This is the rule in most, but not all, of the states, even in the case of sealed instruments. But in some of them it has been held applicable only in case of a money consideration or is limited to showing a consideration of the same character as that recited and not a totally different kind of consideration: *Wilson v. Highley*, 98 Kans. 154, 157 Pac. 411. See also *Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1025; *Muir v. Morris*, 80 Ore. 378, 154 Pac. 117, 157 Pac. 785; *Erfurth v. Erfurth*, 90 Wash. 521, 156 Pac. 523.

<sup>43</sup> *Brousseau v. Jacobs Pharmacy Co.* (Ga.), 93 S. E. 293; *Muir v. Morris*, 80 Ore. 378, 154 Pac. 117, 157 Pac. 785. See also *Sternberg v. Trueblood* (Ark.), 186 S. W. 836; *Harding v. Robinson* (Cal.), 166 Pac. 808; *Tatum v. Orange & C. R. Co.* (Tex. Civ. App.), 198 S. W. 348.

§ 1643. **One contract as consideration for another.**—Want or failure of consideration may be shown by parol, in a proper case, and where a parol agreement is the consideration for a written contract or induces it and forms part of the consideration, such agreement may usually be shown even though it might otherwise be considered inadmissible as varying a written contract.<sup>44</sup> Thus, in the case of a contract to install a telegraph signal and fire alarm box, where the contract disclosed the services to be performed by the telegraph signal but was silent as to the services to be performed with reference to the fire alarm box, except to install it, parol evidence was held admissible to show that, as an additional consideration, the party installing it, upon receipt of a fire alarm at its central office, was to transmit the alarm by gongs.<sup>45</sup>

§ 1644. **Bills of lading.**<sup>46</sup>

§ 1645. **Evidence to connect different writings.**—The parol evidence rule of exclusion does not prevent the admission of letters in negotiation or oral evidence to connect different writings and thus show, in a proper case, that, together, they constituted the contract.<sup>47</sup>

§ 1646. **Resulting trust.**—Parol evidence is admissible, in a proper case, to establish a resulting trust.<sup>48</sup>

§ 1647. **Showing deed to be a mortgage.**—A deed, though absolute on its face, may be shown by parol evidence to be a mortgage.<sup>49</sup> This rule prevails in nearly every jurisdiction, al-

<sup>44</sup> *Coffman v. Malone*, 98 Nebr. 819, 154 N. W. 726, L. R. A. 1917B, 258n; *Locke v. Murdoch*, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267n; *Colvin v. Goff*, 82 Ore. 314, 161 Pac. 568, L. R. A. 1917C, 300n; *De Rue v. McIntosh*, 26 S. Dak. 42, 127 N. W. 532. See also *Excelsior Sav. & Assn. v. Fox*, 253 Pa. 257, 98 Atl. 593, 83 Cent. L. J. 281, and note.

<sup>45</sup> *Missouri Dist. Tel. Co. v. Morris & Co.*, 243 Fed. 481.

<sup>46</sup> Post § 3156.

<sup>47</sup> *Hamilton Iron & Co. v. Groveland Min. Co.*, 233 Fed. 388, 147 C. C. A. 324; *Kimbrow v. Wells*, 112 Ark. 126, 165 S. W. 645 (or to show that they were not executed at the same time and not part of the contract);

*Title Guaranty & Co. v. Lippincott*, 252 Pa. 112, 97 Atl. 201.

<sup>48</sup> *Home Land & Co. v. Routh*, 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C, 1142n; *McIntosh v. Hunt*, 29 Cal. App. 779, 157 Pac. 839, 842; *Hayden v. Dannenberg*, 42 Okla. 776, 143 Pac. 859, Ann. Cas. 1916D, 1191n (but it must be clear and decisive). See also *Richards v. Wilson (Ind.)*, 112 N. E. 780.

<sup>49</sup> *Grumner v. Price*, 101 Ark. 611, 143 S. W. 95; *Edwards v. Bond*, 105 Ark. 314, 151 S. W. 243; *Todd v. Todd*, 164 Cal. 255, 128 Pac. 413; *Capital Lumber Co. v. Saunders*, 26 Idaho 408, 143 Pac. 1178; *Caldwell v. McGee*, 162 Ill. App. 171; *Ward v. Tuttle*, 54 Ind. App. 674, 102 N. E.

though there are a few in which it is somewhat restricted or obtains only in equity.<sup>50</sup>

§ 1648. **Dates.**—Parol evidence as to the true date of an instrument is admissible in a proper case.<sup>51</sup>

§ 1649. **Illegality.**—The general rule excluding parol evidence does not prevent the admission of such evidence to show that the written agreement is illegal, as in violation of a statute, against public policy, or the like.<sup>52</sup>

§§ 1650, 1651. **Fraud and duress—Illustrative cases.**—It is well settled that parol evidence is admissible to show fraud or duress.<sup>53</sup> Thus, evidence has been held admissible to show what was said in procuring the writing or its execution in order to show fraud charged in regard to such matter.<sup>54</sup> And such fraud may be shown notwithstanding the instrument provides that no conditions, representations or agreement, other than therein stated, had been made, or should be binding.<sup>55</sup> So, evidence of previous promises inconsistent with the written agreement were held admissible where fraudulent conduct was alleged, beginning with representations of the means and property of the other

405; *Irish v. Steeves*, 154 Iowa 286, 134 N. W. 634; *McRobert v. Bridget*, 168 Iowa 28, 149 N. W. 906; *Castillo v. McBeath*, 162 Ky. 382, 172 S. W. 669; *Crane v. Reed*, 172 Mich. 642, 138 N. W. 223; *Baumgartner v. Corliss*, 115 Minn. 11, 131 N. W. 638; *Phillips v. Jackson*, 240 Mo. 310, 144 S. W. 112; *Worley v. Carter*, 30 Okla. 642, 121 Pac. 669; *Grover v. Hawthorne*, 62 Ore. 77, 114 Pac. 472, 121 Pac. 808; *Bryan v. Boyd*, 100 S. Car. 397, 84 S. E. 992; *Niles v. Lee*, 31 S. Dak. 234, 140 N. W. 259; *Cox v. Kearley* (Tex. Civ. App.), 175 S. W. 731; *Johnson v. Nat. Bank*, 65 Wash. 261, 118 Pac. 21, L. R. A. 1916B, 4n.

<sup>50</sup> See elaborate note in L. R. A. 1916B, 18-610, showing the rule in each state and covering the entire subject.

<sup>51</sup> *Erickson v. Robertson*, 116 Minn. 90, 133 N. W. 164, 37 L. R. A. (N. S.) 1133n, Ann. Cas. 1913A, 493, and note.

<sup>52</sup> *People's Bank & Co. v. Floyd* (Ala.), 75 So. 940; *Hindenlang v. Mahon*, 225 Mass. 445, 114 N. E. 684; *Mitchell v. Campbell*, 111 Miss. 806,

72 So. 231; *Kuhn v. Buhl*, 251 Pa. 348, 96 Atl. 977, Ann. Cas. 1917D, 415n; *Ennis v. New World Life Ins. Co.* (Wash.), 165 Pac. 1091 (illegality in stock subscription).

<sup>53</sup> *Pollock v. Skelton*, 15 Ga. App. 1, 82 S. E. 381; *Griesa v. Thomas*, 99 Kans. 335, 161 Pac. 670; *Outcalt Advertising Co. v. Smalley* (Kans.), 168 Pac. 677; *Shallcross Printing & Co. v. Brown* (Mo. App.), 185 S. W. 745; *Hillman v. Luzon Cafe Co.*, 49 Mont. 180, 142 Pac. 641; *Berrendo Irr. & Co. v. Jacobs* (N. Mex.), 168 Pac. 483; *Parham v. Atlantic Life Ins. Co.*, 104 S. Car. 223, 88 S. E. 470. Compare *Interior Warehouse Co. v. Dunn*, 80 Ore. 528, 157 Pac. 806.

<sup>54</sup> *Lake Erie Land Co. v. Chilinski* (Mich.), 163 N. W. 929. See also *Nickle v. Reeder* (Okla.), 166 Pac. 895; *Heinman v. Old Nat. Bank*, 157 Wis. 289, 147 N. W. 360.

<sup>55</sup> *Berrendo Irr. & Co. v. Jacobs* (N. Mex.), 168 Pac. 483; *Commonwealth Bonding & Co. v. Bomar* (Tex. Civ. App.), 169 S. W. 1060. See also *Hetrick v. Gerlinger Motor Car Co.*, 84 Ore. 133, 164 Pac. 379.

party, by which the party alleging the fraud was induced to enter into the written agreement.<sup>56</sup>

§§ 1652, 1653. **Mistake—Illustrative cases.**—Parol evidence is also admissible in a proper case to show mutual mistake.<sup>57</sup> So, parol evidence has been admitted to show that the signature to a bond was put in the wrong place by mistake,<sup>58</sup> and that there was a mistake in inserting a certain date in an instrument.<sup>59</sup>

§ 1654. **Discharge—Performance—Waiver.**<sup>60</sup>

§ 1655. **Parol evidence to aid interpretation.**<sup>61</sup>—It has already been shown in considering the subject of the construction of contracts that parol as well as other extrinsic evidence is often admissible to aid in the construction of a contract where it is ambiguous.<sup>62</sup> There are many decisions to this effect,<sup>63</sup> and the practical construction given to the contract by the parties is usually very important in such cases.<sup>64</sup> But, as a general rule, where the contract is not ambiguous or of doubtful meaning parol evidence is not admissible to determine its construction.<sup>65</sup> The rule is thus stated in a recent case: "It is a cardinal rule of construction (where the writing is not ambiguous) that it shall be so interpreted as to carry into effect the intention of the

<sup>56</sup> Tevis v. Ryan, 233 U. S. 273, 58 L. ed. 957, 34 Sup. Ct. 481.

<sup>57</sup> Kansas City &c. R. Co. v. Smithson, 113 Ark. 305, 168 S. W. 555; Minneapolis Steel &c. Co. v. Schlansky, 100 Kans. 562, 165 Pac. 289 (and to show what the contract really was, in a suit for its reformation). See also note in L. R. A. 1916B, 38.

<sup>58</sup> Craig v. Spencer (Okla.), 156 Pac. 172.

<sup>59</sup> Breitzke v. Tucker (Ark.), 196 S. W. 462.

<sup>60</sup> Post § 1861. See also Jones v. Little (Ark.), 194 S. W. 229.

<sup>61</sup> [Main section quoted in McDonald v. Mezon (N. Mex.), 168 Pac. 1069, 1072.]

<sup>62</sup> Ante §§ 1517-1519.

<sup>63</sup> Mobile County v. Linch (Ala.), 73 So. 423; New Brantner &c. Ditch Co. v. Kramer, 57 Colo. 218, 141 Pac. 498, Ann. Cas. 1916B, 1225n; New Idea Arc Light Co. v. G. C. Renneker Co., 195 Ill. App. 290; Royer

v. Western Silo Co., 99 Kans. 309, 161 Pac. 654; McFarland v. Hiltzley (S. Dak.), 166 N. W. 141; and many other cases cited in § 1517 ante.

<sup>64</sup> Butte Water Co. v. Butte, 48 Mont. 386, 138 Pac. 195; Spande v. Western Life &c. Co., 68 Ore. 171, 136 Pac. 1189; Douglass v. Morrisville, 89 Vt. 201, 95 Atl. 810; Gish v. Roanoke, 119 Va. 519, 89 S. E. 970; ante § 1537. Evidence of the construction placed on a written contract by the parties, when competent, is valuable in aiding to ascertain the intention of such parties, but its use is limited to ascertaining such intention, and it can not be used to force a new and different meaning into the contract: Sholl Bros. v. Peoria &c. R. Co., 196 Ill. App. 306.

<sup>65</sup> Ross v. Savage, 66 Fla. 106, 63 So. 148; Keinath v. Reed, 18 N. Mex. 358, 137 Pac. 841; Morganton Mfg. &c. Co. v. Anderson, 165 N. Car. 285, 81 S. E. 418, Ann. Cas. 1916A, 763n.

parties as expressed by the writings. If the language or any portion thereof is ambiguous or of uncertain meaning or application, parol evidence may be heard, not to vary or contradict the writings, but to ascertain the sense in which the language was used and its application to the subject-matter of the contract, to arrive at the true intention of the parties at the time the contract was entered into. In ascertaining such intention the court will, if necessary, consider the relation and situation of the parties, the character of the transaction, and all the surroundings and conditions attending the execution of the contract."<sup>66</sup>

**§§ 1656-1658. Patent and latent ambiguity.**—There is perhaps little value in the distinction made between patent and latent ambiguities, and, in some instances, courts have been misled by attempting to draw it and apply a different rule to each, but in one class of cases, where there is a latent ambiguity known as equivocation, evidence of the intent may be admitted where it would not otherwise be admissible, and it is often said that oral evidence is admissible to fit a description to the subject-matter where the ambiguity is latent.<sup>67</sup>

**§§ 1659, 1660. Identification of subject-matter—Illustrative cases.**—When there is ambiguity as to the subject-matter of a contract, parol evidence is usually admissible to identify it.<sup>68</sup> As shown in the authorities cited, this rule is frequently applied to ambiguous descriptions of land or personal property. It is also applicable so as to permit oral evidence of a payment or a claim, or the like, referred to in the contract.<sup>69</sup>

<sup>66</sup> *Robbins v. Brazil Syndicate &c. Co.* (Ind. App.), 114 N. E. 707, 709 (holding evidence of previous course of dealing and agreements between the parties, their situation and the circumstances under which the contract was made, admissible to show the meaning and application of phrase "same as last").

<sup>67</sup> *Reynolds v. Trawick* (Ala.), 72 So. 378; *Speed v. Perry*, 167 N. Car. 122, 83 S. E. 176; *Snider v. Robinson* (W. Va.), 88 S. E. 599. See also *Ault v. Clark* (Ind. App.), 112 N. E. 843. See as to what is a latent ambiguity and when there is no latent ambiguity: *Diffie v. White* (Tex. Civ. App.), 184 S. W. 1065; *Paxton v. Benedum &c. Oil Co.* (W. Va.), 94

S. E. 472. As to what is a patent ambiguity, see: *San Antonio Life Ins. Co. v. Griffith* (Tex. Civ. App.), 185 S. W. 335.

<sup>68</sup> *In re Silver*, 208 Fed. 797; *Vose v. United States &c. Products Co.*, 216 Fed. 775 (to identify a patent); *Joyce v. Tomasini* (Cal.), 142 Pac. 67 (to identify land); *State Sav. &c. Co. v. Matz*, 26 Colo. App. 511, 143 Pac. 1039 (same); *Ault v. Clark* (Ind. App.), 112 N. E. 843; *Myllins v. Raine &c. Lumber Co.*, 73 W. Va. 674, 81 S. E. 823 (price, character and value of land, etc., admitted to identify it). But compare *Denison &c. Dry Goods Co. v. Hill*, 135 Tenn. 60, 185 S. W. 723.

<sup>69</sup> *Keene v. Ætna Life Ins. Co.*, 213

§ 1661. **Meaning of words—Generally.**—Parol evidence is not ordinarily admissible to explain or contradict words that have a well-known meaning and do not appear to be ambiguous or used in a different sense.<sup>70</sup> But such evidence is usually admissible to explain where there is an apparent ambiguity caused by the subject-matter or particular connection in which the words are used or the like.<sup>71</sup> Where a contract provided that money was to be returned if a “store” was not established by a certain corporation, evidence was held admissible to show the meaning of the word “store.”<sup>72</sup> So, parol evidence has been held admissible to show that a written warranty of a machine “under normal conditions” referred to normal conditions inside of a mine and not outside.<sup>73</sup>

§ 1663. **Usage and custom.**—Parol evidence of a usage or custom is also admissible in a proper case to explain the meaning of terms controlled thereby or aid the court in the interpretation of the contract.<sup>74</sup>

§ 1664. **Identification of parties.**—Another common use of parol evidence is to identify parties, and it is well settled that such evidence is admissible in a proper case for that purpose.<sup>75</sup> Parol evidence has also been held admissible, as between the original parties, to show in what capacity the signers executed the instrument and to show the parties bound.<sup>76</sup>

Fed. 893; *Blizzard Bros. v. Growers Canning Co.* (Iowa), 148 N. W. 973 (to show certain claim not included in check for settlement of account). See also *Hartley v. Werner* (Mo. App.), 196 S. W. 1072; *State Agricultural &c. Soc. v. Taylor*, 104 S. Car. 167, 88 S. E. 372.

<sup>70</sup> *Burge v. Albany Nurseries* (Cal.), 168 Pac. 343; *Wilmarth v. Pacific Mut. Life Ins. Co.*, 168 Cal. 536, 143 Pac. 780, Ann. Cas. 1915B, 1120n. See also *Valentine v. Shepherd* (Ariz.), 168 Pac. 643.

<sup>71</sup> *Orvis v. British-American Cotton Co.*, 242 Fed. 835; *W. T. Smith Lumber Co. v. Jernigan*, 185 Ala. 125, 64 So. 300, Ann. Cas. 1916C, 654; *Davis v. Martin Stave Co.*, 113 Ark. 325, 168 S. W. 553; *Bronson v. Wilson*, 186 Ill. App. 69; *Globe &c. F. Ins. Co. v. Hamilton* (Ind. App.), 116 N. E. 597; *Butcher v. Smith* (Tex. Civ. App.), 195 S. W. 1180.

<sup>72</sup> *Devine v. George* (Colo.), 166 Pac. 242.

<sup>73</sup> *Westinghouse Elec. &c. Co. v. Greenville Coal Co.*, 169 Ky. 280, 183 S. W. 901.

<sup>74</sup> *W. T. Smith Lumber Co. v. Jernigan*, 185 Ala. 125, 64 So. 300, Ann. Cas. 1916C, 654, and note; *Folley & Co. v. Smith*, 103 S. Car. 445, 88 S. E. 24; post § 1705.

<sup>75</sup> *Cincinnati &c. R. Co. v. Luke*, 169 Ky. 560, 184 S. W. 1132, 171 Ky. 50, 186 S. W. 875; *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108n; *Ellis v. Stone*, 21 N. Mex. 730, 158 Pac. 480, L. R. A. 1916F, 1228; *First State Bank v. Power* (Tex. Civ. App.), 166 S. W. 382; *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713. But see *Reif v. Commercial Cabinet Co.*, 185 Ill. App. 577.

<sup>76</sup> *W. C. Dean Jewelry Co. v. Storm* (Okla.), 166 Pac. 1046.



§ 1665. **Abbreviations, technical trade and local terms.**—Parol evidence is usually admissible to explain abbreviations, at least when uncommon and not generally understood.<sup>77</sup> So, technical terms of science or art and of trade may usually be explained by parol evidence,<sup>78</sup> and even local terms having a well-defined local meaning may be explained when used in a written contract with reference to their use and meaning in such locality.<sup>79</sup> Thus, parol evidence has been held admissible to show that figures in the weight column of a bill of lading were trade abbreviations,<sup>80</sup> and so has evidence of an established trade meaning to the effect that “winter wheat bran” contains screenings.<sup>81</sup>

<sup>77</sup> *Pittsburg Steel Co. v. Cottengin* (Mo. App.), 165 S. W. 391; *Banner Lumber Co. v. Robson*, 182 Mo. App. 611, 168 S. W. 244.

<sup>78</sup> *Davis v. Martin Stave Co.*, 113 Ark. 325, 168 S. W. 553; *Wilkes v. Stacy*, 113 Ark. 556, 169 S. W. 796 (meaning of “furnishing trade”); *New Brantner Extension Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498, Ann. Cas. 1916B, 1225, and note; *American Heating & Co. v. Salmon & Co.*, 195 Ill. App. 297; *Becker v. Churdan*, 175 Iowa 159, 157 N. W. 221; *W. T. Tilden Co. v. Denesten Hair Co.*, 216 Mass. 330, 103 N. E. 916; *Neal v. Camden Ferry Co.*, 166 N. Car. 563, 82 S. E. 878; *William*

*M. Roylance Co. v. Descalzi*, 243 Pa. 180, 90 Atl. 55; *Southern Gas & Co. v. Adams* (Tex. Civ. App.), 169 S. W. 1143; *Berry v. Wadhams Oil Co.*, 156 Wis. 588, 146 N. W. 783.

<sup>79</sup> *W. T. Smith Lumber Co. v. Jernigan*, 185 Ala. 125, 64 So. 300, Ann. Cas. 1916C, 654, and note (“timber suitable for sawlogs”); *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975 (“crop of beets”); *Toledo & C. R. Co. v. East St. Louis & C. R. Co.*, 197 Ill. App. 230.

<sup>80</sup> *Lampert Lumber Co. v. Minneapolis & C. R. Co.*, 127 Minn. 195, 149 N. W. 133.

<sup>81</sup> *Walker v. Gateway Mill Co.* (Va.), 92 S. E. 826.

## CHAPTER XXXVIII

### CUSTOMS AND USAGES

§§ 1677-1695. **Requisites of a valid custom or usage—Reasonableness — Generality and uniformity — Antiquity — Legality.**—A custom or usage can not be shown where there is no proof that it was general or well established or that a party knew of it or ought to have known it.<sup>1</sup> When the manufacture of gasoline from waste gas was in its infancy it was held that evidence as to the custom by which a conveyance of waste gas should be construed was inadmissible.<sup>2</sup> A custom can not change the positive law, and it is not admissible to show that it was the custom for one making sales to sign the name of the other party and bind the latter thereby.<sup>3</sup>

§§ 1696-1702. **Knowledge of custom or usage essential—Presumption of knowledge.**—A custom or usage, to be considered, must ordinarily be notorious and well established or actually known to the parties;<sup>4</sup> and a usage of trade, although general, can not be presumed to have been in contemplation of

<sup>1</sup> *Smuckler v. Di Napoli*, 62 Pa. Super. Ct. 570; *Zartner v. George*, 156 Wis. 131, 145 N. W. 971, 52 L. R. A. (N. S.) 129. See also *Calhoun v. Ainsworth*, 118 Ark. 316, 176 S. W. 316, L. R. A. 1915E, 395; *Estes v. Local Union*, 90 Conn. 426, 97 Atl. 326; *Stevens v. Wisconsin Farm & Co.*, 124 Minn. 421, 145 N. W. 173. It must also be reasonable: *Mutual & Co. Brewing Co. v. Dithrich*, 54 Pa. Super. Ct. 560. See also *Fleisher v. Abbott*, 222 Fed. 211, 137 C. C. A. 525 (a custom of wool trade held reasonable). A custom, to be considered as part of a contract, must be reasonable, uniform, well settled, not opposed to law, and not in contradiction of the terms of the contract: *Kennedy v. Perkins & Co.*, 154 N. Y. S. 101.

<sup>2</sup> *Bubb v. Parker & Co. Oil Co.*, 252 Pa. 26, 97 Atl. 114.

<sup>3</sup> *Happ Bros. Co. v. Hunter Mfg. & Co.*, 145 Ga. 836, 90 S. E. 61.

So evidence of a custom among motor car manufacturers of using such terms as "agents" and "commissions" in a sense opposite to their legal and generally understood meaning is inadmissible: *Renick v. Brooke* (Mo. App.), 190 S. W. 641. And where a sale contract expressly gave the buyer the right to have each shipment analyzed before accepting it, evidence of a trade custom, that such provision would not prevent the title from passing, was held inadmissible: *Agri Mfg. Co. v. Atlantic Fertilizer Co.*, 129 Md. 42, 98 Atl. 365. See also *Exchange Nat. Bank v. Little*, 111 Ark. 263, 164 S. W. 731; *Comstock v. Larimer & Co. Reservoir Co.*, 58 Colo. 186, 145 Pac. 700, Ann. Cas. 1916A, 416n; *Northwestern Nat. Ins. Co. v. Southern States & Co.* (Ga. App.), 93 S. E. 157.

<sup>4</sup> *Middleton v. Western Union Tel. Co.* (Ala.), 72 So. 548; *Lynch v. Perkins Van & Co.*, 31 Cal. App. 68, 159

the parties unless it is actually known to them or is so well established or has existed so long that knowledge on their part may reasonably be presumed.<sup>5</sup> But one making a contract in the ordinary course of business is ordinarily presumed to have done so with knowledge of and reference to any general usage or custom of such business.<sup>6</sup>

**§§ 1705-1708. Custom or usage to explain—Construction of words—Unusual and technical words.**—Where the contract is clear, certain, and unambiguous, the general rule is that evidence of usage or custom is inadmissible to vary the contract or show a different intention.<sup>7</sup> But, as already shown, such evidence is admissible in case of ambiguity or uncertainty to explain and, in some instances, even where in one sense there is no ambiguity apparent on the face of the writing. Evidence of the meaning of trade terms and the like used therein and established by custom or usage in regard to the matter to which the contract relates may be necessary and admissible in order to properly apply expressions in the writing to the subject-matter.<sup>8</sup>

**§ 1709. Contract not created by custom or usage.**—Although general usage may be shown to remove ambiguities and uncertainties, it can not be shown and employed for the purpose of destroying, contradicting, or modifying what is manifest, nor to make a contract where there is none.<sup>9</sup>

Pac. 822; *Estes v. Local Union &c.*, 90 Conn. 426, 97 Atl. 326; *Smuckler v. Di Napoli*, 62 Pa. Super. Ct. 570. See also *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737n; *American Sav. &c. Co. v. Dennis*, 90 Wash. 547, 156 Pac. 559.

<sup>5</sup> *Cole Motor Car Co. v. Tebault*, 196 Ala. 382, 72 So. 21.

<sup>6</sup> *Toledo &c. R. Co. v. East St. Louis &c. R. Co.*, 197 Ill. App. 230; *Miller v. Great Western Commission Co.*, 98 Nebr. 392, 152 N. W. 787.

<sup>7</sup> *McDowell v. Bowles &c. Grain Co.*, 177 Iowa 744, 157 N. W. 173; *Fidelity &c. Co. v. Callahan Bros.*, 98 Kans. 547, 158 Pac. 658; *Interior Warehouse Co. v. Dunn*, 80 Ore. 528, 157 Pac. 806; *Chicago &c. R. Co. v. Pavillard* (Tex. Civ. App.), 187 S. W. 998; *Wilkins v. Kessinger*, 90 Wash. 447, 156 Pac. 389. See also

*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 Fed. 913, 144 C. C. A. 195; *Cargill Commission Co. v. Mowery*, 99 Kans. 389, 161 Pac. 634, 162 Pac. 313.

<sup>8</sup> Ante §§ 1663, 1665. See also *W. T. Smith Lumber Co. v. Jernigan*, 185 Ala. 125, 64 So. 300, Ann. Cas. 1916C, 654, and note; *People v. Traves*, 188 Mich. 415, 154 N. W. 120. In a contract for installing a heating plant a provision calling for a certain part of the contract price "when steam is turned on plant" is to be construed in accordance with the meaning given to the term by the trade: *American Heating &c. Corp. v. William E. Salmon & Co.*, 195 Ill. App. 297; *Aradalou v. New York &c. R. Co.*, 225 Mass. 235, 114 N. E. 297.

<sup>9</sup> *Great Lakes Coal &c. Co. v. Seitelur Transit Co.*, 220 Fed. 28, 136 C.

§ 1710. **Incorporation of custom or usage in contract.**—Known usages of a trade or business are generally presumed to enter into and form part of a contract made with respect thereto.<sup>10</sup>

§ 1713. **Express contract can not be varied or contradicted by custom or usage.**—An express contract, clearly and positively showing the intention of the parties, can not be varied or contradicted by evidence of a custom or usage.<sup>11</sup> A custom may control the mode of performance, but it can not change the intrinsic character of a contract.<sup>12</sup>

§ 1716. **Exclusion of custom or usage by express contract.**—Where an express provision of a contract precludes a custom from being a part of it, such custom can not be shown by parol and thus made part of the contract.<sup>13</sup>

§ 1717. **Implied exclusion of custom.**—A usage or custom can not, by implication, nullify the express terms of a contract,<sup>14</sup> and evidence of a custom is not admissible, under the guise of explaining a contract, to ingraft on it a new provision and alter its intrinsic character.<sup>15</sup>

§§ 1721, 1722. **Custom or usage to explain matters on which contract is silent—Adding to terms of contract—Illustrative cases.**—Where a contract is silent as to some matter or phase of the transaction and it may well be presumed that such matter was intended to be controlled by a custom or usage of the trade, especially where it relates to the mode of performance, parol evidence of such custom or usage is admissible in a proper

C. A. 110; *State v. Public Service Commission*, 269 Mo. 63, 189 S. W. 377.

<sup>10</sup> *Friedheim v. Walter H. Hildie Co.*, 104 S. Car. 378, 89 S. E. 358; *Burden v. Woodside Cotton Mills*, 104 S. Car. 435, 89 S. E. 474. See also *Miller v. Great Western Commission Co. (Nebr.)*, 152 N. W. 787; *Sutherland & Co. v. Gibson*, 117 Va. 840, 86 S. E. 108.

<sup>11</sup> *Levy v. Hoffman*, 235 Fed. 46, 148 C. C. A. 540; *McDowell v. Bowles & Co. Grain Co.*, 177 Iowa 744, 157 N. W. 173; *Gooch v. Coleman (N. Mex.)*, 159 Pac. 945; *Bernard v. Houser*, 68 Ore. 240, 137 Pac. 227; *Interior Warehouse Co. v. Dunn*, 80

Ore. 528, 157 Pac. 806; *Chicago & C. R. Co. v. Pavillard (Tex. Civ. App.)*, 187 S. W. 998; *State v. Park (Wis.)*, 165 N. W. 289. Where there is a sale with express agreement, a custom among dealers as to methods of conducting sales and as to giving warranties is immaterial: *Leitner v. Thayer*, 24 Wyo. 378, 159 Pac. 1084. <sup>12</sup> *Scott's Exr. v. Chesterton*, 117 Va. 584, 85 S. E. 502.

<sup>13</sup> *Cartersville Grocery Co. v. Rowland*, 17 Ga. App. 42, 86 S. E. 402; *Davidson v. Zorger*, 181 Ill. App. 113.

<sup>14</sup> *Middleton v. Western Union Tel. Co. (Ala.)*, 72 So. 548.

<sup>15</sup> *Scott's Exr. v. Chesterman*, 117 Va. 584, 85 S. E. 502.

case.<sup>16</sup> Thus, in case of a general contract of employment fixing no time for its continuance, evidence of a well-known custom as to the period of such employments to terminate them on two weeks' notice, or the like, has been held admissible.<sup>17</sup> And a local custom regulating the delivery of goods by a carrier and notice to the shipper has been held to form part of the contract of shipment.<sup>18</sup> But where the law implies a certain element as part of the contract, as, for instance, that delivery of goods ordered without specifying the time shall be made within a reasonable time, it is held that this can not be varied or contradicted by proof of an oral agreement or understanding to the contrary.<sup>19</sup>

**§ 1723. Usage to explain meaning of unambiguous terms having a peculiar meaning.**—A word or phrase which is unambiguous in itself and according to its ordinary meaning, may be rendered ambiguous by the context or connection in which it is used, so as to admit parol evidence; and where the contract is made with reference to a trade custom or even a local usage in which such word or phrase has a peculiar meaning, evidence thereof is admissible.<sup>20</sup>

**§ 1725. Warranty may not be added.<sup>21</sup>**

<sup>16</sup> Nagel v. Meier (Iowa), 155 N. W. 813; Barrie v. Quinby, 206 Mass. 259, 92 N. E. 451; De Carlton v. Glaser, 172 App. Div. 132, 158 N. Y. S. 271; Folley & Co. v. Smith, 103 S. Car. 445, 88 S. E. 24 (added term as to custom in regard to inspection admissible). See also Strong v. Ringle, 96 Kans. 573, 152 Pac. 631; First Nat. Bank v. Hogg-Harris Lumber Co., 181 Ill. App. 220. Where an agreement to pay a broker a commission was silent as to commission to be paid, it was implied that rate should be such as was usually and customarily paid for such services in such business at that place: Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056. But in construing an express contract of employment as manager of a certain business, it has been held that a custom of employment by the season in such trade will not be considered: Dunning v. Lederer, 164 Wis. 399, 160 N. W. 159.

<sup>17</sup> Arkadelphia Lumber Co. v. Asman, 85 Ark. 568, 107 S. W. 1171; De Carlton v. Glaser, 172 App. Div.

132, 158 N. Y. S. 271. See also Behnke v. Turnverein Einigkeit, 180 Ill. App. 319; George v. Davies, 2 L. R. (1911) K. B. 445, 80 L. J. K. B. 924. But compare Bowen v. Chenoa & Co. Coal Co., 168 Ky. 588, 182 S. W. 635.

<sup>18</sup> South-Deerfield Storage Co. v. New York & Co. R. Co., 222 Mass. 535, 111 N. E. 367.

<sup>19</sup> Cameron Coal & Co. v. Universal Metal Co., 26 Okla. 615, 110 Pac. 720, 31 L. R. A. (N. S.) 618, and note. See also Ackerlind v. United States, 49 Ct. Cl. 635.

<sup>20</sup> W. T. Smith Lumber Co. v. Jernigan, 185 Ala. 125, 64 So. 300, Ann. Cas. 1916C, 654, and note; Corey v. Struve, 16 Cal. App. 310, 116 Pac. 975; Wood v. Allen, 111 Iowa 97, 82 N. W. 451. See also Hoerger v. Sidway Mercantile Co., 183 Ind. 610, 109 N. E. 770; Nolin Milling Co. v. White Grocery Co., 168 Ky. 417, 182 S. W. 191; Asbury v. Evans (Mo. App.), 182 S. W. 785.

<sup>21</sup> See post § 5007.

§ 1729. **Effect of custom on liability of connecting carriers.**—In an action by the initial carrier under the Interstate Commerce Act as amended, to recover from connecting carriers the amount the initial carrier had paid shippers for loss of property, a local custom of the connecting carriers as to delivery, unknown to the initial carrier, is not binding upon it.<sup>22</sup>

§ 1730. **Custom as to delivery of goods to carrier.**—Parol evidence is admissible in a proper case to show a usage to receive goods at a particular place other than an established station and delivery at such place in accordance with such usage.<sup>23</sup>

§ 1731. **Usage as to capacity of cars.**—Parol evidence is admissible to show the maximum and minimum weight of a "carload" of cotton seed, and the term may be construed by the custom of trade.<sup>24</sup>

§§ 1732, 1733. **Custom and usage as to delivery by carrier—Carrier by water.**—Evidence of a custom or usage is often admissible to show the time, place, or manner of delivery of goods by carriers, and in case of carriers by water the custom or usage of the port is frequently controlling.<sup>25</sup>

§§ 1735, 1736. **Custom as to baggage.**—Custom or usage in regard to delivery and carriage of baggage is also sometimes controlling and evidence thereof admissible in a proper case, but a general custom or usage of a transfer company to carry only passengers and not baggage is inadmissible or immaterial where in the particular case it agreed and undertook to carry it for a valuable consideration.<sup>26</sup> So testimony of one who transfers baggage to a railway station that it was his custom to deposit hand baggage on the platform outside the building is insufficient to show a custom of the railroad company to receive it there so as to relieve the transfer man from liability for its loss.<sup>27</sup>

§§ 1742, 1743. **Powers of president and other officers of corporation as affected by custom or usage.**—The president and other officers of a corporation usually have such powers and

<sup>22</sup> Hill Steamboat Line v. Panama R. Co., 97 Misc. 22, 160 N. Y. S. 1103.

<sup>23</sup> Post § 3142.

<sup>24</sup> Ward v. Cotton Seed &c. Co., 193 Ala. 101, 69 So. 514; Thompson v. Strong (Ala.), 74 So. 34.

<sup>25</sup> Post §§ 3262, 3265, 3270.

<sup>26</sup> City Transfer Co. v. Draper, 115 Ga. 954, 45 S. E. 221.

<sup>27</sup> Alexander v. McNally, 112 Mo. App. 563, 87 S. W. 1.

authority as such officers have in accordance with the general usage of like corporations,<sup>28</sup> and authority may be inferred from habitual exercise of it, without objection, for a long time.<sup>29</sup>

**§ 1744. Effect of usage or custom on right of corporate officer to compensation.**—As a general rule, in the absence of a contract express or implied, an officer or director of a corporation, or a partner, is not entitled to compensation for ordinary services, nor even to extra compensation for services outside his regular duties.<sup>30</sup> But evidence of custom or usage to pay such compensation is admissible in a proper case, and a contract to do so may be implied.<sup>31</sup>

**§§ 1746-1751. Insurance customs and usages.**—Evidence of custom or usage is often admissible in insurance cases.<sup>32</sup> There is sharp conflict among the authorities as to whether a custom or usage of a subordinate lodge or its officers to receive arrearages will operate as a waiver of a provision in the contract or laws of the organization requiring prompt payment and prevent a forfeiture. In a number of recent cases it is held that such a provision even in the laws of the organization may be waived by such a custom.<sup>33</sup> But other recent cases are to the contrary, at least where the laws of the order require prompt payment and prohibit a waiver, and notice of the alleged custom is not brought

<sup>28</sup> *Columbian Woodmen v. Benz*, 11 Ga. App. 733, 76 S. E. 99; *Traitel Marble Co. v. Brown Bros.*, 159 App. Div. 485, 144 N. Y. S. 562.

<sup>29</sup> *Citizens Bank & Co. v. Thornton*, 174 Fed. 752, 98 C. C. A. 478; *Ney v. Eastern Iowa Tel. Co.*, 162 Iowa 525, 144 N. W. 383; *First Nat. Bank v. Bickel*, 154 Ky. 11, 156 S. W. 856 (duty of bank cashier by long usage to look after notices of dishonor).

<sup>30</sup> *Title Ins. Co. v. Home Tel. Co.*, 200 Fed. 263; *Roth v. Boies*, 139 Iowa 253, 115 N. W. 930 (partner); *Boothe v. Summit Coal & Co.*, 72 Wash. 679, 131 Pac. 252 (partner not entitled to compensation for exceptional services and increased activity). See also *Notley v. First State Bank*, 154 Mich. 676, 118 N. W. 486; *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785; *McKean v. Riter-Conley Mfg. Co.*, 230 Pa. 319,

79 Atl. 561; *Gay v. Householder*, 71 W. Va. 277, 76 S. E. 450, Ann. Cas. 1914C, 297, and note.

<sup>31</sup> *Rains v. Weiler* (Kans.), 166 Pac. 235, L. R. A. 1917F, 571, and note. See also *Maynard v. Maynard* (Ga.), 93 S. E. 289; *Mondamin Bank v. Burke*, 165 Iowa 711, 147 N. W. 148; *Arthur v. McCallum* (Mich.), 162 N. W. 118.

<sup>32</sup> Post §§ 4131, 4134, 4148.

<sup>33</sup> *Dromgold v. Royal Neighbors*, 261 Ill. 60, 103 N. E. 584; *O'Malley v. Supreme Council*, 165 Ill. App. 186; *Jakes v. North American Union*, 186 Ill. App. 1; *Edmiston v. Homesteaders*, 93 Kans. 485, 144 Pac. 826, Ann. Cas. 1916D, 588n; *Sauerwein v. Grand Lodge*, 121 Minn. 229, 141 N. W. 174; *Dougherty v. Supreme Court*, 125 Minn. 142, 145 N. W. 813. See also *Walker v. United Order*, 212 Mass. 289, 98 N. E. 1039, Ann. Cas. 1913D, 345, and note.

home to the general body or any general officer.<sup>34</sup> It has been held that insurance brokers having the placing of insurance are required to get and submit rates from underwriters according to the usual course of business.<sup>35</sup>

§§ 1755, 1756. **Bank usages as to powers and duties of officers—Cashiers.**<sup>36</sup>—Implied authority of the cashier of a bank can not be invoked to sustain a transaction prohibited by statute or beyond the powers of such a corporation.<sup>37</sup>

§ 1757. **Certification of checks.**<sup>38</sup>

§ 1764. **Mailing notice of protest.**—Even if mailing of notice of protest is sufficient in a proper case where the custom or usage is established, a notice of dishonor mailed to a place where the party required to be notified never resided, and sent there merely because the other party had deposited the note in a bank at such place is insufficient.<sup>39</sup> It has also been held that demand by telephone for payment of a note is not good.<sup>40</sup>

§ 1765. **Collection customs of banks.**—The rules and usages of a clearing house are binding upon its members;<sup>41</sup> but they do not, ordinarily, affect the rights and liabilities of others, and the failure of a bank paying a check in favor of a third person, who forwards it through another bank for collection, to offer to return the check to the collecting bank and to demand repayment within the time required by the rules of the clearing house does not affect its right to recover from such third person the amount paid.<sup>42</sup> It has also been held that knowledge on the

<sup>34</sup> *Order of United Commercial Travelers v. Young*, 212 Fed. 132, 128 C. C. A. 648 (evidence of custom of secretary and treasurer of local council to permit and receive payments after due held inadmissible); *Odd Fellows' Ben. Assn. v. Smith*, 101 Miss. 332, 58 So. 100; *Griffith v. Supreme Council*, 182 Mo. App. 644, 166 S. W. 324; *Bennett v. Sovereign Camp* (Tex. Civ. App.), 168 S. W. 1023. See also *Hartman v. National Council*, 76 Ore. 153, 147 Pac. 931, L. R. A. 1915E, 152.

<sup>35</sup> *Johnson v. Harper Transp. Co.*, 228 Fed. 730.

<sup>36</sup> See ante, §§ 1742, 1743.

<sup>37</sup> *Gage & Co. v. Bank of Holcomb* (Mo. App.), 196 S. W. 1077.

<sup>38</sup> As to the effect of certification of checks, see note in L. R. A. 1916C, 171, 172.

<sup>39</sup> *Silver v. Louchenn*, 147 N. Y. S. 29.

<sup>40</sup> *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, Ann. Cas. 1912A, 861, 34 L. R. A. (N. S.) 417; *State Nat. Bank v. Kennedy*, 145 App. Div. 669, 130 N. Y. S. 412. (There was no attempt in these cases, however, to prove custom or usage which seems to prevail in some places as to making demand or protest on giving notice of dishonor over the telephone.)

<sup>41</sup> Notes in Ann. Cas. 1914C, 514, and 50 L. R. A. (N. S.) 542.

<sup>42</sup> *National Exchange Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. 1026, 33



part of one who deposits a check in a bank for collection, of a custom of the bank to collect through a clearing house, does not make a rule of the clearing house as to the time of settlements between its members binding upon him so as to relieve the bank from liability for loss caused by reason of the check not being presented to the drawee until after the close of business on the day following its receipt, although the presentment is in accordance with such rule.<sup>43</sup>

§§ 1766-1768. **Collection customs of banks—Negligence—Custom of sending collection to drawee—Remittance of proceeds.**—There is sharp conflict among the authorities as to whether a bank is liable for the failure of its correspondent or agent to remit the money collected where a check payable in another city is indorsed in blank and deposited in a bank to be credited to the depositor, but the numerical weight of authority seems to be to the effect that the bank is liable.<sup>44</sup> A known and well established custom or usage of banks in regard to collections is generally controlling;<sup>45</sup> but usage or custom can not justify negligence,<sup>46</sup> and a custom of sending checks for payment and remittance to the bank on which it is drawn is so unreasonable or negligent that it will not bind the drawer and relieve the forwarding bank.<sup>47</sup>

§ 1770. **Customs and usages in master and servant relation.**—Evidence of custom or usage is often admissible in master and servant cases not only on questions of negligence and contributory negligence, but also on questions of contract, such as the term of employment where no definite time is otherwise fixed,<sup>48</sup> scope of employment, duties, authority and compen-

L. R. A. (N. S.) 963n, Ann. Cas. 1914C, 508.

<sup>43</sup> *Dorchester v. Merchants' Nat. Bank*, 106 Tex. 201, 163 S. W. 5, 50 L. R. A. (N. S.) 542n. This decision seems to be questionable, or at least close to the line.

<sup>44</sup> *Brown v. People's Bank*, 59 Fla. 163, 52 So. 719, 52 L. R. A. (N. S.) 608, and note reviewing authorities and showing in what states this view is taken and in what states and jurisdictions the contrary is held.

<sup>45</sup> Note in 52 L. R. A. (N. S.) 639, et seq.

<sup>46</sup> *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012, 32 L. R. A. (N. S.) 987, Ann. Cas. 1912B, 115, and notes.

<sup>47</sup> *Pickett v. Thomas J. Baird Invest. Co.*, 22 N. Dak. 343, 133 N. W. 1026; and note in 52 L. R. A. (N. S.) 648.

<sup>48</sup> *Arkadelphia Lumber Co. v. Asman*, 85 Ark. 568, 107 S. W. 1171. See also *George v. Davies*, 2 L. R. (1911) K. B. 445, 80 L. J. K. B. 924; and note in 51 L. R. A. (N. S.) 629.

sation of the servant, and the like, where it does not contradict or vary the terms of the contract.<sup>49</sup>

§§ 1771, 1772. **Customs and usages in principal and agent relation—Authority of agent.**—Usage and custom, and habitual course of dealing, are more frequently invoked and considered in agency cases than in almost any other class of cases, especially in order to show the authority of the agent, real or ostensible and implied, but this phase of the subject is treated elsewhere.<sup>50</sup> One or two illustrations will suffice here. A known usage of trade or course of business in a particular employment may extend the ordinary scope of an agent's authority, and such usage or course of business may validate the act of an agent in receiving payment of a debt before maturity, though otherwise he would not have such authority.<sup>51</sup> But the fact that a traveling salesman was allowed to collect bills on one or two exceptional occasions does not authorize him to collect bills generally, and one who pays a bill to a traveling salesman, who has no authority to collect it, can not justify such payment on the ground of a local usage where he did not know of such usage.<sup>52</sup>

§§ 1773, 1774. **Brokers and factors — Usages.** — Where one sends an order to a broker engaged in an established market or trade, for a deal therein, he thereby confers upon the broker, in the absence of anything to the contrary, authority to deal according to the reasonable and well established customs and usages of such market or trade.<sup>53</sup>

§ 1783. **Theatrical and amusement contract.**—The term "theater supplies" in a lease, as understood in the film business, includes such minor incidentals necessary to the conduct of the business as are kept by a film exchange for the accommodation of the trade.<sup>54</sup>

<sup>49</sup> See notes in L. R. A. 1915C, 1208, L. R. A. 1916B, 754.

<sup>50</sup> See Chapter LIX on Agency, and post §§ 2929, 2930; also ante § 1742, and post § 1773.

<sup>51</sup> Voelkner v. Ott, 197 Ill. App. 520. See also Dothan Grocery Co. v. Pilcher (Ala.), 75 So. 899.

<sup>52</sup> Lyles-Black Co. v. Alldredge, 10 Ala. App. 632, 65 So. 696.

<sup>53</sup> Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. 845; Boyle v. Henning, 121 Fed. 376; Wilhite v.

Houston, 200 Fed. 390, 118 C. C. A. 542; Ling v. Malcolm, 77 Conn. 517, 59 Atl. 698; Cronan v. Hornblower, 211 Mass. 538, 98 N. E. 504. See also on the general subject of rights and duties of brokers: Austin v. Hayden, 171 Mich. 38, 137 N. W. 317, Ann. Cas. 1915B, 894, and extended note; and post Ch. LXIII, § 2902, et seq.

<sup>54</sup> McCullough Realty Co. v. Laemmle Film Service (Iowa), 165 N. W. 33.

§ 1786. **Local customs and usages must be pleaded.**—Special and local usages or customs must be pleaded.<sup>55</sup>

§§ 1790, 1791. **Judicial notice of customs and usages.**—The courts take judicial notice of well established general customs commonly known, but not of mere local usages or customs.<sup>56</sup>

<sup>55</sup> *Mowbray &c. Co. v. Kelley*, 170 Ky. 271, 185 S. W. 1130; *Mendenhall v. Sherman*, 193 Mo. App. 684, 187 S. W. 271; *Wilkins v. Kessinger*, 90 Wash. 447, 156 Pac. 389. See also *Hamby v. Truitt* (Ga. App.), 81 S. E. 593; *Gilbert v. Citizens' Nat. Bank* (Okla.), 160 Pac. 635, L. R. A. 1917A, 740.

<sup>56</sup> *Northern Lights Min. Co. v. Blue Goose Min. Co.*, 25 Cal. App. 282, 143 Pac. 540; *Mendetz v. Wood & Co.*, 148 N. Y. S. 92.

## CHAPTER XXXIX

### TRADE CONTRACTS

§ 1811. **Construction of particular terms in contracts of sale, barter or exchange generally.**—A “marketable title” is one of such a character as should assure to the vendee a peaceful enjoyment of the property. It is one in which the possession can be acquired and retained without litigation or judicial decision.<sup>1</sup> “Merchandise” is held to be tangible personal property which may be the subject of sale.<sup>2</sup> “O. K.,” whatever its origin, has a well-defined meaning in common usage and means all right or correct.<sup>3</sup> The meaning of “inch” as used in measuring water seems to be very indefinite, some authorities contending that it means a square inch of water without reference to velocity while others contend that it has reference to a given velocity or pressure.<sup>4</sup> The term “known business” means the occupation of supplying ice for water coolers, and is not limited to the customers of the company, where a party covenants that he will not enter in the ice business in the cooler trade, so as to interfere in any manner with the “known business” of a company.<sup>5</sup> It was held in a recent case that the term “face or par value” included the amount due on the mortgage note at the time of election, but that no interest could be computed on the other note, under a contract whereby a partner withdrew from a firm upon payment of a certain price, with option to apply thereon, at the “face or par value,” a mortgage note bearing interest, and another note not purporting interest on its face.<sup>6</sup>

§ 1816. **“More or less” in sales of personalty.**—The words

<sup>1</sup> *Barnard v. Brown*, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. 432; *Adkins v. Gillispie* (Tex. Civ. App.), 189 S. W. 275, 281, and cases there cited.

<sup>2</sup> *New England &c. S. S. Co., v. Commonwealth*, 195 Mass. 385, 391, 81 N. E. 286, 11 Ann. Cas. 678; *Boston Loan Co. v. Commonwealth*, 224 Mass. 181, 112 N. E. 875; *A. Harris & Co. v. Grinnell Willis & Co.* (Tex. Civ. App.), 187 S. W. 753

<sup>3</sup> *State v. Blanchard Construction Co.*, 91 Kans. 74, 136 Pac. 905, Ann. Cas. 1915C, 192. See also note in Ann. Cas. 1915C, 197.

<sup>4</sup> *New Brantner Extension Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498, Ann. Cas. 1916B, 1225; note Ann. Cas. 1916B, 1230.

<sup>5</sup> *Olson v. Ostby*, 178 Ill. App. 165.

<sup>6</sup> *In re Stoneman*, 146 N. Y. S. 172.

“more or less” in a contract have no technical meaning and must be so understood as to effectuate the intention of the parties.<sup>7</sup>

§ 1817. **“More or less” in description of land.**—In a recent case it was held that the plain meaning of the words “more or less” is that the parties are to run the risk of gain or loss, and if there is only a trifle less than thirty-two acres, the shortage is not material, where a contract for the purchase of land described it by metes and bounds and ended “containing thirty-two acres more or less.”<sup>8</sup> It was held that where the vendor contracted to sell and deliver “nine hundred two-year-old steers more or less, branded V on left thigh, situated on” vendor’s ranch, it meant that the vendor would deliver all the steers fitting the description which he had on the ranch, and that it was a mere estimate of the number.<sup>9</sup>

§ 1818. **“About”—“Almost.”**—When the vendor agreed to sell “900 steers more or less” the term “more or less” could be construed as an approximation on a fixed basis, or as a mere estimate of an unknown or indefinite quantity, and must be construed according to the intention of the parties from all the terms of the contract.<sup>10</sup>

§ 1820. **Terms relating to time, “year,” “month,” “week,” “day,” “Sunday.”**—A contract which refers to land as “this day sold” indicates that it was executed after the deed to the land was delivered.<sup>11</sup>

§ 1821. **“From and after”—“On”—“On or before”—“On or about”—“Since.”**—Where a contract of sale required that the articles should be delivered “on or about” a certain day, it was held that delivery ten or twelve days thereafter was within a reasonable time and was a sufficient compliance with the contract, though time was made of the essence. It was held that the expression “on or about” was not equivalent to the fixing of a day certain.<sup>12</sup> And where plaintiff alleged that he demanded and

<sup>7</sup> P. Sanford Ross, Inc. v. United States, 50 Ct. Cl. 168.

<sup>8</sup> Andrews v. Sercombs, 82 Ore. 616, 162 Pac. 836.

<sup>9</sup> Mosby v. Smith, 194 Mo. App. 20, 186 S. W. 49.

<sup>10</sup> Mosby v. Smith, 194 Mo. App. 20, 186 S. W. 49.

<sup>11</sup> Cutler v. Spens, 191 Mich. 603, 158 N. W. 224.

<sup>12</sup> Passow & Sons v. Harris (Cal. App.), 156 Pac. 997.

that the defendant refused to furnish cars "on or about" June 14, proof that it was on that day of July is not a variance.<sup>13</sup>

§ 1822. "Until"—"By"—"Forthwith"—"Immediate"—"Presently"—"At once."—"At once" does not mean instantaneously, but with reasonable expedition under the circumstances.<sup>14</sup> So, "immediately" generally means within a reasonable time under the circumstances.<sup>15</sup>

§ 1825. "C. O. D." and "F. O. B."<sup>16</sup>—In a recent case it was held that "f. o. b. cars at seller's factory" meant that the seller was to load the merchandise on cars at its factory, and that the buyer was to pay the freight to destination, the words "f. o. b." meaning literally free on board, so that the merchandise was to be put on cars for shipment without any expense or act of the buyer, and as soon as so placed the title was to pass to the buyer.<sup>17</sup>

§ 1826. "Carloads."—In an action by the buyer for breach of contract of sale of "three cars" of cotton seed, where the evidence showed that a carload of cotton seed ranges from fifteen to thirty-two tons and the verdict for the plaintiff disclosed that it was calculated upon the basis of a minimum capacity of a car the defendant could not complain that the contract was void for uncertainty.<sup>18</sup>

§ 1828. "Satisfactory."—It has been held that in a contract in which plaintiff agreed to erect a water-softening plant for the defendant and furnish such chemicals as should be required for a thorough and satisfactory treatment of the water, the word "satisfactory" did not mean satisfactory to the defend-

<sup>13</sup> Texas &c. R. Co. v. Weems (Tex. Civ. App.), 184 S. W. 1103.

<sup>14</sup> Wichita Mill Co. v. Liberal Elevator Co., 243 Fed. 99, 103, citing Fidelity &c. Co. v. Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833; Empire State Surety Co. v. Northwest Lumber Co., 203 Fed. 417, 121 C. C. A. 527, and other cases.

<sup>15</sup> McVeltz v. Flentge (Cal.), 169 Pac. 666.

<sup>16</sup> Acceptance of an order for goods f. o. b. requires the seller to procure and load the cars at his own expense:

Hurst v. Altamont Mfg. Co., 73 Kans. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928n, 117 Am. St. 525, 9 Ann. Cas. 549; Culp v. Sandoval (N. Mex.), 159 Pac. 956, L. R. A. 1917A, 1157 and note; Menz Lumber Co. v. McNeeley & Co. (Wash.), 108 Pac. 621, 28 L. R. A. (N. S.) 1007.

<sup>17</sup> Planters' Fertilizer &c. Co. v. Columbia Cotton Oil Co., 126 Ark. 19, 189 S. W. 166, 167.

<sup>18</sup> Thompson v. Strong (Ala.), 74 So. 34. See also ante § 1731 and cases there cited.

ant, but merely that this plant should conform with the usual standards of such plants.<sup>19</sup>

§ 1829. **"For collection."**—Where the owner of a draft indorses it "for collection," he warrants that the instrument is genuine, that he has good title, etc., both under the statute and the law merchant, and in the absence of special authority, the collecting agent does not have authority to accept anything except legal currency.<sup>20</sup>

§ 1838. **Construction of conditions and warranties.**—A contract to furnish the plumbing and heating of a house and to do the work in a workmanlike manner, where the manner and method of heating the house were left to the contractor, has been held to import or imply a warranty that the method or system used would be proper and suitable to accomplish the purpose designated, but not to warrant that a specified number of feet of radiators of a certain size would be sufficient to heat the house.<sup>21</sup> A guaranty that a drying apparatus would be of a certain capacity has been held to include a guaranty of the capacity of the conveyor as well as the other part, although the conveyor was not included in the original offer.<sup>22</sup> And a contract for the construction of a refrigerating plant providing for partial payments on certificates of a consulting engineer and final payment on final certificate and guaranteeing a certain minimum refrigerating capacity has been held to contain a warranty which survived such final certificate and acceptance.<sup>23</sup> But a provision in a contract for construction of a boiler that a certain quantity of brick would be required, being merely the seller's estimate and not a material part of the contract, does not amount to a warranty.<sup>24</sup>

§ 1840. **"Guaranty," "unlimited guaranty," "primarily liable," "secondarily liable," "surety."**—A contract is one of

<sup>19</sup> *George W. Lord Co. v. Industrial Dyeing & C. Works*, 252 Pa. 421, 97 Atl. 573.

<sup>20</sup> *In re Zrigenhein* (Mo. App.), 187 S. W. 893.

<sup>21</sup> *Miller v. Winters*, 144 N. Y. S. 351.

<sup>22</sup> *B. F. Sturtevant Co. v. International Banana Food Co.*, 179 Mich. 611, 146 N. W. 93.

<sup>23</sup> *Condict v. Onward Const. Co.*, 210 N. Y. 88, 103 N. E. 886. For construction of a warranty as to speed and coal consumption and conditions of payment in contract for steamship, see: *Fore River Shipbuilding Co. v. Southern Pac. Co.*, 219 Fed. 387, 135 C. C. A. 129.

<sup>24</sup> *Erie City Iron Works v. Cushnoc Paper Co.* 113 Maine 222, 93 Atl. 356.

guaranty where it was agreed to "stand back of and become responsible for" a note, made to induce the payee to take it.<sup>25</sup>

§ 1844. "Lease" or "license," "subtenant." — The term "lease" imports a contract, either written or verbal, by which one person divests himself of and another person takes possession of lands or chattels for a term.<sup>26</sup> It was held that a contract between a brewing company and a hotel company, whereby the hotel company agreed to advertise only the beer manufactured by the brewing company on premises of which the hotel company "is the owner or lessee under long-term leases" did not cover premises which the hotel company held under a short-term lease, and not used or intended to be used for hotel purposes.<sup>27</sup>

§ 1846. **Miscellaneous terms.**—Subscribers in arrears may still be "paid subscribers" to be counted in determining circulation for the purpose of an advertising contract.<sup>28</sup> A provision for pro rata contribution to a fund means in proportion or proportionately, according to the measure, interest, or liability of each.<sup>29</sup> When the sample is not furnished or approved until within two years prior to the filing of the application, a contract for sale of articles subsequently patented, subject to approval of the buyer of a sample to be afterward submitted, is not a putting "on sale" of the invention, and does not invalidate the patent.<sup>30</sup> A covenant in

A provision in a building contract for examination of the specifications by the contractor before signing, and that he would guarantee anything not objected to by him, does not include any guaranty by him of the sufficiency of the soil to support the building: *William Miller & Sons Co. v. Homeopathic Medical &c. Dispensary*, 243 Pa. 502, 90 Atl. 394. See also *New York v. Pennsylvania Steel Co.*, 206 Fed. 454, 124 C. C. A. 360.

<sup>25</sup> *Eckhart v. Heier*, 37 S. Dak. 382, 158 N. W. 403.

<sup>26</sup> *Mower v. Rasmusson*, 34 N. Dak. 233, 158 N. W. 261.

<sup>27</sup> *Fred Miller Brewing Co. v. Moir Hotel Co.*, 190 Ill. App. 32.

<sup>28</sup> *Cream of Wheat Co. v. Arthur H. Crist Co.*, 166 App. Div. 870, 152 N. Y. S. 407. See also for other cases involving construction of terms in advertising contracts: *Stoner-McCray*

*System v. Manhattan Oil Co.*, 176 Iowa 630, 156 N. W. 683 ("bulletin advertising"); *Patent Hanging Book Cover Co. v. Marcus*, 157 N. Y. S. 211.

<sup>29</sup> *Chaplin v. Griffin*, 252 Pa. 271, 97 Atl. 409. See as to meaning of word "profits," as used in a contract by which A agreed to pay B half the net profits of the use of certain teams belonging to a firm of which C was a member, in satisfaction of B's judgment against C: *Craib v. Peterson*, 77 Wash. 357, 137 Pac. 481. Evidence as to the meaning of "lighterage free" in a written contract of shipment has been held admissible: *Ross v. Maine Cent. R. Co.*, 114 Maine 287, 96 Atl. 223.

<sup>30</sup> *Burke Electric Co. v. Independent Pneumatic Tool Co.*, 232 Fed. 145, 146 C. C. A. 337.



a lease which gives the lessee, his heirs or assigns, an "option to renew" at the expiration of the term, runs with the land and is enforceable against assigns of the reversion with notice.<sup>31</sup> "Or" is a co-ordinating particle making an alternative, and indicates a choice of one of different things, but not of all.<sup>32</sup> As used in a certain statute, the word "or" has been held disjunctive as to persons but conjunctive as to a complete act of making, signing, and sealing.<sup>33</sup> In construing L. O. L., § 227, in an Oregon statute, the court held that "necessary" means "reasonably necessary" or "convenient" or "suitable," and does not mean "indispensable" or "absolutely necessary."<sup>34</sup> "Occupation" means one's principal business, habitual or stated employment, vocation, calling, trade, the business in which one principally engages to secure a living.<sup>35</sup> The word "at," when used in reference to time, does not always mean the exact moment or day, but may express nearness or proximity, and consequently may denote a reasonable time.<sup>36</sup>

<sup>31</sup> Crenshaw-Gary Lumber Co. v. Norton, 111 Miss. 720, 72 So. 140, L. R. A. 1916E, 1227n.

<sup>32</sup> Swift & Co., Limited v. Bonvil-  
lain, 139 La. 558, 71 So. 849.

<sup>33</sup> Home Title Ins. Co. v. Keith,  
230 Fed. 905.

<sup>34</sup> Childers v. Brown, 81 Ore. 1, 158  
Pac. 166.

<sup>35</sup> Childers v. Brown, 81 Ore. 1, 158  
Pac. 166.

<sup>36</sup> Childers v. Brown, 81 Ore. 1, 158  
Pac. 166.

## CHAPTER XL

### DISCHARGE OF CONTRACT BY AGREEMENT

§ 1857. **Discharge by agreement generally—Consideration.**<sup>1</sup>—An executory contract may be altered at the pleasure of the parties thereto and in any particular they see fit upon no consideration other than mutual consent.<sup>2</sup> But after the contract has ceased to be executory and one of the parties has done in whole or in part that which is required of him, then the agreement can be discharged, modified or a new contract substituted for the old only when such discharge, modification or substitution is supported by a consideration.<sup>3</sup> Thus a partial payment of a past due debt furnishes no consideration for an agreement to extend the time of payment of the debt.<sup>4</sup> There must be a consideration for a subsequent contract not a part of the original agreement and not supported by the consideration thereof,<sup>5</sup> and the same is true of the alteration of a contract, in the absence of mutual undertakings which may form the consideration,<sup>6</sup> and

<sup>1</sup> [Main section cited in *Montgomery Co. v. New Farley Nat. Bank* (Ala.), 75 So. 918, 919.]

<sup>2</sup> *George v. Roberts*, 186 Ala. 521, 65 So. 345 (parol modification of building contract); *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564; *Johnson v. McFry*, 13 Ala. App. 619, 68 So. 718; *Dunaway v. Roden*, 14 Ala. App. 501, 71 So. 70; *Easton v. Snyder-Trimble Co.*, 94 Nebr. 18, 142 N. W. 695. An oral agreement, extending or enlarging the time for performance of a written contract, must generally be supported by a sufficient consideration, but if mutual acts are to be performed by the parties nothing more is necessary: *Scott v. Hubbard*, 67 Ore. 498, 136 Pac. 653.

<sup>3</sup> *Titus v. Whiteside*, 228 Fed. 965 (contract to examine and purchase timber lands).

<sup>4</sup> *Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308. After the ex-

piration of the time for the performance of a contract, any agreement for the performance of a contract at a different time is binding only when supported by a new consideration: *Jenkins v. Brittin*, 185 Ill. App. 67; *Lester v. Hutson* (Tex. Civ. App.), 167 S. W. 321 (consideration held sufficient).

<sup>5</sup> *First Nat. Bank v. Nakdimen*, 111 Ark. 223, 163 S. W. 785.

<sup>6</sup> *Capitol Food Co. v. Mode*, 112 Ark. 165, 165 S. W. 637; *Wilt v. Hammond*, 179 Mo. App. 406, 165 S. W. 362; *Koslosky v. Bloch*, 191 Mo. App. 257, 177 S. W. 1060 (contract to settle material man's claim no consideration); *Barlow v. Cotulla*, 107 Tex. 37, 173 S. W. 874; *Zindorf v. Tillotson*, 83 Wash. 472, 145 Pac. 587 (consideration held sufficient); *Foley v. Marsch*, 162 Wis. 25, 154 N. W. 982 (railroad construction work—mutual agreements existed).

also of a new contract discharging the old,<sup>7</sup> and the waiver of a provision of a contract, in the absence of estoppel.<sup>8</sup>

**§ 1858. Discharge by waiver, rescission or cancellation.**—A “waiver,” in the law of contracts, may be defined as the intentional relinquishment of a known right, under the contract, based on a consideration.<sup>9</sup>

**§ 1860. Form of new agreement—Contract under seal.**—The old common-law rule that the discharge or modification of a contract under seal must be in the same form as the original contract still obtains in some jurisdictions and therefore an agreement under seal can not be modified by parol.<sup>10</sup> A contract under seal may be orally renewed.<sup>11</sup>

**§ 1861. Form of new agreement—Written contract discharged by subsequent oral contract.**—The parties to an unsealed written contract may, in most jurisdictions, at any time before a breach, by a new contract not in writing, waive, dissolve, annul, or vary or qualify the terms of the former agreement,<sup>12</sup>

<sup>7</sup> *Goller v. Henseler Mercantile Oil &c. Co.* (Mo. App.), 161 S. W. 584. To same effect: *Stofferan v. Depew*, 79 Wash. 170, 139 Pac. 1084. A threat to cause another's contract to be broken furnishes no consideration for a new contract between the one making the threat and the party threatened: *J. I. Case Threshing Mach. Co. v. Loomis*, 31 N. Dak. 27, 153 N. W. 479.

<sup>8</sup> *Hasler v. West India S. S. Co.*, 212 Fed. 862, 129 C. C. A. 382. The mutual oral promise of parties to a lumber contract that they would settle by the tallies of the house to which the lumber was shipped, and a waiver of the right to keep accurate accounts was a sufficient consideration for a supplemental oral agreement: *McKinney v. Matthews*, 166 N. Car. 576, 82 S. E. 1036. An actor who contracted with the playwright to place his play with some manager who would give him the leading role, can recover for his services in placing the play, when at the playwright's request he waived his right to the leading role to induce a manager to produce the play: *King v. Broadhurst*, 164 App. Div. 689, 150 N. Y. S. 376.

<sup>9</sup> *Adams v. A. A. Paton & Co.* (Tex. Civ. App.), 173 S. W. 546.

<sup>10</sup> *Lanum v. Harrington*, 267 Ill. 57, 107 N. E. 826; *Yockey v. Marion*, 269 Ill. 342, 110 N. E. 34 (executory contract). But see *Pierce v. Powers*, 180 Ill. App. 687 (holding conditions may be waived by parol).

<sup>11</sup> *Kime v. Tobyhanna Creek Ice Co.*, 240 Pa. 61, 87 Atl. 278.

<sup>12</sup> *Johnson v. McFry*, 13 Ala. App. 619, 68 So. 718; *Homire v. Stratton &c. Co.*, 157 Ky. 822, 164 S. W. 67; *Peck-Hammond & Co. v. Miller*, 164 Ky. 206, 175 S. W. 347; *Murray v. Boyd*, 165 Ky. 625, 177 S. W. 468; *F. W. Heitmann Co. v. Kansas City Southern R. Co.*, 136 La. 825, 67 So. 895 (bill of lading may be modified orally); *Furness v. Randall*, 124 Md. 101, 91 Atl. 797; *Furness v. Fahey*, 124 Md. 110, 91 Atl. 800 (contract modified to provide for particular vessel); *Freedman v. Gordon*, 220 Mass. 324, 107 N. E. 982 (building contract modified); *Gouzoulas v. F. W. Stock & Sons*, 223 Mass. 537, 112 N. E. 221 (contract concerning storage charges); *Goller v. Henseler Mercantile Oil &c. Co.* (Mo. App.), 161 S. W. 584; *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463; *Sterling Engineering &c. Co. v. Berg* (Wis.), 152 N. W. 851 (oral request

and when the written contract is annulled by a subsequent oral agreement neither party can claim benefits under the annulled writing,<sup>13</sup> but in some states an oral agreement is ineffective to vary or supersede a written contract unless executed.<sup>14</sup> However, in jurisdictions where this rule obtains it seems that there may be a valid waiver by parol of a provision of a written contract.<sup>15</sup> And a substantial performance of an oral agreement for an extension of time makes the oral agreement a lawful alteration of the written contract under the foregoing statute.<sup>16</sup> Even when there is a stipulation in a written contract which requires changes herein to be made in writing, this does not prevent the parties from terminating such contract and making a new verbal contract, no question concerning the statute of frauds entering in,<sup>17</sup> or the parties may orally agree upon a different method of performing the agreement.<sup>18</sup>

§ 1862. Form of new agreement—Contract within statute of frauds.<sup>19</sup>

§ 1864. New contract expressly substituted for old.—There is no question that persons entering into a contract

complied with held to modify contract). A party to an agreement in writing who orally agrees to pay the expense made necessary by changed conditions, can not repudiate his oral contract and rely upon the written agreement: *City Messenger &c. Co. v. Postal Tel. Co.*, 74 Ore. 433, 145 Pac. 657. Where an oral agreement for an extension of time on a mortgage is reduced to writing, it is merged in the written contract, and thereafter the latter's terms control: *First State Bank v. Fuson* (Tex. Civ. App.), 185 S. W. 1042. A provision in a contract that no extension of time could be claimed unless demanded in writing may be waived: *Walsh v. North American Cold Storage Co.*, 260 Ill. 322, 103 N. E. 185.

<sup>13</sup> *Finola Mfg. Co. v. Paulsen* (Okla.), 151 Pac. 195.

<sup>14</sup> *J. I. Case Threshing Mach. Co. v. Loomis*, 31 N. Dak. 27, 153 N. W. 479; *Wynn v. Coonen*, 31 N. Dak. 160, 153 N. W. 980; *Early v. King*, 38 Okla. 206, 135 Pac. 286; *Brown*

*v. Coppadge* (Okla.), 153 Pac. 817 (may be changed by agreement in writing). An executory oral agreement to change the method of discharging a chattel mortgage does not affect the mortgage under the Montana statute preventing written contract from being changed by executory oral agreements: *Kinsman v. Stanhope*, 50 Mont. 41, 144 Pac. 1083.

<sup>15</sup> *Fairbanks, Morse & Co. v. Nelson*, 217 Fed. 218, 133 C. C. A. 212. An oral agreement may supersede a written contract: *Credit Clearance Bureau v. George A. Hochbann Contracting Co.*, 25 Cal. App. 546, 144 Pac. 315.

<sup>16</sup> *American-Hawaiian Engineering &c. Co. v. Butler*, 165 Cal. 497, 133 Pac. 280.

<sup>17</sup> *Tiiley v. Bartow*, 8 Ala. App. 639, 62 So. 330.

<sup>18</sup> *Denoth v. Carter*, 85 N. J. L. 95, 88 Atl. 835.

<sup>19</sup> [Main section cited in *Burgher & Co. v. Canter* (Tex. Civ. App.), 190 S. W. 1147, 1148.]

may substitute another for it, whereupon the first contract ceases to be binding on either of the parties.<sup>20</sup> It is not every addition or variation, however, that makes a new contract; the parties thereto may adjust contracts where they do not materially affect their rights and no new contract is actually entered into.<sup>21</sup> But where one enters into an agreement to do certain work in preparing a road, and, after he enters upon the work, a new contract is entered into and the agreed price reduced \$700, a warranty included in the first contract that the road would be suitable for races and remain in good condition does not cover the new arrangement.<sup>22</sup>

§ 1865. **New contract inconsistent with old.**<sup>23</sup>—Where a new contract between the same parties concerning the same subject-matter is so inconsistent with the former contract as to render its performance impossible, the former is rescinded.<sup>24</sup>

§ 1866. **Contract composed of new and old terms.**—A change in the method of computing compensation<sup>25</sup> or the amount

<sup>20</sup> Triangle Waist Co. v. Todd, 168 App. Div. 693, 154 N. Y. S. 542. See also Adickes v. Chatham, 167 N. Car. 681, 83 S. E. 748.

<sup>21</sup> England v. Houser, 178 Mo. App. 70, 163 S. W. 890. It may not supplant the prior contract but be in addition thereto: Whitehead v. Rhea (Tex. Civ. App.), 168 S. W. 460.

<sup>22</sup> Lewis Mfg. Co. v. Cobe, 180 Ill. App. 466. Where there is no common understanding by the parties as to the words used in the modification of their contract, there is no meeting of minds, and therefore no modification of the original agreement: Furness-Withy & Co. v. Fahey, 127 Md. 333, 96 Atl. 619. As to meeting of minds, see also: Carnahan Mfg. Co. v. Beebe-Bowles Co., 80 Ore. 124, 156 Pac. 584. An award by arbitrators is not necessarily a modification: Parkersburg &c. Sand Co. v. Smith, 76 W. Va. 246, 85 S. E. 516. Where parties by letters agreed to changes

in a prior written contract, the final agreement will be gathered from the written contract and the letters considered as a whole: Orfield v. Harney, 33 N. Dak. 568, 157 N. W. 124.

<sup>23</sup> [Main section cited in Wilson v. Gibbs (Iowa), 160 N. W. 329.]

<sup>24</sup> Menefee v. Rankins, 158 Ky. 78, 164 S. W. 365. Where the parties to a contract make a new agreement as to the subject-matter, the terms of which are co-extensive with, but repugnant to, those of the old contract the latter is discharged: Poteet v. Imboden (W. Va.), 88 S. E. 1024.

<sup>25</sup> Where a contract with a salesman required him to pay plaintiff fixed amounts in case of failure to make sales as agreed, was terminated by the parties entering into a new contract for sales on commission, the new contract did not defeat plaintiff's right to sums due under the old: Beck v. Danaher, 93 Misc. 537, 157 N. Y. S. 503.

to be paid<sup>26</sup> or the allowance of a discount<sup>27</sup> does not necessarily discharge the old contract and prevent any recovery thereunder.<sup>28</sup>

§ 1867. Substitution of new party—Novation.<sup>29</sup>

<sup>26</sup> Conversation after controversy as to false representations as to amount of work held to make a new contract to pay a reasonable price for the excess: *Zindorf v. Tillotson*, 83 Wash. 472, 145 Pac. 587. A contract for purchase of automobiles to be resold on commission is not void because the manufacturer reserves the right to change the price at which they were to be sold, subject to variations in the market; since in no case was agent's commission to be changed: *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823.

<sup>27</sup> *In re Desnoyers Shoe Co.*, 227 Fed. 16, 141 C. C. A. 570.

<sup>28</sup> The terms upon which the incorporation is granted, such as an extension of time, must be complied with or

the old contract may be enforced: *Strickland v. Bank of Cartersville*, 141 Ga. 565, 81 S. E. 886. If the contract provides that before an extension of time will be granted there must be a request for such extension, there can be no claim for extension unless it is requested and granted: *Redington v. Hartford*, 85 N. J. L. 704, 90 Atl. 284.

<sup>29</sup> [Main section quoted in *Molera v. Cooper*, 173 Cal. 259, 160 Pac. 231, 232.]

Where a stranger conducts himself so as to lead others to believe that he intended to make the contract his own he is considered as having assumed the contract: *Swift & Co. v. Detroit Rock Salt Co.*, 233 Fed. 231, 147 C. C. A. 237.

## CHAPTER XLI

### PERFORMANCE

§ 1878. **Substantial performance.**—A party to a contract must substantially perform its terms,<sup>1</sup> and before there can be a recovery on a contract not fully performed the contractor must have attempted in good faith to perform it and there must have been a substantial performance.<sup>2</sup> To constitute "substantial performance" there must have been no wilful departure from the terms of the contract, no omission of any of its essential parts, and there must be a good-faith performance of all of its substantive parts. When this is done, trivial defects or imperfections in the work will not defeat a recovery of the contract-price.<sup>3</sup> But the amount recovered will be the contract-price less the cost of supplying the defects or omissions, if any, and not the amount recoverable on a quantum meruit.<sup>4</sup> Partial performance which falls short of substantial performance is not sufficient.<sup>5</sup>

§ 1879. **Illustrative cases of substantial performance.**—Where plaintiffs agreed to secure assignments to defendant of claims against defendant's son they substantially performed their contract, and were entitled to sue on defendant's note, given as a part of the agreement, when they obtained assignments of all claims but two, secured an assignment of one of those pending the trial, and tendered the amount of the other claim.<sup>6</sup>

<sup>1</sup> *Culver v. Culliton*, 77 Wash. 457, 137 Pac. 1000.

<sup>2</sup> *Buckley v. Marin County*, 25 Cal. App. 577, 144 Pac. 545.

<sup>3</sup> *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769.

<sup>4</sup> *Northwestern Theatrical Assn. v. Hannigan*, 218 Fed. 359, 134 C. C. A. 167; *John S. Noel Co. v. Newcomb*, 188 Mich. 53, 154 N. W. 58; *Lindberg v. Hodgins*, 89 Misc. 454, 152 N. Y. S. 229; *Asbestos Plastering Co. v. Norcross Bros. Co.*, 153 N. Y. S. 681; *Otis Elevator Co. v. Flanders Realty Co.*, 244 Pa. 186, 90 Atl. 624; *Robinson v. Listonburg Coal Mining Co.*, 58 Pa. Super. Ct. 136; *United Iron*

*Works v. Wagner*, 89 Wash. 293, 154 Pac. 460.

<sup>5</sup> *Harrison v. Turner*, 27 Cal. App. 423, 150 Pac. 395 (advertising contract); *Turner v. Howze* (Cal. App.), 151 Pac. 751 (failure to make improvements). Thus under a contract for work to be done at the agreed price of \$3,200, failure to perform work of the value of \$450 defeated recovery: *North American Wall Paper Co. v. Jackson Construction Co.*, 167 App. Div. 779, 153 N. Y. S. 204.

<sup>6</sup> *Taylor v. Ewing*, 74 Wash. 214, 132 Pac. 1009. Where defendant substantially performed an orchard planting agreement which contained a pen-

§ 1881. **Contracts to be performed "to the satisfaction" of adverse party.**—Where a contract requires work called for thereby to be done to the satisfaction of the promisee, it has been held in some cases not capricious satisfaction that is meant, but the satisfaction of a reasonable man acting in good faith and who is honestly dissatisfied.<sup>7</sup> If the work is done in a workmanlike way, as would satisfy a reasonable man,<sup>8</sup> or conforms to the usual standards of such work,<sup>9</sup> it is all that is required under such decisions.<sup>10</sup> However, if the subject of the contract involves personal taste or feeling,<sup>11</sup> such as a picture of defendant's son,<sup>12</sup> or plans and specifications for a building,<sup>13</sup> the person to be satisfied is the sole and only judge.<sup>14</sup>

§ 1884. **Contracts to be performed to the satisfaction of a third party.**—Where contracts are to be performed to the satisfaction of a third party his decision is final when made in good faith and not unjustly or arbitrarily.<sup>15</sup>

§ 1888. **Waiver.**—A party to a contract who has the right to insist upon a condition precedent to performance on his part will waive such condition precedent by a total denial of liability or by placing his refusal to perform on other grounds.<sup>16</sup>

alty for delay, plaintiff could not recover damages for delay, in the absence of proof of actual pecuniary loss resulting therefrom: *Sledge v. Arcadia Orchards Co.*, 77 Wash. 477, 137 Pac. 1051.

<sup>7</sup> *Hay v. Hassett*, 174 Iowa 601, 156 N. W. 734; *Waite v. C. E. Shoemaker & Co.*, 50 Mont. 264, 146 Pac. 736. But if the party to whose satisfaction the contract must be performed acts in good faith under an honest sense of dissatisfaction, and there is no fixed standard by which to judge the work, his judgment is conclusive: *Dubinsky v. Wells Bros. Co.*, 218 Mass. 232, 105 N. E. 1004. A playwright who orders from a designer of theatrical costumes a set of plates for costumes for a play, and gives the designer a very wide latitude as to the designs, and does not provide that they should be satisfactory to himself or any other person, and agrees to pay for them as soon as the plates are ready, will be liable for the agreed price of the plates, although the costumes do not meet with his

own approval: *Anderson v. Long*, 56 Pa. Super. Ct. 183.

<sup>8</sup> *Miller v. Phillips* (R. I.), 98 Atl. 59.

<sup>9</sup> *George W. Lord Co. v. Industrial Dyeing & Works*, 252 Pa. 421, 97 Atl. 573 (erection of water softening plant).

<sup>10</sup> *Lumbermen's Nat. Bank of Portland v. Minor*, 65 Ore. 412, 133 Pac. 87 (lease of storeroom).

<sup>11</sup> *Hanaford v. Stevens & Co.* (R. I.), 98 Atl. 209.

<sup>12</sup> *Bowen v. Buckner* (Mo. App.), 183 S. W. 704.

<sup>13</sup> *Barnett v. Beggs*, 208 Fed. 255.

<sup>14</sup> *Aymar v. Bloomingdale*, 157 N. Y. S. 837 (dental work).

<sup>15</sup> *Penn Bridge Co. v. Kershaw County*, 226 Fed. 728, 141 C. C. A. 484 (engineer to pass on work); *Ball-Carden Co. v. Ridgell* (Tex. Civ. App.), 171 S. W. 509 (engineer's judgment conclusive). See post § 3707 et seq.

<sup>16</sup> *Hansell-Elcock Co. v. Frankfort Marine Accident & Ins. Co.*, 177 Ill. App. 500.



## CHAPTER XLII

### IMPOSSIBILITY OF PERFORMANCE—IMPOSSIBLE CONTRACT GENERALLY

§ 1890. **Impossibility—Generally.**—Improbability or difficulty of accomplishing an undertaking will not excuse the non-performance thereof when it does not appear that such undertaking can not be performed by any means.<sup>1</sup> Thus it is no defense to an action on a contract to find a purchaser at an advanced price within a stated time that it was impossible to procure such purchaser.<sup>2</sup>

§ 1891. **The general rule.**—When performance depends upon the assumed existence or continued existence of something performance is excused to the extent that the thing ceases to exist or proves to be nonexistent.<sup>3</sup> Thus where defendant contracted to move a barn which was subsequently destroyed by an unavoidable accident, he was excused from liability for damages for failure to move it.<sup>4</sup> Unforeseen difficulties will not excuse him.<sup>5</sup> Impossibility of performing a contract caused by a foreign war is no excuse for nonperformance.<sup>6</sup>

<sup>1</sup> *Berry v. Wells*, 43 Okla. 70, 141 Pac. 444 (contract for delivery of stock). Where one has agreed without qualification to do an act not impossible in its nature, he is not excused because of difficulty of performance or by becoming unable to perform. The expense may be so great as to make the contract impossible of performance: *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1n. Matters known at the time and inducing the making of a contract will not excuse nonperformance: *Berman v. Rosenberg*, 115 Maine 19, 97 Atl. 6. There must be a reservation covering such hardship or impossibility: *Northern Irr. Co. v. Watkins* (Tex. Civ. App.), 183 S. W. 431. Performance of a contract is excused only when rendered impossible by the act of God, the law, or the other party:

*Penn Bridge Co. v. Kershaw County*, 226 Fed. 728, 141 C. C. A. 484.

<sup>2</sup> *Hurless v. Wiley*, 91 Kans. 347, 137 Pac. 981, L. R. A. 1915C, 177.

<sup>3</sup> *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1n. To same effect: *Perlee v. Jeffcott*, 89 N. J. L. 34, 97 Atl. 789.

<sup>4</sup> *Jones-Gray Const. Co. v. Stephens*, 167 Ky. 765, 181 S. W. 659.

<sup>5</sup> *Koester v. Lowenhardt*, 177 Mo. App. 699, 160 S. W. 566 (public street new and soft); *Waite v. Shoemaker Co.*, 50 Mont. 264, 146 Pac. 736; *Stagg v. Spray Water Power &c. Co.*, 171 N. Car. 583, 89 S. E. 47. Impossibility of performance, arising subsequent to the agreement, does not excuse the promisor: *Jackson County Light &c. Co. v. Independence*, 188 Mo. App. 157, 175 S. W. 86.

<sup>6</sup> *Richards & Co. v. Wreschner*, 156 N. Y. S. 1054.

§ 1892. **Impossibility by act of God.**—In the absence of any statute abrogating the rule, one who expressly contracts to do a thing is not generally excused from performance because it is rendered impossible by the act of God.<sup>7</sup> Extraordinary weather conditions will not excuse delay.<sup>8</sup>

§ 1896. **Delivery of goods by carrier.**—Carriers of goods are bailees for hire and a slightly different rule applies to bailment contracts from that which applies to contracts for service and the like, so far as impossibility of performance is concerned, consequently, to avoid any confusion on this point and to avoid duplication, the recent decisions on this topic will be found in the chapter on carriers.<sup>9</sup>

§ 1900. **Legal impossibility at the time of contracting.**—Where the law creates a duty and the party is disabled to perform it through no fault of his own and has no remedy, the law will excuse him, and he will not be held liable in damages for failure to perform.<sup>10</sup> It is only where a party by his contract creates a duty or charge upon himself that he is bound to make it good notwithstanding he is prevented by inevitable necessity. In such cases he is held to the performance of his contract because he might have originally provided against it. When it is the law that creates the duty or charge and the party is unable to perform it without default, the law excuses. The law never exacts performance of a contract where performance would involve violation of law.<sup>11</sup>

§ 1901. **Impossibility caused by subsequent law.**<sup>12</sup>—When the law intervenes performance of a contract is excused.<sup>13</sup> Thus performance of a previously-made discriminating contract is excused by the subsequent enactment of a law making such contract unlawful.<sup>14</sup> And where the contract is rendered impossible of performance by legislative enactment or court decision, not only

<sup>7</sup> Northern Irr. Co. v. Dodd (Tex. Civ. App.), 162 S. W. 946. (Wash.), 162 Pac. 31, L. R. A. 1917C, 931, 935.]

<sup>8</sup> Stevens v. Lewis-Wilson-Hicks Co., 170 Ky. 238, 185 S. W. 873.

<sup>9</sup> See post Chap. LXXVIII.

<sup>10</sup> Northern Irr. Co. v. Watkins (Tex. Civ. App.), 183 S. W. 431.

<sup>11</sup> Monaca v. Monaca & Co. St. R. Co., 247 Pa. 242, 93 Atl. 344.

<sup>12</sup> [Main section cited in The Stratford v. Seattle & Co. Brewing Co.

<sup>13</sup> Louisville & Co. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848n; Northern Irr. Co. v. Watkins (Tex. Civ. App.), 183 S. W. 431.

<sup>14</sup> Public Service Electric Co. v. Board of Public Utility Comrs., 87 N. J. L. 128, 93 Atl. 707.

is the doing of the work excused but there can be no recovery of the agreed price to be paid for the work<sup>15</sup> except a pro tanto amount.<sup>16</sup> However, an injunction which merely prevents the use of a certain machine employed in doing the work is not a prevention by the act or operation of law so as to excuse defendant from performing the contract.<sup>17</sup>

§ 1902. **Impossibility—Recovery pro tanto.**—In case the completion of the work called for by the contract is rendered impossible through no fault of the promisor he may recover the reasonable value of the work actually done.<sup>18</sup>

§ 1904. **Recovery on contract of service.**—Where a contract for personal services is special and entire, there can be no recovery of the agreed price unless the agreement has been performed, but where performance has been prevented by the party for whom the service is to be rendered, the other party may renounce the agreement and sue for damages.<sup>19</sup>

§ 1907. **What are contracts for personal acts.**—Contracts for the performance of a purely personal service are discharged by the death of either party, but the death of a party to a contract by which a corporation agrees to make payment of a certain sum annually so long as a certain condition exists,<sup>20</sup> or the death of a payee of a contract binding the maker to pay a specified sum as nearly as possible to meet such payee's requirements,<sup>21</sup> or the death of a father who had agreed to convey land to his children upon the making of certain payments by them<sup>22</sup> does not discharge the contract, as in neither case does the contract come within the personal service rule. Ordinarily a contract is not extinguished by the death of one of the parties, if it may be performed by his personal representative.<sup>23</sup>

§ 1908. **Contracts to build, becoming impossible.**—The mere failure of the architect to prepare complete specifications

<sup>15</sup> Corporation Service Co. v. Bolger, 190 Ill. App. 75.

<sup>16</sup> See post § 1902.

<sup>17</sup> Brown v. Ehlinger, 90 Wash. 585, 156 Pac. 544.

<sup>18</sup> McDaniels v. Harrington, 80 Ore. 628, 157 Pac. 1068.

<sup>19</sup> McCurry v. Purgason, 170 N. Car. 463, 87 S. E. 244.

<sup>20</sup> Arlington Hotel Co. v. Rector (Ark.), 186 S. W. 622.

<sup>21</sup> Ryan v. Litchfield (Iowa), 144 N. W. 313.

<sup>22</sup> Aylesworth v. Aylesworth (Ind. App.), 106 N. E. 907.

<sup>23</sup> Miller v. Ready (Ind. App.), 108 N. E. 605.

of fixtures and decorations does not relieve the contractor from his obligation to furnish such equipment as was usual and necessary.<sup>24</sup> Likewise, the fact that it was impossible to build a grandstand in accordance with the plans agreed on does not excuse the contractor from constructing the same.<sup>25</sup> The same is true of defects in the soil which render necessary a greater amount of work than was contemplated.<sup>26</sup>

§ 1909. **Same—Who must bear loss sustained.**—A contractor who undertakes to build a house before receiving any compensation can not recover where the house, before completion, is destroyed; but where payment is to be made in instalments he may recover an instalment due at the time of destruction of such house, in some jurisdictions.<sup>27</sup>

§ 1916. **Impossibility resulting from acts of third persons.**<sup>28</sup>—Where defendant for a sufficient consideration promised to pay plaintiff \$700 out of the third payment to be received by defendant, the latter impliedly covenanted to do nothing of its own motion to disable itself, directly or indirectly, from receiving this third payment, but the contract also impliedly contained a further term to the effect that if for any reason outside of either direct action or control of defendant no third payment should be made defendant would be released from its liability on its promise.<sup>29</sup>

<sup>24</sup> *Orpheus Vaudeville Co. v. Clayton Inv. Co.* (Utah), 140 Pac. 653.

<sup>25</sup> *N. J. Magnam Co. v. Fuller*, 222 Mass. 530, 111 N. E. 399.

<sup>26</sup> *Ford v. Shepard Co.*, 36 R. I. 497, 90 Atl. 805. Where, because of insufficient solidity of the soil, it was impossible to erect a substantial building supported by the footings specified in the drawings, the rule of impossibility of completion for which the contractor was not responsible

applied: *William Miller & Sons Co. v. Homeopathic Medical &c. Hospital*, 243 Pa. 502, 90 Atl. 394.

<sup>27</sup> *Peck-Hammond Co. v. Miller*, 164 Ky. 206, 175 S. W. 347.

<sup>28</sup> [Main section cited in *Hokanson v. Western Empire Land Co.*, 132 Minn. 74, 155 N. W. 1043, L. R. A. 1917C, 761, 762.]

<sup>29</sup> *Crane Co. v. National Nassau Bank*, 90 Misc. 353, 153 N. Y. S. 260.

## CHAPTER XLIII

### PAYMENT

#### § 1926. When to be in money.<sup>1</sup>

§ 1927. **When in something other than money.**—An order directing a builder to pay plaintiff \$1,800 from money due defendant, which the builder accepted and made part payment on, was not a payment of plaintiff's claim, in the absence of an agreement by the latter to release defendant.<sup>2</sup>

§ 1930. **How made—When complete—Conditional payment.**—Where two defendants ordered whisky of plaintiff and remitted him cash to cover price and amount due on his judgment against a third defendant, plaintiff could not refuse to ship the whisky, return amount intended for it, and retain enough of the money sent to satisfy the judgment.<sup>3</sup>

§ 1933. **Payment by check or other commercial paper.**—The acceptance of a note or any number of renewals for an indebtedness does not, as between the parties, discharge it in the absence of a clear intention to do so.<sup>4</sup> But in case a note is given for an open account, it is a condition precedent to judgment on the account that the note be surrendered or be shown to be unenforceable.<sup>5</sup>

§ 1936. **Evidence of payment.**—The words "when accepted as such and in due course actually paid" must be construed

<sup>1</sup> [Main section cited in *Rylance v. James Walker Co.*, 129 Md. 475, 99 Atl. 597, 599.]

<sup>2</sup> *Efron v. Scarpelli*, 162 N. Y. S. 640.

<sup>3</sup> *Semms & Co. v. Barnett* (Mo. App.), 190 S. W. 394.

<sup>4</sup> In re *McAusland*, 235 Fed. 173; *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014 (note given for antecedent debt). A contract which recites that the purchaser agrees to pay \$600, "\$475 and notes cash in hand paid, \* \* \* the receipt of which is hereby acknowledged, and the residue," to

be paid in one year, does not entitle the purchaser to credit for the notes until paid: *Bailey v. Riffe* (W. Va.), 90 S. E. 791. The case last above cited would seem to go farther than most cases. So here the notes were the notes of a third person which were assigned to the vendor. This usually constitutes payment.

<sup>5</sup> *Standard Cooperage Co. v. O'Neill*, 146 Ga. 235, 91 S. E. 82. Compare with *Brown v. Bishop*, 225 Mass. 276, 114 N. E. 316, where it was held that plaintiff's failure to produce a note indorsed to them by defendants as

as declared in section 148 of the Negotiable Instruments Law to be a payment of the instrument at or after maturity to the holder thereof, in good faith, and without notice that his title is defective.<sup>6</sup> One employed to collect claims who forwards to his clients their share of the money collected is entitled to a receipt for the money.<sup>7</sup>

**§ 1939. Loss of right by debtor to make appropriation.**—Where payments are made on a running account and no direction given as to their application, they may be applied by the creditor to the balance due.<sup>8</sup>

**§ 1940. When creditor may determine.**—The holder of notes secured by insurance policies put up as collateral, on payment of the policies, may apply the money so received as he chooses to any of the notes, in the absence of an agreement to the contrary.<sup>9</sup> And where the maker of a note discounted at a national bank makes an unapplied payment thereon, the bank can apply such payment first to the satisfaction of the discount without the consent of the debtor.<sup>10</sup>

**§ 1941. Loss of right by creditor.**—The application of a general payment on account is changed by the retention and cashing of a subsequent check which directs, as a condition to keeping it, that the prior payment be applied on a special account.<sup>11</sup>

**§ 1943. Application by law — Interests of parties and others.**—An application of payments once made by the parties can not be changed so as to affect the rights of third persons,<sup>12</sup> such as a surety, without the latter's consent.<sup>13</sup>

conditional payment for the account sued upon did not make it error to refuse a ruling that plaintiffs could not recover, where judgment was stayed until the note was produced.

<sup>6</sup> *Potter v. Sager*, 98 Misc. 25, 161 N. Y. S. 1088.

<sup>7</sup> *State v. Farrin*, 81 Ore. 489, 160 Pac. 124.

<sup>8</sup> *Lake Grocery Co. v. Chiostri*, 34 N. Dak. 386, 158 N. W. 998.

<sup>9</sup> *American Sav. Bank & Co. v. Munson*, 93 Wash. 78, 159 Pac. 1195.

<sup>10</sup> *Baker v. Lynchburg Nat. Bank (Va.)*, 91 S. E. 157.

<sup>11</sup> *Royal Colliery Co. v. Alwart Bros. Coal Co.*, 276 Ill. 193, 114 N. E. 499.

<sup>12</sup> *The Sophia Johnson*, 237 Fed. 406.

<sup>13</sup> *United States v. Brent*, 236 Fed. 771. Where payments are made under a composition agreement with the bankrupt makers of notes to an indorser, who held other claims against the bankrupt, should be applied pro rata to the payment of all claims, notes included, so as to reduce pro tanto the liability of all indorsers: *Silverman v. Rubenstein*, 162 N. Y. S. 733. In case of a loan to a corporation, it receiving the benefit, with an unauthorized contract for excessive interest, repudiated by it, payments on account of interest will be applied, as though no rate had been

§ 1944. **Application in case of accounts.**—Where there is a running open account between parties and no application of payments is made by either, the law may apply the payment according to priority of time, and this rule applies where one item is better secured than the other.<sup>14</sup> Or where the account is divided into interest and non-interest-bearing items, credits may be divided pro rata between the two items.<sup>15</sup>

fixed, first to the payment of legal rate, and then to the principal: Stanley v. Franco-American Ferment Co., 97 Misc. 401, 161 N. Y. S. 365.

<sup>14</sup> Friedman-Shelby Shoe Co. v. Da-

vidson (Tex. Civ. App.), 189 S. W. 1029. See also Compton v. Collins (Ala.), 73 So. 334.

<sup>15</sup> Compton v. Collins, 197 Ala. 642, 73 So. 334.

## CHAPTER XLIV

### TENDER

§ 1957. **To whom it may be made.**—Tender to an attorney who has authority to collect an account is sufficient.<sup>1</sup>

§ 1959. **Money must actually be produced.**—A “tender” is the actual proffer of money as distinguished from the mere proposal or proposition to pay it over. A tender must always be kept good, and when actually made into court can not be withdrawn.<sup>2</sup>

§ 1960. **Tender of less than due.**—The tender must be of an amount sufficient to cover the demand.<sup>3</sup> Thus, the tender must include interest due.<sup>4</sup>

§ 1964. **Conditional tender.**—Tender of payment to be available as a defense to an action on a money demand must be unconditional.<sup>5</sup>

§ 1970. **Waiver—Generally.**—Where tender is made by check and neither the person to whom it is tendered nor his attorney makes any objection because the tender is not made in money, all objections thereto for that reason are waived.<sup>6</sup> And it can not afterward be urged that the tender should have been made in money and not by check.<sup>7</sup> The objection that the tender was not kept good may also be waived.<sup>8</sup>

§ 1971. **Waiver—Refusal on specific grounds.**<sup>9</sup>

<sup>1</sup> *Hirsh v. Ogden Furniture &c. Co.*, 48 Utah 434, 160 Pac. 283.

<sup>2</sup> *Hart v. Kanawha Oil Co. (W. Va.)*, 90 S. E. 604.

<sup>3</sup> *Bly v. Poole (Okla.)*, 159 Pac. 511.

<sup>4</sup> *Wiggins v. Sheppard*, 145 Ga. 835, 90 S. E. 56. The right to interest may be waived, however: *Hirsh v. Ogden Furniture &c. Co.*, 48 Utah 434, 162 Pac. 283.

<sup>5</sup> *Bly v. Poole (Okla.)*, 159 Pac. 511.

<sup>6</sup> *Hirsh v. Ogden Furniture &c. Co.*, 48 Utah 434, 160 Pac. 283.

<sup>7</sup> *Moore v. Twin City Ice &c. Co.*, 92 Wash. 608, 159 Pac. 779.

<sup>8</sup> *Hirsh v. Ogden Furniture &c. Co.*, 48 Utah 434, 160 Pac. 283. The question of whether insufficiency of the tender was waived is for the jury: *Wiggins v. Sheppard*, 145 Ga. 835, 90 S. E. 56.

<sup>9</sup> [Main section cited in *Owens v. North State Life Ins. Co. (N. Car.)*, 92 S. E. 168, 169.]



§ 1973. **Keeping tender good.**—One relying on a plea of tender must show that he had at time of making the tender, and still has, the money with which to make the payment tender good.<sup>10</sup> In case of suit the tender must be kept good by payment of the money into court.<sup>11</sup>

§ 1976. **Tender of specific goods.**—In case a tender of specific goods is refused, though wrongfully, the tenderer becomes the bailee for the tenderee, and is required to take care of the property at the risk and expense of the tenderee.<sup>12</sup>

<sup>10</sup> Short v. Rogue River Irr. &c. Co., 82 Ore. 662, 162 Pac. 845. To same effect: Owens v. Commonwealth Trust Co., 196 Ill. App. 571.

<sup>11</sup> Eibschutz v. Ginsberg, 163 N. Y. S. 160.

<sup>12</sup> Wilson v. Trexler, 106 S. Car. 15, 90 S. E. 180.

## CHAPTER XLV

### MERGER AND BANKRUPTCY

§ 1981. **Definition of merger.**—There is no merger where the new contract does not express the entire agreement.<sup>1</sup>

§ 1983. **Merger of parol in written contract.**—All prior negotiations as to the subject-matter of a contract are considered merged in the written agreement, in the absence of fraud, accident or mistake, when embraced within the terms of the writing.<sup>2</sup>

<sup>1</sup> *Thompson v. Citizens' Bank*, 144 Ga. 10, 85 S. E. 1002. Where a tenant contracted to buy beer from a brewing company during the term of his lease unless the lease was canceled by the lessor pursuant to an option in the lease, the tenant was not relieved from performance of his covenant by a cancellation of the lease by mutual agreement between him and the lessor prior to the time provided for the lessor to exercise his option: *United States Brewing Co. v. D. Kavanaugh's Sons*, 185 Ill. App. 137.

<sup>2</sup> *Champion Mfg. Co. v. W. W. Crandall & Co.*, 16 Ga. App. 536, 85 S. E. 673; *Noble v. Trump* (Iowa), 156 N. W. 376; *Bassett v. Bassett*, 159 Ky. 117, 166 S. W. 763 (option to share equally in purchase of land); *J. I. Case Threshing Mach. Co. v. McCoy*, 111 Miss. 715, 72 So. 138; *Goller v. Henseler Mercantile Oil & Supply Co.*, 179 Mo. App. 48, 161 S. W. 584; *Locke v. Murdoch*, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917B, 267n; *Colvin v. Post Mortgage & Co.*, 173 App. Div. 85, 159 N. Y. S. 361; *Fischer v. Schram*, 173 App. Div. 147, 159 N. Y. S. 496. Where there is a conflict between an oral contract to arbitrate and the written arbitration agreement, the oral contract will be deemed merged in the written agreement: *Mahony v. Mahony*, 158 App. Div. 623, 143 N. Y. S. 881. Where the parties to a con-

tract for railroad construction work fail to execute the written contract until a few days before the completion of the work, the written contract governs and supplants parol declarations concerning the nature of the work and that plaintiff would make a profit, declarations being omitted from the written contract: *Robertson v. C. H. Sharp Contracting Co.*, 122 Ark. 611, 183 S. W. 754. Thus an oral contract to furnish brick at \$15.25 a thousand has been held merged in a subsequent written agreement fixing the rate at \$17.25 a thousand: *Denny-Renton Clay & Co. v. Johnson*, 88 Wash. 251, 152 Pac. 1017. A party to a verbal agreement should not be deprived of his original security by the acceptance of an additional written contract, binding other parties, especially where such security is accepted at the instance and for the protection of the original parties: *Pierce-Fordyce Oil Assn. v. Woods* (Tex. Civ. App.), 180 S. W. 1181. And one who sold goods under a parol agreement fixing his commission, but signed written receipts for the commissions which set out a different contract, did not thereby cause the oral agreement to be supplanted by such receipt; the parol agreement having been performed, and there being no new consideration for the writing: *Adams Co. v. Helman*, 58 Ind. App. 394, 106 N. E. 733.

§ 1988. **Merger by modification—Continued.**—The rights of the parties under an option to assign certain judgments may be merged or settled by a subsequent contract,<sup>3</sup> or property withdrawn from the operation of the first contract<sup>4</sup> or, in the absence of fraud, all preceding transactions may be ratified.<sup>5</sup>

§ 1990. **Discharge by bankruptcy.**—In case a verdict is general and the issues many, or if the claim is so united with one for damages as to be not distinguishable, or at least unseparable, from a demand which is provable in bankruptcy, such verdict does not establish that the case is within the exceptions to provable claims under the Bankruptcy Act.<sup>6</sup> Discharge by bankruptcy applies only to the bankrupt, and a surety company which reinsures the risks of an insolvent surety company is entitled to sue for a premium due under the original contract with the insolvent company as against the objection that the insolvency of the original company terminated the contract of insurance.<sup>7</sup>

§ 1992. **"Debts provable" under provisions of section 63, subdivision a, of the Bankruptcy Act.**—A debt, to be discharged in bankruptcy, must be provable at the date the petition is filed.<sup>8</sup> But when the liability has attached when the petition in bankruptcy is filed, and the debt is provable under the Bankruptcy Act, such as the liability of a stockholder in a bank, the obligation is discharged by the bankruptcy proceeding.<sup>9</sup>

§ 1994. **Debts discharged.**—In an action to enjoin execution on a judgment, claimed to be discharged by bankruptcy, the burden is on plaintiff to plead and prove the discharge and that the debt is not one of a class which the Bankruptcy Act excepts from the discharge.<sup>10</sup>

<sup>3</sup> Peterson v. Rankin, 161 Iowa 431, 143 N. W. 418.

<sup>4</sup> H. E. Orr Co. v. Interlaken Land Co., 74 Wash. 340, 133 Pac. 599.

<sup>5</sup> Barnes v. Century Savings Bank, 165 Iowa 141, 144 N. W. 367.

<sup>6</sup> Halligan v. Dowell (Iowa), 161 N. W. 177.

<sup>7</sup> National Surety Co. v. Winston, 161 App. Div. 594, 146 N. Y. S. 825.

<sup>8</sup> Van Tuyl v. Schwab, 174 App. Div. 665, 161 N. Y. S. 323.

<sup>9</sup> Van Tuyl v. Schwab, 174 App. Div. 665, 161 N. Y. S. 323. Costs decreed against defendants in suit in

equity by bankrupt is a provable debt under the federal Bankruptcy Act, when not characterized by the fraud of the bankrupt entering into written contract of sale of personality which the suit was brought to reform: Kennett v. Tudor (Vt.), 99 Atl. 306.

<sup>10</sup> Bunting Stone Hardw. Co. v. Alexander (Tex. Civ. App.), 190 S. W. 1152. But compare with Halligan v. Dowell (Iowa), 161 N. W. 177. Execution on a judgment discharged by bankruptcy proceedings may be enjoined: Bunting Stone Hardw. Co. v. Alexander (Tex. Civ. App.), 190

§ 1995. **Construction of section 17—Exception 2.**—Section 17 of the Bankruptcy Act, July 1, 1898, as amended by Act of Congress, February 5, 1903, § 5, provides that a judgment in favor of a wife for alimony is not a debt discharged by bankruptcy, and such judgment is not released by a discharge in bankruptcy.<sup>11</sup> The same is true in case of the unauthorized sale by brokers of stock held by them as collateral and their appropriation of the proceeds, such acts being considered a wilful and malicious injury to property,<sup>12</sup> and of a judgment based on a wilful and malicious assault on the person,<sup>13</sup> and a judgment against a bankrupt in favor of a surety company for false representations as to his financial responsibility in obtaining a bond.<sup>14</sup> A judgment for breach of promise to marry is dischargeable in bankruptcy.<sup>15</sup>

§ 1996. **Construction of section 17—Exception 3.**—The burden of proving failure to receive notice of bankruptcy proceedings is upon the creditor in an action to recover the amount of the debt.<sup>16</sup>

§ 1997. **Construction of section 17—Exception 4.**—Where one who is president of a corporation and embezzles its entire assets, his liability therefor is not discharged in a bankruptcy proceeding, whether recovery be by the shareholders for their loss or by the trustee in bankruptcy for the corporation.<sup>17</sup> But a dealer selling goods on commission has been held not to be acting in a fiduciary capacity within section 17, subdivision 4 of the Bankruptcy Act.<sup>18</sup>

S. W. 1152, or perpetually stayed: *Strickland v. Brown* (Ga. App.), 90 S. E. 1039.

<sup>11</sup> *Brown v. Brown*, 172 Ky. 754, 189 S. W. 921.

<sup>12</sup> *McIntyre v. Kavanaugh*, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. ed. 205. To same effect: *Wood v. Fiske*, 175 App. Div. 135, 161 N. Y. S. 1097.

<sup>13</sup> *In re Conroy*, 237 Fed. 817, 151 C. C. A. 59. To same effect: *McClellan v. Schmidt*, 235 Fed. 986 (injury from fire held not wilful and malicious).

<sup>14</sup> *In re Dunfee*, 219 N. Y. 188, 114 N. E. 52. To same effect: *Ehlinger v. Speckels* (Tex. Civ. App.), 189 S. W. 348 (false representation to obtain loan). A debt involved in an

action for deceit, consisting of false representations that personalty sold plaintiffs was free of incumbrances, is a liability for obtaining property under false pretenses, from which defendants were not released by discharges in bankruptcy: *Kennett v. Tudor* (Vt.), 99 Atl. 306.

<sup>15</sup> *In re Komar*, 234 Fed. 378. *Quære*: Would the judgment be discharged if the breach of the contract to marry was accompanied by seduction.

<sup>16</sup> *Merchants Bank v. Miller*, 176 App. Div. 412, 162 N. Y. S. 999.

<sup>17</sup> *Floyd v. Layton*, 172 N. Car. 64, 89 S. E. 998.

<sup>18</sup> *Michelin Tire Co. v. Hearn* (Tex. Civ. App.), 188 S. W. 943.

§ 1998. Discharge of codebtor of bankrupt—Section 16.—Although the debt may be an obligation discharged by bankruptcy proceedings the creditor is entitled to judgment against the debtor as a basis for pursuing his remedies against the surety.<sup>19</sup>

<sup>19</sup> Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858.

## CHAPTER XLVI

### ALTERATION OF CONTRACTS

§ 2005. **What is an alteration.**—The test by which to determine the materiality of an alteration in a contract is not necessarily the increase or decrease of rights or liabilities, but whether the instrument has the same operation.<sup>1</sup>

§ 2007. **Alteration must be made by interested party—Spoliation.**—An alteration, in order to vitiate a contract, must be made by the person claiming a benefit thereunder or by some one in collusion with him, and not by a mere stranger.<sup>2</sup> Thus the alteration of a written contract by an agent who does not have express or implied authority to make the alteration does not avoid the contract.<sup>3</sup> The same has been held true of a cashier's fraudulent and material alteration of a note done without the knowledge or consent of the bank.<sup>4</sup> In case an unauthorized change is made by a stranger it is merely a spoliation<sup>5</sup> and does not affect the right to enforce the contract as originally intended.<sup>6</sup>

§ 2008. **Modification by consent.**—When the alteration is made with the consent of the parties, either express<sup>7</sup> or implied,<sup>8</sup>

<sup>1</sup> Wayne Co. Nat. Bank v. Kneeland (Okla.), 161 Pac. 193; Gray v. Williams (Vt.), 99 Atl. 735.

<sup>2</sup> Probasco v. Shaw, 144 Ga. 416, 87 S. E. 466; Gurley Bros. v. Bunch, 130 Mo. App. 665, 108 S. W. 1109; Commonwealth Nat. Bank v. Baughman, 27 Okla. 175, 111 Pac. 332. Where the makers of a note left it with one of the signers to be delivered and he altered it before giving it to the bank the alteration will not be considered the act of a stranger: Barton Saving Bank & Co. v. Stephenson, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346n.

<sup>3</sup> Shenkberg Co. v. Porter, 137 Iowa 245, 114 N. W. 890.

<sup>4</sup> Broadway Nat. Bank v. Hefferman, 220 Mass. 247, 107 N. E. 921.

<sup>5</sup> Smith v. Barnes, 51 Mont. 202, 149 Pac. 963, Ann. Cas. 1917D, 330.

<sup>6</sup> Shenkberg Co. v. Porter, 137 Iowa 245, 114 N. W. 890; Provenzano v. Gleeser, 122 La. 378, 47 So. 688; Spreng v. Juni, 109 Minn. 85, 122 N. W. 1015, 18 Ann. Cas. 222; Bank of Flat River v. Walton, 187 Mo. App. 621, 173 S. W. 56; Lohman v. Raymond, 18 N. Mex. 225, 137 Pac. 375; Wicker v. Jones, 159 N. Car. 102, 74 S. E. 801, 40 L. R. A. (N. S.) 69, Ann. Cas. 1914B, 1083; Rushing v. Citizens' Nat. Bank (Tex. Civ. App.), 160 S. W. 337.

<sup>7</sup> Waskey v. Chambers, 224 U. S. 564, 56 L. ed. 885, 32 Sup. Ct. 597, Ann. Cas. 1913D, 998; Eadie v. Chambers, 172 Fed. 73, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879, 18 Ann. Cas. 1096; Lanum v. Harrington, 267 Ill. 57, 107 N. E. 826.

<sup>8</sup> Barrett v. Effenberg, 29 Okla. 679, 119 Pac. 135.

such alteration does not discharge the contract. If not all the parties consent, those actually consenting are bound.<sup>9</sup>

§ 2009. **Extra-judicial reformation.**—A contract is not discharged by an alteration made in good faith which merely makes the contract conform with the agreement actually entered into.<sup>10</sup>

§ 2010. **Right to fill blanks.**—The right to fill blanks exists and will be binding when the additions or insertions are made in conformity with the apparent character and object of the blank.<sup>11</sup> However, if the blank is filled in after delivery and without authority it may avoid the contract.<sup>12</sup> The authority to fill blanks is generally implied.<sup>13</sup>

§ 2011. **Alteration must be material.**—An alteration to discharge the instrument must be material. The test is, does the change give the contract a different effect from that which it had originally, as to rights, interest or obligation of the parties.<sup>14</sup> Thus, retracing in ink penciled figures,<sup>15</sup> or the addition of words that more accurately describe the chattels mortgaged,<sup>16</sup> are not material alterations. The material alteration of a duplicate original does not, according to some authorities, nullify the con-

<sup>9</sup> *Holyfield v. Harrington*, 84 Kans. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131; *Tyler v. First Nat. Bank*, 150 Ky. 515, 150 S. W. 665.

<sup>10</sup> *Miller v. Yockey*, 49 Colo. 303, 112 Pac. 772; *Bayse v. McKenney*, 43 Ind. App. 422, 87 N. E. 693 (interlineation of mortgage); *Gray v. Williams* (Vt.), 99 Atl. 735 (marginal notes).

<sup>11</sup> *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894; *Schnitzer v. Kramer*, 189 Ill. App. 350; *Kindler Co. v. First Nat. Bank*, 61 Ind. App. 79, 109 N. E. 66; *Johnston v. Hoover*, 139 Iowa 143, 117 N. W. 277.

<sup>12</sup> *Ayers v. Walker*, 54 Colo. 571, 131 Pac. 384. See also *Montgomery v. Dresher*, 90 Nebr. 632, 134 N. W. 251, 38 L. R. A. (N. S.) 423n.

<sup>13</sup> *Kindler Co. v. First Nat. Bank*, 61 Ind. App. 79, 109 N. E. 66 (may be implied from circumstances); *Montgomery v. Dresher*, 90 Nebr.

632, 134 N. W. 251, 38 L. R. A. (N. S.) 423n; *Bloomington v. McKee*, 97 Misc. 660, 162 N. Y. S. 286.

<sup>14</sup> *Fry v. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10; *Wicher v. Jones*, 159 N. Car. 102, 74 S. E. 801, 40 L. R. A. (N. S.) 69, Ann. Cas. 1914B, 1083n; *Commonwealth Nat. Bank v. Baughman*, 27 Okla. 175, 111 Pac. 332; *Citizens' State Bank v. Grant* (Okla.), 152 Pac. 1082; *Voris v. Birdsall* (Okla.), 153 Pac. 673; *Barton Savings Bank v. Stephenson*, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346n; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941. A material alteration may be in the form of a marginal note: *Gray v. Williams* (Vt.), 99 Atl. 735.

<sup>15</sup> *Tutwiler v. Burns*, 160 Ala. 386, 49 So. 455.

<sup>16</sup> *Benton v. Clemmons*, 157 Ala. 658, 47 So. 582.

tract.<sup>17</sup> Alterations of the names of parties to the contract,<sup>18</sup> or the consideration,<sup>19</sup> subject-matter,<sup>20</sup> time,<sup>21</sup> place<sup>22</sup> or date<sup>23</sup> are generally material.

§ 2014. **Effect of material alteration.**—A material alteration of a contract by one not a stranger thereto renders it void and of no effect as to all parties not consenting.<sup>24</sup>

§ 2016. **Time of alteration—Presumptions.**—An erasure,<sup>25</sup> interlineation,<sup>26</sup> the insertion of a clause,<sup>27</sup> or the striking off of a name<sup>28</sup> before delivery is not an alteration which dis-

<sup>17</sup> *Barkley v. Atlantic Coast Realty Co.*, 170 N. Car. 481, 87 S. E. 219, contra *Koons v. St. Louis Car Co.*, 203 Mo. 227, 101 S. W. 49.

<sup>18</sup> *Wilson v. Barnard*, 10 Ga. App. 98, 72 S. E. 943 (changing name of payee); *Snell v. Davis*, 149 Ill. App. 391 (erasing name of joint maker); *Builders' Lime &c. Co. v. Wernier*, 170 Iowa 444, 151 N. W. 100, Ann. Cas. 1917C, 1174n (changing from "order" to "bearer"); *International Bank v. Mullen*, 30 Okla. 547, 120 Pac. 257, Ann. Cas. 1913C, 180n (changing name of payee); *Citizens' State Bank v. Grant* (Okla.), 152 Pac. 1082 (adding word "president" to payee's name); *Holbart v. Lauritson*, 34 S. Dak. 267, 148 N. W. 19 (changing name of payee). The addition of the name of a witness to the signature of the surety, without the surety's knowledge or consent, has been held a material alteration, releasing the surety: *Swank v. Kaufman*, 255 Pa. 316, 99 Atl. 1000, L. R. A. 1917D, 826n. To same effect: *Carson v. Woods* (Mo.), 177 S. W. 623; *Everhart v. Fulmer*, 58 Pa. Super. Ct. 454. See, however, *Gillespie v. Smith*, 229 Fed. 760; *International Harvester Co. v. Davis*, 13 Ga. App. 1, 78 S. E. 770.

<sup>19</sup> *Outcault Adv. Co. v. Young Hardw. Co.*, 110 Ark. 123, 161 S. W. 142.

<sup>20</sup> *Howard Piano Co. v. Glover*, 7 Ga. App. 548, 67 S. E. 277; *Stringer v. Geiser Mfg. Co.*, 189 Mo. App. 337, 175 S. W. 239.

<sup>21</sup> *Pensacola State Bank v. Melton*, 210 Fed. 57; *Baldwin v. Haskell Nat. Bank*, 104 Tex. 122, 133 S. W. 864,

1178; *Caldwell Nat. Bank v. Reep* (Tex. Civ. App.), 188 S. W. 507 (innocent alteration held to destroy instrument).

<sup>22</sup> *Mitchell v. Reed*, 32 Ky. L. 683, 106 S. W. 833.

<sup>23</sup> *Schubert v. Schubert*, 168 Ill. App. 419; *Fry v. Jenkins*, 173 Ill. App. 486; *Bodine v. Berg*, 82 N. J. L. 662, 82 Atl. 901, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913D, 721n; *Barton Sav. Bank v. Stephenson*, 87 Vt. 433, 89 Atl. 639, 51 L. R. A. (N. S.) 346n. But a change in the figures setting out the date making them correspond to the date set out in writing is not a material alteration, since the writing controls: *Lombardo v. Lombardini*, 57 Wash. 352, 106 Pac. 907, 32 L. R. A. (N. S.) 515n.

<sup>24</sup> *W. 612; Evatt v. Dulaney*, 51 Okla. 81, 151 Pac. 607. The alteration of a

<sup>25</sup> *Carson v. Woods* (Mo.), 177 S. stock subscription contract as to the number of shares and amount of the capital stock subscribed for releases the subscriber: *Bohn v. Burton-Lingo Co.* (Tex. Civ. App.), 175 S. W. 173. If the alteration is material the intent in making the same is immaterial: *Gray v. Williams* (Vt.), 99 Atl. 735.

<sup>26</sup> *Thorp v. Jamison*, 154 Iowa 77, 134 N. W. 583, 39 L. R. A. (N. S.) 100n.

<sup>27</sup> *Wicker v. Jones*, 159 N. Car. 102, 74 S. E. 801, 40 L. R. A. (N. S.) 69, Ann. Cas. 1914B, 1083n.

<sup>28</sup> *Johnson v. Northern &c. Investment Co.*, 168 Iowa 340, 150 N. W. 596.

<sup>29</sup> *Hess v. Schaffner* (Tex. Civ. App.), 139 S. W. 1024.



charges the contract except perhaps as to parties thereto who had no knowledge of the alteration.<sup>29</sup>

§ 2018. **Effect of ratification of alteration.**—An alteration of an instrument is ratified when, with knowledge of the change, it is subsequently recognized as valid by the party to be bound.<sup>30</sup>

§ 2019. **Questions of law and questions of fact.**—The question as to whether an alteration of a contract is material is for the court,<sup>31</sup> but whether the alteration was actually made, the time when made,<sup>32</sup> and whether it was assented to<sup>33</sup> or has been ratified<sup>34</sup> is for the jury, as is also the question of by whom made and with what intent.<sup>35</sup>

<sup>29</sup> Swank v. Kaufman, 255 Pa. 316, 99 Atl. 1003, L. R. A. 1917D, 826n. Compare with International Harvester Co. v. Davis, 13 Ga. App. 1, 78 S. E. 770.

<sup>30</sup> Gray v. Williams (Vt.), 99 Atl. 735. The ratification of an alteration of a contract may be express or implied: Divide Canal &c. Co. v. Tenney, 57 Colo. 14, 139 Pac. 1110. Ratification must be pleaded: Wayne Co. Nat. Bank v. Kneeland (Okla.), 161 Pac. 193.

<sup>31</sup> Geist v. Kaplan, 195 Ill. App. 299; Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 161 Iowa 535, 143 N. W. 569; Wicker v. Jones, 159 N.

Car. 102, 74 S. E. 801, 40 L. R. A. (N. S.) 69, Ann. Cas. 1914B, 1083n. See, however, American Trust &c. Bank v. Perkins, 108 Miss. 834, 67 So. 481; Cavitt v. Robertson, 42 Okla. 619, 142 Pac. 299; Iowa City &c. Bank v. Kane, 63 Pa. Super. Ct. 368.

<sup>32</sup> McWilliams v. Lavell, 175 Ill. App. 165.

<sup>33</sup> Goldsmith v. Stocker, 249 Pa. 180, 94 Atl. 829; Gray v. Williams (Vt.), 99 Atl. 735.

<sup>34</sup> American Trust &c. Co. v. Perkins, 108 Miss. 834, 67 So. 481; Gray v. Williams (Vt.), 99 Atl. 735.

<sup>35</sup> Hutchinson v. Kelly, 276 Ill. 438, 114 N. E. 1012.

## CHAPTER XLVII

### DISCHARGE BY BREACH

§ 2025. **Meaning and effect of breach of contract in general.**—The breach of an executory agreement by one of the parties thereto justifies its abandonment by the other party.<sup>1</sup> Thus where one has wilfully and inexcusably failed to perform a material part of his agreement it constitutes an abandonment of the entire contract and he can not recover on failure of the other party to perform.<sup>2</sup>

§ 2026. **Election to terminate contract on breach.**<sup>3</sup>—Where a contract is abandoned by one party thereto, the other party may, at his option, treat the contract as at an end,<sup>4</sup> or he

<sup>1</sup> *Hecht v. White* (Ga. App.), 80 S. E. 15; *Poppenberg v. R. M. Owen & Co.*, 84 Misc. 126, 146 N. Y. S. 478. To same effect: *Lewis v. West Virginia Pulp & Co.*, 76 W. Va. 103, 84 S. E. 1063.

<sup>2</sup> *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820. A contract may be breached in any one of three ways: (1) By a positive statement of an intention not to be bound or to perform and an acceptance by the other party; (2) by inability to perform; (3) by failure to perform: *Provident Savings Life Assur. Soc. v. Ellinger* (Tex. Civ. App.), 164 S. W. 1024. For examples of breaches of contract, see: *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564 (voting contest, changing terms); *Kimbro v. Wells*, 121 Ark. 45, 180 S. W. 342 (contract in restraint of trade); *Peterson v. Bauer*, 174 Ill. App. 91 (change in plans for work); *Koehring Mach. Co. v. Chicago Builders' Specialties Co.*, 177 Ill. App. 100 (exclusive agency contract); *Scott v. T. W. Stevenson Co.*, 130 Minn. 151, 153 N. W. 316 (contract to furnish goods); *Brown v. Randall*, 77 N. H. 594, 90 Atl. 786 (contract for management of machinery); *Carlton Illustrators v. American Locomotive Co.*, 168 App. Div. 289, 153

N. Y. S. 1018 (contract to furnish illustrations); *Empire Lighting Fixture Co. v. Browning*, 93 Misc. 489, 157 N. Y. S. 284 (contract to furnish gas fixtures, etc.); *Kuhns v. Loetz-bier*, 58 Pa. Super. Ct. 148 (contract in restraint of trade); *Culp v. Kirkman*, 79 Wash. 440, 140 Pac. 346 (contract for seeding land). For examples of acts held insufficient to constitute a breach, see: *Dick Co. v. Fuller*, 213 Fed. 98 (suit for specific performance); *Gleason v. Thaw*, 205 Fed. 505, 123 C. C. A. 573 (contract for attorney's fees, taking notes). *Greenlee County v. Cotey*, 17 Ariz. 542, 155 Pac. 302 (refusal to pay instalment); *Bogata Mercantile Co. v. Outcalt Advertising Co.* (Tex. Civ. App.), 184 S. W. 333 (advertising contract); *Parr v. Howell*, 74 W. Va. 413, 82 S. E. 126 (attempts to obtain unauthorized alterations). See also: *Bendix v. Staver Carriage Co.*, 194 Ill. App. 310 (contract prohibiting use of defendant's name); *Hochberg Contracting Co. v. F. & P. Auto Transp. Co.*, 158 N. Y. S. 879 (contract for use of auto truck).

<sup>3</sup> [Main section quoted in *Bare v. Victoria Coal & Co.*, 73 W. Va. 632, 80 S. E. 941, 942.]

<sup>4</sup> *Pardoe v. Jones*, 161 Iowa 426, 143 N. W. 405.

may elect to treat it as still in force, and when he does so it is alive as to both parties, and can only be enforced in accordance with its terms.<sup>5</sup> In this connection it would be well to note that where the effect of the breach is to work a forfeiture, that forfeitures are not favored, but, on the contrary, are to be avoided rather than created by construction.<sup>6</sup>

§ 2027. **Renunciation — Anticipatory breach — English rule.**<sup>7</sup>

§ 2028. **Renunciation—Anticipatory breach—Controlling American rule.**<sup>8</sup>—By the weight of authority an anticipatory breach excuses the other party from further performance and not only that but he may treat the contract as terminated and at once maintain an action for damages.<sup>9</sup> In order to constitute an anticipatory breach, the renunciation must be unequivocal, and must, to afford the basis for a recovery of damages, be accepted by the other party.<sup>10</sup>

§ 2029. **Renunciation — Anticipatory breach — Contrary American view.**<sup>11</sup>

§ 2030. **Renunciation during performance.**<sup>12</sup>

<sup>5</sup> *Roller v. Leonard*, 229 Fed. 607, 143 C. C. A. 629. The party not in default upon breach of a contract by the other party is required to elect whether he will treat the contract as dissolved in toto or insist on further performance: *Lowy v. Rosengrant*, 196 Ala. 337, 71 So. 439.

<sup>6</sup> *O'Connor v. Knights and Ladies of Security (Iowa)*, 158 N. W. 761; *Stout v. Missouri Fidelity & Co. (Mo. App.)*, 179 S. W. 993; *Hartman v. Chicago & C. R. Co.*, 192 Mo. App. 271, 182 S. W. 148; *Sheaffer v. Eichenberg*, 62 Pa. Super. Ct. 510; *Sparkman v. Davenport (Tex. Civ. App.)*, 160 S. W. 410; *State v. Sunset Tel. & Co.*, 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F, 1178.

<sup>7</sup> [Main section cited in *Phosphate Mining Co. v. Atlanta Oil & Co. (Ga. App.)*, 93 S. E. 532.]

<sup>8</sup> [Main section cited in *Phosphate Mining Co. v. Atlanta Oil & Co. (Ga. App.)*, 93 S. E. 532.]

<sup>9</sup> *Indiana Life Endowment Co. v. Carnithan (Ind. App.)*, 109 N. E. 851.

<sup>10</sup> *United Press Assns. v. National*

*Newspapers' Assn.*, 227 Fed. 193. One party to an agreement can not create a breach by giving notice that he does not intend to be bound thereby. It may become such, however, if accepted and acted upon by the other party: *Alvey-Ferguson Co. v. Ernst Tosetti Brewing Co.*, 178 Ill. App. 536.

<sup>11</sup> There may exist an anticipatory breach of an executory contract of sale: *Hart-Parr Co. v. Finley*, 31 N. Dak. 130, 153 N. W. 137, L. R. A. 1915E, 851.

<sup>12</sup> [Main section cited in *Bare v. Victoria Coal & Co.*, 73 W. Va. 632, 80 S. E. 941, 942.]

Where one party to a written contract, after partial performance, claims a subsequent oral modification thereof, a denial by the other party is not a renunciation of the true contract, and will not excuse performance on the part of the first party, so as to give immediate cause of action for breach of contract: *Bare v. Victoria Coal & Co.*, 73 W. Va. 632, 80 S. E. 941.

§ 2031. **Renunciation—Illustrations of principles.**—Where a collection company guarantees to collect a certain per cent. of old outlawed claims within a certain time or to continue the service until the guaranty is collected or until it is determined that an adjustment of the listed claims can not be secured and the company fails to collect the amount guaranteed and writes the creditor that the claims can not be collected and that he send claims not more than twelve months old so that the guaranteed amount may be collected is shown an election not to continue under the contract and an attempted repudiation thereof and entitles the creditor to a recovery of the amount of the guaranty less the maximum commission and the amount actually collected.<sup>13</sup>

§ 2032. **Character of notice of renunciation.**—In order to constitute a breach of the contract by renunciation the denial of liability must cover all the acts to be performed by the defaulting party under the contract,<sup>14</sup> and the declaration of the renunciation, in case of an anticipatory breach must be positive and unconditional.<sup>15</sup> However, a denial of the execution of the contract<sup>16</sup> or a positive refusal to perform, although entire performance is not due,<sup>17</sup> or a positive notice of intended breach,<sup>18</sup> or the declaration of an intention not to abide by it<sup>19</sup> constitutes a renunciation and breach. Whether the action of one party to a partially executed contract constitutes a renunciation is a question for the jury.<sup>20</sup>

§ 2034. **Withdrawal of renunciation.**—A renunciation may be withdrawn as where defendant, having contracted to pay for compartments in a mausoleum to be built, repudiated the same before performance, but afterward acted on a committee of crypt holders, was held to have impliedly withdrawn such repudiation

<sup>13</sup> Barstow Stove Co. v. Consolidated Adjustment Co., 175 Ill. App. 449.

<sup>14</sup> Indiana Life Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77.

<sup>15</sup> Provident Savings Life Assur. Society v. Ellinger (Tex. Civ. App.), 164 S. W. 1024. To same effect: Bare v. Victoria Coal &c. Co., 73 W. Va. 632, 80 S. E. 941.

<sup>16</sup> Draper v. Miller, 92 Kans. 695, 141 Pac. 1014.

<sup>17</sup> Donati v. Cleveland Grain Co., 221 Fed. 168, 137 C. C. A. 68. See also Roberts v. American Column &c. Co., 76 W. Va. 290, 85 S. E. 535.

<sup>18</sup> Waterman v. Bryson (Iowa), 158 N. W. 466.

<sup>19</sup> New Mexico-Colorado Coal &c. Co. v. Baker, 21 N. Mex. 531, 157 Pac. 167.

<sup>20</sup> Colorado Yule-Marble Co. v. Collins, 230 Fed. 78, 144 C. C. A. 376.

and to be liable for the contract price upon performance by plaintiff.<sup>21</sup> But a subsequent promise or offer to perform after an anticipatory renunciation does not affect the rights of the adverse party.<sup>22</sup>

**§ 2035. No right to increase damages by performance after notice of renunciation.**—In case there has been no actual notice of renunciation but a breach vital to the performance of the contract is inevitable and foreseen, one is not required to go ahead and accumulate a bill for damages.<sup>23</sup>

**§ 2036. Voluntary creation of impossibility of performance before performance is due.**—Whenever one party to a contract voluntarily makes performance impossible by some act prior to the time of performance the other party may treat the contract as broken<sup>24</sup> and immediately sue for damages.<sup>25</sup>

**§ 2039. Creation of impossibility of performance by sale of subject-matter to another.**—A party to a contract has no right to dispose of property so as to make performance by him impossible.<sup>26</sup> Thus a traction company breaches its contract to construct a street railroad around property by selling a part of its road and dismantling the rest, thus rendering itself incapable of performing the same.<sup>27</sup>

**§ 2041. Creation of impossibility of performance where promisor is disabled by act of promisee.**—When performance of a contract is prevented by the wrongful interference of one party, the other has the right to treat such wrongful act as a breach and sue for damages.<sup>28</sup> This would be true when the promisee refuses to permit the promisor to go ahead with the contract and orders him to stop work.<sup>29</sup>

<sup>21</sup> Iowa Mausoleum Co. v. Wright, 170 Iowa 546, 153 N. W. 94.

<sup>22</sup> Waterman v. Bryson (Iowa), 158 N. W. 466. A mere notice of intention not to be bound by a contract is not in itself a breach and only becomes so upon being accepted and acted upon as such by the other party, and until so accepted and acted upon by the other party, the notice is only a declaration of intention and may be withdrawn at any time before performance is due: Alvey-Ferguson Co. v. Ernst Tosetti Brewing Co., 178 Ill. App. 536.

<sup>23</sup> William Cramp &c. Ship and Engine Bldg. Co. v. United States, 50 Ct. Cl. 179.

<sup>24</sup> Levy &c. Motor Co. v. City Motor Cab Co., 174 Ill. App. 20.

<sup>25</sup> McFarland v. Welch, 48 Mont. 196, 136 Pac. 394.

<sup>26</sup> Megraw v. Hamilton Trust Co., 252 Pa. 425, 97 Atl. 581.

<sup>27</sup> Arlington Heights Realty Co. v. Citizens' R. &c. Co. (Tex. Civ. App.), 160 S. W. 1109.

<sup>28</sup> McFarland v. Welch, 48 Mont. 196, 136 Pac. 394.

<sup>29</sup> McDonough v. Almy, 218 Mass.

§ 2042. **Creation of impossibility by bankruptcy or insolvency of party.**—The filing of an involuntary petition in bankruptcy may amount to an anticipatory breach of the bankrupt's executory contract where the trustee in bankruptcy does not elect to perform the agreement.<sup>30</sup>

§ 2044. **Nonperformance on failure to perform conditions precedent.**<sup>31</sup>

§ 2050. **Waiver of breach of contract as discharge—Essentials of such waiver.**—When the breach of a contract is waived such breach does not operate as a discharge thereof and the rule that one who has defaulted can not enforce the contract does not apply when such default is waived.<sup>32</sup> And where there has been a waiver of strict performance and performance under the liberal construction has been accepted, there must be reasonable notice given of the intention to return to the strict or exact terms of the agreement before a forfeiture or rescission can be declared.<sup>33</sup> It has been held that there may be a waiver shown by the satisfaction of a mortgage given to secure performance of the contract,<sup>34</sup> by the drawing up of a supplemental<sup>35</sup> or subsequent

409, 105 N. E. 1012, Ann. Cas. 1915D, 855n (contract for blasting rock). To same effect: *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769 (contractor prevented by owner from doing work); *St. John v. St. John*, 223 Mass. 137, 111 N. E. 719 (defendant moving and rendering performance impossible); *Zadek v. Olds*, 166 App. Div. 60, 151 N. Y. S. 634 (work to be done on commission). A member of a labor union who is a party to an agreement between the union and his employer to the effect that so long as the union is able to furnish help to the employer no other help shall be employed does not breach his agreement with the other members so as to give them a right of action by keeping his employment after expulsion from the union: *Shinsky v. Tracey* (Mass.), 114 N. E. 957.

<sup>30</sup> *Central Trust Co. v. Chicago Auditorium Assn.*, 240 U. S. 581, 60 L. ed. 811, 36 Sup. Ct. 412, L. R. A. 1917B, 580n.

<sup>31</sup> [Main section quoted in *Burpee v. Guggenheim*, 226 Fed. 219.]

<sup>32</sup> *Shorett v. Knudson*, 74 Wash.

448, 133 Pac. 1029. In order that there may be a waiver of a breach there must be knowledge of the breach: *Midland City Hotel Co. v. Alexander*, 14 Ga. App. 8, 80 S. E. 24. Each party has the right to recover for the breaches of the other: *Poppenberg v. Owen & Co.*, 84 Misc. 126, 146 N. Y. S. 478. The waiver of a written contract may be in whole or in part and may be made directly or indirectly: *Fairbanks, Morse & Co. v. Nelson*, 217 Fed. 218, 133 C. C. A. 212.

<sup>33</sup> *Hibernian Banking Assn. v. Bell & Co. Coal Co.*, 181 Ill. App. 581. A second contract which provides that it shall not revive the original or waive any rights thereunder, approved by the surety, "without prejudice to any rights under" the first contract, does not waive the right to damages for breach of the first contract: *Comey v. United Surety Co.*, 160 App. Div. 698, 145 N. Y. S. 674.

<sup>34</sup> *Colby v. Interlaken Land Co.*, 88 Wash. 196, 152 Pac. 994.

<sup>35</sup> *Bowman v. Schatzinger*, 35 Ohio Cir. Ct. 40.

contract,<sup>36</sup> by an unqualified acquiescence in the breach,<sup>37</sup> by an acceptance of the benefits of the contract long after the breach, there never having been made any attempt to rescind,<sup>38</sup> or by the writing of a letter subsequent to the breach from which one would be warranted in assuming that if the work was continued to completion, it would be accepted.<sup>39</sup> On the other hand, it has been held that there was no waiver of a right to require a bond as provided for in the contract by merely urging completion of the work.<sup>40</sup> Nor does the fact that during the pendency of an action to enforce the contract payments are made thereunder cut off the right of action.<sup>41</sup>

<sup>36</sup> *Badger Mfg. Co. v. United States*, 49 Ct. Cl. 538.

<sup>37</sup> *Croak v. Trentman*, 50 Okla. 659, 150 Pac. 1088 (right to sue for damages waived).

<sup>38</sup> *American Sand &c. Co. v. Chicago Gravel Co.*, 184 Ill. App. 509. But in a building contract taking possession thereof and paying the contract-price in full does not waive the right of action for faulty construction, especially when the payment is accompanied with notice that damages will be claimed: *Leonard v. Home Builders*, 174 Cal. 65, 161 Pac. 1151, L. R. A. 1917C, 322.

<sup>39</sup> *Sledge v. Arcadia Orchards Co.*, 77 Wash. 477, 137 Pac. 1051. Right to recover liquidated damages for failure to complete building on time may be waived: *Haentze v. Brown*, 193 Ill. App. 288. But waiver of strict performance as to time does not prevent the party not in default from recovering for the breach of other terms of the contract: *Wiggin v. Marsh Lumber Co. (W. Va.)*, 87 S. E. 194. Where the party to a contract waived its breach by making a payment under the contract, he is not precluded from thereafter withdrawing from the contract and demanding back his money, if the other parties had not altered their position in reliance upon the payment: *Sickelsteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024. In action for damages for breach of an agreement to furnish an

auto truck for thirty days, plaintiff could waive any condition of complete performance as a concurrent or precedent condition to defendant's right to payment for four days' work: *Hochberg Contracting Co. v. F. & P. Auto Transp. Co.*, 158 N. Y. S. 879. A warranty of roofing provided that notice of defect should be given in writing. It was conceded that no notice was given or waived. Held that breach of such warranty was no defense to an action on the contract for material furnished and labor performed: *Myers v. Philip Carey Co.*, 17 Ga. App. 535, 87 S. E. 825.

<sup>40</sup> *Symms-Powers Co. v. Kennedy*, 33 S. Dak. 355, 146 N. W. 570.

<sup>41</sup> *Blose v. Blose*, 118 Va. 16, 86 S. E. 911. Where defendant breached an agreement to supply building material, plaintiff's failure to get materials elsewhere and negotiations with new defendant for a new contract was not a waiver of the breach where plaintiff believed and relied on defendant's false statement that the former's architect had canceled the contract: *Sherry v. Federal Terra Cotta Co.*, 172 App. Div. 57, 158 N. Y. S. 241. Acceptance of the work after the date fixed for completion is not a waiver of the right to a counterclaim for resultant damage is a waiver of any defense to an action for the agreed compensation: *Brooklyn Structural Steel Corp. v. Lechtman*, 92 Misc. 164, 155 N. Y. S. 220.

§ 2051. **Waiver of breach as ground for damages.**<sup>42</sup>—  
When the breach of a contract has been waived by failure on the part of defendant to insist on it he can not afterward set it up in excuse of his own breach of the contract.<sup>43</sup>

<sup>42</sup> [Main section quoted in Leonard v. Home Builders, 174 Cal. 65, 161 Pac. 1151, L. R. A. 1917C, 322, 323.]

<sup>43</sup> Phillips v. Todd (Mo. App.), 180 S. W. 1039.



## CHAPTER XLVIII

### DISCHARGE OF RIGHT OF ACTION

§ 2056. **Release defined and distinguished.**—A release constitutes a relinquishment, concession, or surrendering of a right to the person against whom it might have been enforced.<sup>1</sup>

§ 2058. **Consideration of release.**—When notes, and not their payment, are accepted as part of the consideration for a release, such release can not be set aside on the ground that the notes were not paid.<sup>2</sup> But the payment of an admitted indebtedness furnishes no consideration for the release of the sum remaining unpaid.<sup>3</sup> The absence of consideration renders the release of no avail.<sup>4</sup>

§ 2059. **Necessity for seal on release.**—At common law a release was required to be executed under seal, but this is not true as a general rule in most jurisdictions at the present time.<sup>5</sup> But if under seal the instrument is protected from attack for lack of consideration.<sup>6</sup>

§ 2061. **Construction of releases in general.**<sup>6a</sup>—A release should be so construed as to carry out the intention of the parties as expressed by the language of the instrument when read in the light of the circumstances surrounding the transaction.<sup>7</sup> The

<sup>1</sup> Coopey v. Keady, 73 Ore. 66, 144 Pac. 99. The mere agreement to settle or the authorization of another to settle does not amount to a release when no settlement was in fact made: Stowe v. United States Express Co., 179 Mich. 349, 146 N. W. 158.

<sup>2</sup> Galveston &c. R. Co. v. Walker (Tex. Civ. App.), 163 S. W. 1038. A well driller's waiver of his right to dig a well deep enough to produce a supply of water to last a year is consideration for a release of the warranty when the owner claims the vein encountered is sufficient and the driller stated it was insufficient: Goff v. Craig, 51 Ind. App. 461, 99 N. E. 1013.

<sup>3</sup> American Warming &c. Co. v. Fayette Lumber Co., 54 Pa. Super.

Ct. 211. To same effect: Harms v. Fidelity &c. Co., 172 Mo. App. 241, 157 S. W. 1046. Otherwise when the amount is unliquidated and there is a bona fide dispute as to the amount actually due: Putman v. Boyer, 173 Mo. App. 394, 158 S. W. 861.

<sup>4</sup> Burke v. Leming Lumber Co., 121 Ark. 194, 180 S. W. 499; Post v. Thomas, 153 App. Div. 865, 139 N. Y. S. 6.

<sup>5</sup> Coopey v. Keady, 73 Ore. 66, 144 Pac. 99.

<sup>6</sup> Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883, L. R. A. 1915E, 800n.

<sup>6a</sup> [Main section cited in Jensen v. McConnell Bros. (Idaho), 169 Pac. 292, 293.]

<sup>7</sup> Miller v. Lloyd, 181 Ill. App. 230;

rules concerning the construction of releases are the same in equity as in law.<sup>8</sup>

§ 2063. **Effect of release—At law and in equity.**—A valid release extinguishes all claims that are covered by the release.<sup>9</sup> Thus a voluntary release of a debt is not revived by an express promise to pay nor does the express promise furnish a consideration.<sup>10</sup>

§ 2064. **Effect of release of one joint debtor.**—Where the note is the joint and several obligation of the makers, all the makers are not necessarily released by the release of one.<sup>11</sup> Thus a state statute which provides that a release of one or more joint debtors is a payment on the debt of the full proportionate shares of such debtor, has no application to an indebtedness claimed to be several in its inception.<sup>12</sup> And where a debt is to be apportioned among certain people the release of one does not release all.<sup>13</sup> The principle that the release of one joint tortfeasor re-

Swinburne v. Swinburne, 36 R. I. 255, 90 Atl. 121.

<sup>8</sup> Coopey v. Keady, 73 Ore. 66, 144 Pac. 99; Swinburne v. Swinburne, 36 R. I. 255, 90 Atl. 121.

<sup>9</sup> Butterfield v. Reynolds, 189 Mich. 152, 155 N. W. 442; Coopey v. Keady, 73 Ore. 66, 144 Pac. 99. See also American Nat. Ins. Co. v. Mooney, 111 Ark. 514, 164 S. W. 276 (suit on insurance policy). It does not discharge claims not covered by the release: Nalle v. Safe Deposit & Co., 120 Md. 187, 87 Atl. 770; Rochester & Co. Works v. Mitchell Woodbury Co., 215 Mass. 194, 102 N. E. 438; Mitchell v. Mitchell, 170 App. Div. 452, 156 N. Y. S. 76. And it has been held that a release of damages for breach of contract to transport stock promptly is no defense to an action in tort for breach of the carrier's common-law liability: Bratton v. Chicago & C. R. Co., 167 Mo. App. 75, 150 S. W. 1124. If the release applies to only past acts recovery may be had for acts committed subsequent to the execution of the release: Moore v. Hope Natural Gas Co., 76 W. Va. 649, 86 S. E. 564. See also Smith v. Texas & C. R. Co., (Tex. Civ. App.), 180 S. W. 920.

<sup>10</sup> Gross v. Bibb, 19 N. Mex. 495, 145 Pac. 480.

<sup>11</sup> Tinkham v. Wright (Tex. Civ.

App.), 163 S. W. 615. The giving of a note with collateral security by one of two co-tenants does not release the other co-tenant from liability for rent: Kesner v. Truax, 195 Ill. App. 285. In order that a release of one joint obligor shall discharge all, it must be a technical release, without limitation or restriction, and must be under seal: Hillas v. Fuller, 143 N. Y. S. 15. Compare with Fox v. Hudson, 150 Ky. 115, 150 S. W. 49, Ann. Cas. 1914A, 832n. Where an agent has wrongfully pledged goods the release by the principal of the agent also releases the pledgee: Boston Supply Co. v. Rubin, 214 Mass. 217, 101 N. E. 133. A release of one joint debtor reserving a right of action against the others may be construed as a covenant not to sue: Nickerson v. Suplee, 174 Ill. App. 136.

<sup>12</sup> Hosler v. Ireland, 219 Fed. 489, 135 C. C. A. 201.

<sup>13</sup> Miller v. Lloyd, 181 Ill. App. 230. See also Hall v. Allen Mfg. Co., 133 La. 1079, 63 So. 591, holding that a dismissal as to one alleged to be a debtor in solid with another, when there was in reality no debt due from the one released is not a release of the other. Also defines terms "remission" and "conventional discharge." Compare with Case Thresh-

leases all does not apply to a bank which receives a check, fraudulently procured, for collection, and pays the same with notice, for the reason that the bank was not a joint wrongdoer with the parties to the fraud.<sup>14</sup>

§ 2066. **Release obtained through fraud and mistake.**—A release obtained by fraud is invalid.<sup>15</sup> Thus it has been held that a contract of compromise and settlement entered into by one with no business experience who settles his claim upon a misrepresentation as to his want of insurable interest may rescind the settlement and recover the amount due under the original contract.<sup>16</sup> But if the fraud relates to matters outside the release it will not be invalidated.<sup>17</sup> If a release is signed through a misunderstanding of its character it may be considered as a mere nudum pactum.<sup>18</sup>

§ 2067. **Pleading release.**—In case a general release is pleaded by defendant, the plaintiff may, in reply, allege mutual mistake of fact and fraud to avoid such release, notwithstanding the action is one at law and the grounds for avoiding the release are equitable.<sup>19</sup> But an answer which sets up a release, which defense was anticipated by allegations of fraud in the complaint, is insufficient on demurrer.<sup>20</sup>

§ 2068. **Definition and characteristics of accord and satisfaction.**—As used here an "accord and satisfaction" is an executed agreement by which one party gives and the other accepts something in satisfaction or discharge of an existing right of action for the breach of a contract.<sup>21</sup> To constitute an accord

ing Mach. Co. v. Bridger, 133 La. 754, 63 So. 319 (holding if the makers are liable in solid the release of one releases the other).

<sup>14</sup> Arkansas Nat. Bank v. Martin, 110 Ark. 578, 163 S. W. 795.

<sup>15</sup> Interstate Coal Co. v. Trivett, 155 Ky. 825, 160 S. W. 728. This is also true of a release under seal: Southern R. Co. v. Clark, 233 Fed. 900, 147 C. C. A. 574; Woods v. Wilkstrom, 67 Ore. 581, 135 Pac. 192. Grossly inadequate consideration for the release of valuable rights may be evidence of fraud: Weber v. Head Camp &c. Woodmen of the World, 60 Colo. 529, 154 Pac. 728.

<sup>16</sup> Hudson v. Glen Falls Ins. Co., 218 N. Y. 133, 112 N. E. 728, L. R. A. 1917A, 482n.

<sup>17</sup> Putnam v. Boyer, 173 Mo. App. 394, 158 S. W. 861.

<sup>18</sup> Brown v. Farr, 35 Ohio Cir. Ct. 466.

<sup>19</sup> Warner v. Star Co., 162 App. Div. 458, 147 N. Y. S. 803.

<sup>20</sup> Defries v. Finelite, 89 Misc. 209, 151 N. Y. S. 665.

<sup>21</sup> Reliance Life Ins. Co. v. Garth, 192 Ala. 91, 68 So. 871; Graham v. Crismen, 169 Iowa 91, 146 N. W. 756; Wolf v. Humboldt Co., 36 Nev. 26, 131 Pac. 964, 45 L. R. A. (N. S.) 762; Bergman Produce Co. v. Brown (Tex.

and satisfaction, there must be a meeting of the minds of the parties upon an agreement fully settling the claim for the breach.<sup>22</sup> It is not necessary that the words "settle" or "settlement" be used, however, for it is the intention that governs regardless of the words used.<sup>23</sup> When completely executed a valid accord and satisfaction is an absolute defense to a legal action on the claim satisfied.<sup>24</sup>

§ 2070. **Subject-matter of an accord.**—There may be an accord and satisfaction of one or more demands, each arising out of the breach of an entire contract, without affecting other demands growing out of the same contract,<sup>25</sup> or of a claim to the first prize in a voting contest<sup>26</sup> or of a claim for failure to deliver goods as ordered.<sup>27</sup>

§ 2072. **Necessity for execution of accord.**—An accord does not constitute a defense to an action unless it has been executed.<sup>28</sup> The original liability is not extinguished until the accord is executed,<sup>29</sup> and a right of action thereon is not barred.<sup>30</sup> Partial execution of the accord is insufficient.<sup>31</sup>

§ 2074. **New promise as satisfaction.**—While a mere unexecuted accord does not supersede or discharge the original contract, nevertheless if the promise itself legally constitutes consideration and is accepted in satisfaction the accord extinguishes the

Civ. App.), 172 S. W. 554. See also *Borden v. Fine*, 212 Mass. 425, 98 N. E. 1073.

<sup>22</sup> *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 So. 871. It covers only matters actually included therein: *In re Pfenninger's Estate*, 135 Minn. 192, 160 N. W. 487.

<sup>23</sup> *Schultz v. Farmer's Elevator Co.*, 174 Iowa 667, 156 N. W. 716.

<sup>24</sup> *Savage v. Edgar*, 86 N. J. Eq. 205, 98 Atl. 407.

<sup>25</sup> *National Duck Mills v. Catlin*, 10 Ga. App. 240, 73 S. E. 418.

<sup>26</sup> *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564.

<sup>27</sup> *Cohn v. Arkin*, 178 Ill. App. 306.

<sup>28</sup> *Frankfort-Barnett Co. v. William Prym Co.*, 237 Fed. 21, 150 C. C. A. 223; *Kennedy v. Maddox*, 15 Ga. App. 684, 84 S. E. 153 (failure to deliver note); *Cooke v. McAdoo*, 85 N. J. L. 692, 90 Atl. 302 (failure to exe-

cute note); *McCoy v. Millbury*, 87 N. J. L. 697, 94 Atl. 621 (failure to pay agreed sum); *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 App. Div. 465, 135 N. Y. S. 990.

<sup>29</sup> *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac. 624; *Sawyer v. Hawthorne*, 167 Iowa 410, 149 N. W. 512; *Cooke v. McAdoo*, 85 N. J. L. 692, 90 Atl. 302; *McCoy v. Millbury*, 87 N. J. L. 697, 94 Atl. 621; *Business Men's Realty Co. v. Comet Co.*, 152 App. Div. 941, 137 N. Y. S. 823; *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

<sup>30</sup> *White v. Beverly Bldg. Assn.*, 221 Mass. 15, 108 N. E. 921; *Crouch v. Quigley*, 258 Mo. 651, 167 S. W. 978 (breach of promise suit).

<sup>31</sup> *Olson v. Farnsworth*, 97 Nebr. 407, 150 N. W. 260; *Cooke v. McAdoo*, 85 N. J. L. 692, 90 Atl. 302.

original obligation.<sup>32</sup> And when a new contract is accepted in satisfaction of a prior agreement, the remedy for breach thereof is on the new and not the old contract.<sup>33</sup>

§ 2076. **Satisfaction by payment of less than due.**—Where the debt is liquidated and is due (except when the rule is changed by statute) payment by a solvent debtor and receipt by the creditor of a part thereof is not a satisfaction of the whole unless supported by a new consideration; such payment only amounts to a discharge of the amount paid, and an action may be maintained for the balance.<sup>34</sup> Thus the acceptance of a sum less than that actually due under an insurance policy will not prevent recovery of the balance.<sup>35</sup> This principle applies to obligations of

<sup>32</sup> *Babcock v. Huntoon*, 37 R. I. 526, 93 Atl. 911.

<sup>33</sup> *Sawyer v. Hawthorne*, 167 Iowa 410, 149 N. W. 512; *Morgenthaler v. Somers*, 164 Wis. 159, 159 N. W. 717. The new contract must be pleaded as such or its terms reasonably lead to the conclusion that it amounts to an accord and satisfaction: *Champion Fibre Co. v. Hardin*, 172 N. Car. 767, 90 S. E. 919.

<sup>34</sup> *Abercrombie v. Goode*, 187 Ala. 310, 65 So. 816; *Louisiana Lumber Co. v. Farrior Lumber Co.*, 9 Ala. App. 383, 63 So. 788; *Workmen v. James*, 14 Ala. App. 477, 70 So. 976; *Phillips v. Graham Co.*, 17 Ariz. 208, 149 Pac. 755; *New York Life Ins. Co. v. McDonald (Colo.)*, 160 Pac. 193; *Jordy v. Maxwell*, 62 Fla. 236, 56 So. 946; *Holslag v. Morse*, 188 Ill. App. 607 (acceptance of less sum due to mistake); *Kushner v. Perlman*, 189 Ill. App. 59; *American Seeding Mach. Co. v. Baker*, 55 Ind. App. 625, 104 N. E. 524; *Foster County State Bank v. Lammers*, 117 Minn. 94, 134 N. W. 501; *Barrett v. Kern*, 141 Mo. App. 5, 121 S. W. 774; *Vinson v. Lee Jordan Lumber Co.*, 167 Mo. App. 201, 151 S. W. 199; *Miners' &c. Bank v. American Bonding Co. (Mo. App.)*, 186 S. W. 1139; *Castelli v. Jereissati*, 80 N. J. L. 295, 78 Atl. 227; *Decker v. George W. Smith & Co.*, 88 N. J. L. 630, 96 Atl. 915; *Cornell v. Taylor*, 137 App. Div. 496, 122 N. Y. S. 157; *MacEvoy v.*

*Tide Water Oil Co.*, 165 App. Div. 954, 150 N. Y. S. 641; *Baccaria v. Landers*, 84 Misc. 396, 146 N. Y. S. 158; *Havender v. Brodbeck*, 88 Misc. 30, 150 N. Y. S. 162; *Dorman v. Arkin*, 120 N. Y. S. 757; *Kleinfelter v. Granger*, 136 N. Y. S. 485; *Donnell v. First Mtg. &c. Co.*, 153 N. Y. S. 218; *Greensberg v. Eisenberg*, 154 N. Y. S. 119; *Martinson v. Van Cortlandt Operating Co.*, 155 N. Y. S. 359; *Sondhelm v. Scalera*, 161 N. Y. S. 291; *Sherman v. Pacific Coast Pipe Co. (Okla.)*, 159 Pac. 333, L. R. A. 1917A, 716; *Schumacher v. Moffit*, 71 Ore. 79, 142 Pac. 353; *Tustin v. Philadelphia & R. Coal &c. Co.*, 250 Pa. 425, 95 Atl. 595; *Parker v. Mayes*, 85 S. Car. 419, 67 S. E. 559, 137 Am. St. 912; *Simmons Hardw. Co. v. Adams (Tex. Civ. App.)*, 147 S. W. 1196; *Johnson v. Hoover (Tex. Civ. App.)*, 165 S. W. 900; *Schulze v. Waco Land &c. Co. (Tex. Civ. App.)*, 177 S. W. 157; *Smoot v. Checketts*, 41 Utah 211, 125 Pac. 412, Ann. Cas. 1915C, 1113n; *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500. This rule is given a strict construction: *Baccaria v. Landers*, 84 Misc. 396, 146 N. Y. S. 158. The settlement need not be rescinded or the money received be returned before sent for the balance due: *Holslag v. Morse*, 188 Ill. App. 607.

<sup>35</sup> *Weber v. Head Camp &c. Woodmen of the World*, 60 Colo. 529, 154 Pac. 728.

a county,<sup>36</sup> municipal corporations,<sup>37</sup> and relations between attorney and client.<sup>38</sup> It also covers interest when there is an express contract to pay the same.<sup>39</sup> But payment of the principal sum due, less interest, when there is no express contract to pay interest, may amount to an accord and satisfaction as to both principal and interest.<sup>40</sup> Even if there is a statute changing the rule, yet if the less sum is accepted under circumstances that practically amount to coercion it will not operate as a discharge.<sup>41</sup> Merely saving delay is not sufficient consideration to support an agreement to accept less than the amount due in full satisfaction.<sup>42</sup> But the abandonment of an appeal is sufficient consideration to support an agreement to accept as full satisfaction a sum less than the amount of the judgment.<sup>43</sup> A slight consideration will take the case out of the rule, such as payment before maturity,<sup>44</sup> payment by a stranger,<sup>45</sup> or payment in property.<sup>46</sup> It has also been held that a settlement made in view of the insolvency of the debtor,<sup>47</sup> or an agreement not to go through bankruptcy,<sup>48</sup> is sufficient consideration to support the accord and satisfaction. But an agreement to accept as satisfaction a per cent. of the debt equal to the amount paid creditors whose

<sup>36</sup> *Crawford v. Darrow*, 87 Nebr. 494, 127 N. W. 891. See also *Wolf v. Humboldt County*, 36 Nev. 26, 131 Pac. 964, 45 L. R. A. (N. S.) 762.

<sup>37</sup> *Phillips v. Graham County*, 17 Ariz. 208, 149 Pac. 755.

<sup>38</sup> *General Fireproof Constr. Co. v. Butterfield*, 143 App. Div. 708, 128 N. Y. S. 407.

<sup>39</sup> *Abercombie v. Goode*, 187 Ala. 310, 65 So. 816.

<sup>40</sup> *Bennett v. Federal Coal & Co.*, 70 W. Va. 456, 74 S. E. 418, 40 L. R. A. (N. S.) 588n, Ann. Cas. 1913E, 578n.

<sup>41</sup> *Thomas v. Brown*, 116 Va. 233, 81 S. E. 56, Ann. Cas. 1917A, 128n.

<sup>42</sup> *Brush Hat Mfg. Co. v. Abeles*, 45 Pa. Super. Ct. 243.

<sup>43</sup> *Donahue v. Brooks*, 143 Ill. App. 188.

<sup>44</sup> *Zabludowsky v. Gottfried*, 95 Misc. 623, 159 N. Y. S. 785 (three notes payment before the first came due). Compare with *Gilia v. Robbins*, 134 Minn. 45, 158 N. W. 807.

<sup>45</sup> *Kuhn v. Kuhn*, 171 Ill. App. 298; *Sigler v. Sigler*, 98 Kans. 524, 158 Pac. 864, L. R. A. 1917A, 725 (stran-

ger in fact agent of debtor); *Cunningham v. Irwin*, 182 Mich. 629, 148 N. W. 786 (payment by father); *Punamchand v. Temple*, 2 L. R. (1911) K. B. 330 (father paying son's debt). This is not true where the creditor sent to guarantor an erroneous statement and third person paid amount demanded and obtained receipt: *Barber Asphalt Co. v. Mulen*, 220 Mass. 308, 107 N. E. 978. Nor does it apply where the debtor borrows the money and then pays it over himself: *Ivy Court Realty Co. v. Knapp*, 79 Misc. 260, 139 N. Y. S. 918.

<sup>46</sup> *Ikard v. Armstrong*, 10 Ala. App. 657, 65 So. 849 (statute renders satisfaction binding if under seal); *Lamberton v. Harris*, 112 Ark. 503, 166 S. W. 554; *First Nat. Bank v. Latham*, 37 Okla. 286, 132 Pac. 891.

<sup>47</sup> *Winter v. Meier*, 151 Ill. App. 572. Contra: Where the debtor misrepresents his solvency: *Scott v. Parkview Realty & Co.*, 241 Mo. 112, 145 S. W. 48.

<sup>48</sup> *Kuhn v. Kuhn*, 171 Ill. App. 298.

claims are listed in a bankruptcy proceeding does not prevent a recovery of the balance.<sup>49</sup>

**§ 2077. Satisfaction by payment of less sum than due—Checks, drafts, receipts.**—While there are many cases holding that the rule being considered applies only to payment in money and that it does not apply where the payment of less than due is by check, when so understood by the parties, there are a number of recent cases to the contrary.<sup>50</sup> It would seem that if the rule is to be adhered to at all the cases holding that the acceptance of a check for the sum less than due does not amount to a satisfaction and accord states the rule as it should be. Otherwise, the shadow is of more value than the substance. It is also held in some states that when a written release or receipt is executed at the time a sum less than the full amount due is paid reciting full satisfaction and release it extinguishes the entire debt, but this is not true generally.<sup>51</sup>

**§ 2078. Satisfaction of unliquidated or disputed demands by payment of less than claim.**—The payment and acceptance in full settlement of a less sum than claimed, when the claim is unliquidated or in dispute, operates as an accord and satisfaction.<sup>52</sup> It is not, however, so much a question as to

<sup>49</sup> Davis v. Barwich, 88 S. Car. 355, 70 S. E. 1007. See also Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501.

<sup>50</sup> Stewart v. Riley, 189 Ala. 519, 66 So. 488; Louisiana Lumber Co. v. Farrier Lumber Co., 9 Ala. App. 383, 63 So. 788; American Workman v. James, 14 Ala. App. 477, 70 So. 976; Jordy v. Maxwell, 62 Fla. 236, 56 So. 946 (cashier's check); Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501; Schuller v. Robinson, 139 App. Div. 97, 123 N. Y. S. 881; National Art Co. v. Ellery, 145 N. Y. S. 277; Johnson v. Hoover (Tex. Civ. App.), 165 S. W. 900; Nixon v. Kiddy, 66 W. Va. 355, 66 S. E. 500. See also Page v. Barry (Ala.), 73 So. 22; McKinnon v. Holden, 85 Nebr. 406, 123 N. W. 439; Drewry-Hughes Co. v. Davis, 151 N. Car. 295, 66 S. E. 139; Philadelphia & C. R. Co. v. Walker, 45 Pa. Super. Ct. 524; Slocum Co. v. St. Clair, 52 Pa. Super. Ct. 98; American Warm-

ing & Co. v. Fayette Lumber Co., 54 Pa. Super. Ct. 211. To contrary, Longstreth v. Haller, 122 Ark. 212, 183 S. W. 177; American Seeding Mach. Co. v. Baker, 55 Ind. App. 625, 104 N. E. 524; Neubacher v. Perry, 57 Ind. App. 362, 103 N. E. 805.

<sup>51</sup> State v. Gregg, 18 Ariz. 121, 157 Pac. 227; Mosaic Templars v. Austin, 126 Ark. 327, 190 S. W. 571; Ablovitz v. Zoloth, 161 N. Y. S. 260; Mundler v. Palmer, 162 N. Y. S. 605 (foreign money held not a commodity).

<sup>52</sup> Phillips v. Graham Co., 17 Ariz. 208, 149 Pac. 755; Sparks v. Spaulding Mfg. Co., 158 Iowa 491, 139 N. W. 1083; Schultz v. Farmers' Elevator Co., 174 Iowa 667, 156 N. W. 716; Cunningham v. Irwin, 182 Mich. 629, 148 N. W. 786; Hoey v. Ross, 189 Mich. 193, 155 N. W. 375; Part-ridge Lumber Co. v. Phelps-Burruss Lumber Co., 91 Nebr. 396, 136 N. W. 65; Rose v. American Paper Co., 83

whether there is any foundation for the dispute as it is whether the dispute was honest<sup>53</sup> and bona fide.<sup>54</sup> The dispute may be on a matter of law as well as of fact.<sup>55</sup>

§ 2086. **Pleading.**—An accord and satisfaction, in order to be relied on, must generally be specially pleaded<sup>56</sup> unless established by plaintiff's evidence,<sup>57</sup> and can not be proved under a general denial.<sup>58</sup> The plea should allege that the goods or things delivered or money paid were delivered or paid to plaintiffs, and received by them in full satisfaction and discharge of their cause of action.<sup>59</sup> Furthermore, the plea is insufficient if it shows a payment of a less amount in full of a larger amount, and fails to allege or show that the amount was in dispute.<sup>60</sup>

§ 2087. **Discharge by judgment.**—A judgment for damages for breach of a contract is a bar to a subsequent action for damages accruing since the first judgment where the complaint alleges the same breach and states no new cause of action.<sup>61</sup> And where there is a breach of covenant to ditch and fence its right of way by a railroad there can be but one action brought to recover the reasonable cost to the owner to build and maintain the structures and damage to time of trial.<sup>62</sup> Also where a contract is breached in several respects and an action is brought for one of the breaches only, and later another action is brought for the other breaches, both causes of action having arisen at the same time, the first action may be pleaded in abatement of the second.<sup>63</sup>

N. J. L. 707, 85 Atl. 354; *Bergman Produce Co. v. Brown* (Tex. Civ. App.), 156 S. W. 1102.

<sup>53</sup> *Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac. 624; *Wallach v. Manhattan Athletic Club*, 162 N. Y. S. 237. See also *Slimmer v. Dolliver Savings Bank*, 195 Ill. App. 84.

<sup>54</sup> *Ryan v. Progressive Retailer Pub. Co.*, 16 Ga. App. 83, 84 S. E. 834. See also *Pirola v. Fladmark*, 190 Ill. App. 57.

<sup>55</sup> *Ferguson v. Grand Lodge &c. of Honor*, 174 Iowa 61, 156 N. W. 176.

<sup>56</sup> *Phillips v. Graham Co.*, 17 Ariz. 208, 149 Pac. 755; *Williams v. Uzzell*, 108 Ark. 241, 156 S. W. 843; *Poer v. Johnson*, 48 Ind. App. 596, 96 N. E. 189; *Continental Gin Co. v. Arnold* (Okla.), 153 Pac. 160. See also *Breslaur v. McCormick-Saeltzer Co.*, 31 Cal. App. 284, 160 Pac. 251 (an-

swer insufficient to raise question).

<sup>57</sup> *Engineering Co. v. Beam*, 23 Cal. App. 164, 137 Pac. 624.

<sup>58</sup> *Harvey v. Denver &c. R. Co.*, 44 Colo. 258, 99 Pac. 31, 130 Am. St. 120.

<sup>59</sup> *Cahaba Coal Co. v. Hanby*, 7 Ala. App. 282, 61 So. 33; *Lanckester v. Fine*, 134 Minn. 330, 159 N. W. 622. Performance or tender of performance must be pleaded: *Business Men's Realty Co. v. Comet Co.*, 152 App. Div. 941, 137 N. Y. S. 823.

<sup>60</sup> *Louisiana Lumber Co. v. Farrior Lumber Co.*, 9 Ala. App. 383, 63 So. 788.

<sup>61</sup> *Hemingway v. Grayling Lumber Co.*, 125 Ark. 400, 188 S. W. 1186.

<sup>62</sup> *Chicago &c. R. Co. v. Dodds*, 167 Ky. 624, 181 S. W. 666.

<sup>63</sup> *Speier v. Locust Laundry*, 56 Pa. Super. Ct. 323.



And when the judgment does not operate as a bar to an action for a subsequent breach it is an estoppel precluding litigation of any matter or issue determined in the original action and sought to be raised in the subsequent suit.<sup>64</sup> But an action for salary earned under a contract is not necessarily a bar to an action for damages for breach of the agreement.<sup>65</sup> Nor does the recovery of a judgment for the contract-price for publishing advertising matter up to the time of the cancellation of the contract prevent a recovery in damages for the breach of the agreement.<sup>66</sup>

<sup>64</sup> *Old River Rice &c. Co. v. Stubbs* (Tex. Civ. App.), 168 S. W. 28.

<sup>65</sup> *Viall v. Lionel Mfg. Co.*, 90 Conn. 694, 98 Atl. 329. See also *Frost v. International Rubber Co.*, 37 R. I. 406, 92 Atl. 1022. Compare with *Fleischman v. Steele*, 157 N. Y. S.

353, holding that a judgment for wrongful discharge barred an action to recover a certain sum to be paid on a certain day if plaintiff was in defendant's employ.

<sup>66</sup> *Smith Bros. v. Stern*, 148 N. Y. S. 1.

## CHAPTER XLIX

### REMEDIES FOR BREACH

§ 2095. **Remedies available.**—Four remedies may exist upon breach of a contract: (1) The contract may be considered as at an end and suit may be brought on the quantum meruit under an implied contract for services rendered,<sup>1</sup> on the quantum valebant,<sup>2</sup> and the amount expended by plaintiff on the contract;<sup>3</sup> (2) an action for damages for breach of the contract;<sup>4</sup> (3) there may be, in a proper case, an action brought in equity for specific per-

<sup>1</sup> *Greenlee County v. Cotey*, 17 Ariz. 542, 155 Pac. 302 (remedy quantum meruit alone); *Daniels v. McDaniels*, 184 Mo. App. 354, 171 S. W. 14 (contract fully performed); *Waite v. Shoemaker & Co.*, 50 Mont. 264, 146 Pac. 736; *Midtown Contracting Co. v. Goldsticker*, 165 App. Div. 264, 150 N. Y. S. 809; *Freese v. Pavloski* (R. I.), 99 Atl. 13. A contractor is entitled to sue for the contract-price, and is not restricted to an action on quantum meruit, though the work was not completed within the contract period, when the owner had extended the time, and the delay was the owner's fault: *Lapp-Gifford Co. v. Muscocy Water Co.*, 166 Cal. 25, 134 Pac. 989. A contractor who is induced to enter into a contract by fraud may rescind on discovering the fraud, and sue at law for breach of contract, or may sue on a quantum meruit for the value of labor done and materials furnished, or enforce a mechanic's lien to recover for their value: *Girouard v. Jasper*, 219 Mass. 318, 106 N. E. 849.

<sup>2</sup> *Buckeye Cotton Oil Co. v. Matheson*, 104 S. Car. 430, 89 S. E. 478. When defendant, in an agreement for the purchase of property, contracted to pay an additional consideration named contingent on certain events the happening of which was rendered impossible by the wrongful acts of defendant, the seller is not limited to a recovery of the actual value of the property above the consideration received: *Schlottman v. E. I. Du Pont*

*de Nemours Powder Co.*, 210 Fed. 356.

<sup>3</sup> *Jessey v. Butterfield*, 61 Colo. 256, 157 Pac. 1; *Francis v. Brown*, 22 Wyo. 528, 145 Pac. 750.

<sup>4</sup> *Hamil v. Flowers*, 184 Ala. 301, 63 So. 994; *Elrod Lumber Co. v. Moore*, 186 Ala. 430, 65 So. 175 (the breach must be alleged); *Gillin v. Hopkins*, 28 Cal. App. 579, 153 Pac. 724 (failure to deliver stock); *Gordon-Tiger Mining & Co. v. Brown*, 56 Colo. 301, 138 Pac. 51; *Jessey v. Butterfield*, 61 Colo. 256, 157 Pac. 1; *Girouard v. Jasper*, 219 Mass. 318, 106 N. E. 849 (contract induced by fraud); *Francis v. Brown*, 22 Wyo. 528, 145 Pac. 750. The action may be for liquidated damages: *Collins Bros. Co. v. Georgia Hotel Co.*, 142 Ga. 703, 83 S. E. 660. An owner damaged by breach of a building contract may either recover such damages in an independent action, or by way of set-off or counterclaim in an action by the contractor: *Waco Cement Stone Works v. Smith* (Tex. Civ. App.), 162 S. W. 1158. Defendant gave notice of an intended breach of a contract of sale and refused to complete the contract. Held plaintiff could not recover the purchase-price upon an indebitatus count, but must recover upon counts alleging damages for a breach of the contract in refusing to accept the goods when tendered: *Alvey-Ferguson Co. v. Ernst Tosetti Brewing Co.*, 178 Ill. App. 536.

formance;<sup>4a</sup> and (4) a party may consider, when the circumstances permit, the breach as a modification of the old contract to which he assents and proceed under the new contract.<sup>4b</sup> Where the parties to the agreement also specify the remedies accruing on breach thereof, the agreed remedies are exclusive.<sup>5</sup>

§ 2096. **What law governs as to the remedy.**—The laws of the state where the suit is brought govern all questions concerning the remedy. The laws of the forum control.<sup>6</sup> This rule applies to procedure and the manner and time of suing on a contract.<sup>7</sup> But while a state will not enforce a contract made in a foreign state so as to defeat the public policy of the former, the rule does not apply where a party to a contract made in a foreign state comes into the state, not to have it enforced, but to have it repudiated. In the latter case the laws where the contract was made or to be performed will control.<sup>8</sup> A contract made in a certain state but not to be performed there may be enforced in the state where made unless against its public policy or no rem-

<sup>4a</sup> Wherever equity gives the right to specifically enforce an executory contract of sale, the law gives the right to sue for damages for the breach: *Hamil v. Flowers*, 184 Ala. 301, 63 So. 994. An action in equity will not lie to recover compensation or damages for breach of contract: *Swarthmore Lumber Co. v. Parks*, 72 W. Va. 625, 79 S. E. 723. When the contract is induced by fraud suit may be brought in equity to cancel or rescind and to recover that which has been parted with and other equitable relief: *Jessey v. Butterfield*, 61 Colo. 256, 157 Pac. 1. See also *Driggs v. Hendrickson*, 89 Misc. 421, 151 N. Y. S. 858.

<sup>4b</sup> *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564. A party to a contract under seal who relies on a new and independent parol agreement must sue in assumpsit: *Knabe v. Bowles*, 123 Md. 475, 91 Atl. 567.

<sup>5</sup> *Hickman v. Sawyer*, 216 Fed. 281, 132 C. C. A. 425; *Bucalo Pitts Co. v. Allerdice* (Tex. Civ. App.), 177 S. W. 1044. The rule may be declared otherwise by statute: *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641, L. R. A. 1916B, 1201n, Ann. Cas. 1916D, 1248n. On remedies

available, see, generally: *Charlotte v. Atlantic Bitulithic Co.*, 228 Fed. 456, 143 C. C. A. 38; *United Press Assn. v. National Newspaper Assn.*, 237 Fed. 547, 150 C. C. A. 429; *Neal v. Stanley*, 17 Ga. App. 502, 87 S. E. 718; *Sears v. Krekel* (Mo. App.), 184 S. W. 911; *Waite v. C. E. Shoemaker & Co.*, 50 Mont. 264, 146 Pac. 736; *Hoggson Bros. v. Spiekerman*, 175 App. Div. 144, 161 N. Y. S. 930 (several contracts for one improvement. Suit on general account and not on each separate contract); *Freese v. Pavloski* (R. I.), 99 Atl. 13 (contract fully executed); *Buckeye Cotton Oil Co. v. Matheson*, 104 S. Car. 430, 89 S. E. 478.

<sup>6</sup> *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112; *Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574.

<sup>7</sup> *Carpenter v. Hanes*, 167 N. Car. 551, 83 S. E. 577; *Clark v. First Nat. Bank* (Okla.), 157 Pac. 96. "Lex loci solutionis" is the law according to which the contract is to be read to determine the rights of the parties thereto, but does not control the remedy in a different state or country: *Davidson v. Browning*, 73 W. Va. 276, 80 S. E. 363, L. R. A. 1915C, 976n.

<sup>8</sup> *News Pub. Co. v. Associated Press*, 190 Ill. App. 77.

edy is afforded by its laws.<sup>9</sup> It should be borne in mind, however, that when a contract is made in one state to be performed in another the law of the latter governs with reference to all matters concerning performance, regardless of where suit is brought.<sup>10</sup>

§ 2098. **Conditions precedent to action for breach.**—Before one party to a contract can enforce it against the other he must have performed the acts required by him to be performed and it makes no difference whether his failure to perform is due to wilfulness or misfortune.<sup>11</sup> Thus the maker of a purchase-money note can not bring an action for the breach of his transferee's contract to pay the same unless he first pays the note.<sup>12</sup> Likewise when a contract to perfect title to land provides for approval by defendant's attorneys, their approval, when not acting in bad faith, is a condition precedent to the maintenance of a suit on the contract.<sup>13</sup> The giving of bond by a contractor may be a condition precedent to bringing suit.<sup>14</sup> Likewise a demand may

<sup>9</sup> *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436n. A provision in a contract for arbitration of all disputes, void because it ousts the courts of jurisdiction, does not prevent an action on the contract, though made without the state and to be performed in Pennsylvania, where such provision was valid: *Meacham v. Jamestown &c. R. Co.*, 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851.

<sup>10</sup> *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112; *Racine &c. Mfg. Co. v. G. W. White Lumber Co.*, 190 Ill. App. 102; *Peak v. International Harvester Co.* (Mo. App.), 186 S. W. 574; *McClement v. Supreme Court I. O. F.*, 88 Misc. 475, 152 N. Y. S. 136. See also *Davidson v. Browning*, 73 W. Va. 276, 80 S. E. 363, L. R. A. 1915C, 976n (construing phrase "place of performance").

<sup>11</sup> *Raphael v. McGraw*, 185 Ill. App. 406. One entering into a contract imposing obligations upon him and conferring certain rights, can not insist upon the enforcement of his rights without performing his obligations: *Federal Realty Co. v. Evins*, 120 Ark. 259, 179 S. W. 344.

<sup>12</sup> *Stokes v. Robertson*, 143 Ga. 721, 85 S. E. 895. To same effect: *Hyde*

*v. Kirkpatrick*, 78 Ore. 466, 153 Pac. 41, 488.

<sup>13</sup> *Roberts v. Atwood* (Tex. Civ. App.), 188 S. W. 1014.

<sup>14</sup> *Symms-Powers Co. v. Kennedy*, 33 S. Dak. 355, 146 N. W. 570. The presentation of a proper inspection certificate is a condition precedent to recovery for plumbing put in under a contract providing that the work should be performed "according to ordinances of the city of Chicago," which required such certificate to be furnished the property owner when the work was completed: *Levin v. Strempler*, 194 Ill. App. 299. Where the general contractors agreed to pay subcontractors for work done on a city sewer contract, "subject to final acceptance of the work," and the contractors' agreement with the city required that the work be approved by the board of local improvements, and the general contractors, upon failure of the subcontractors to obtain approval of the work from the board, made the proper corrections and secured the approval of the work. Held, that approval by the city of the work done by the subcontractor was a condition precedent to a recovery by the latter in an action of assumpsit on the agreement: *Heirsch v. Lorimer &c. Co.*, 196 Ill. App. 564.

be necessary in order to put the defendant in default.<sup>15</sup> But a demand for payment for services rendered under a contract will not be required when it would have been useless.<sup>16</sup> And one is not required to restore money received under a contract before bringing an action to avoid the same when it was conceded that the amount received was due plaintiff.<sup>17</sup> Also one may retain the benefit of an agreement and sue for damages arising from a breach of part of the contract.<sup>18</sup>

§ 2100. **Parties to actions for breach of contract.**—As a general rule when the functions of a party to a contract have entirely terminated, and no rights of his remain to be affected, he is not a necessary party to a suit on the agreement.<sup>19</sup> It is also true generally that the action may and in many jurisdictions must be prosecuted by the real party in interest. Thus when a valid contract is made for the benefit of some third party such third

<sup>15</sup> *Soderlund v. Helman*, 215 Mass. 542, 102 N. E. 899 (contract to furnish food and board for life); *Seeley v. Osborne*, 161 App. Div. 844, 147 N. Y. S. 116 (demand by letter held insufficient, no answer being received); *James Ackroyd & Sons v. Proctor*, 173 App. Div. 413, 159 N. Y. S. 1038 (notice by letter held insufficient); *Northrup v. Scott*, 85 Misc. 515, 148 N. Y. S. 846 (no time specified, demand should be made in reasonable time); *Dempsey v. Northeastern Const. Co.*, 90 Misc. 142, 154 N. Y. S. 291 (three days' notice required). When no time is specified, the law implies that the act shall be done in a reasonable time, and hence, when such time has elapsed, plaintiff has a right to bring an action without previous demand: *McCall v. Atchley*, 256 Mo. 39, 164 S. W. 593. In Louisiana it is held that one party to a contract need not put the other in default before bringing suit to enforce the agreement: *Healy v. Southern States Alcohol Mfg. Co.*, 136 La. 1080, 68 So. 132. The function of the act of putting the debtor in default by demand is simply to warn him that damage for delay will be demanded, and that time of performance must be strictly complied with: *Watson v. Feibel*, 139 La. 375, 71 So. 585.

<sup>16</sup> *Mead v. Chicago & C. R. Co.*, 189 Ill. App. 323.

<sup>17</sup> *Brocklehurst & Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646.

<sup>18</sup> *Mills v. Morris*, 156 Wis. 38, 145 N. W. 369. Where a debtor agreed with his creditor to postpone enforcement of the debt, providing the debtor paid insurance and taxes, and providing certain notes deposited as collateral be paid promptly at maturity, failure to comply with the latter condition, when not waived, gave the creditor the right to sue without notice, pursuant to Civ. Code 1910, § 4227, that the debtor must comply with his agreement, though mere failure to pay taxes and insurance might not have given him such right: *Strickland v. Bank of Cartersville*, 141 Ga. 565, 81 S. E. 886. It appearing that the purpose of a contract requiring a contractor to furnish a "bill for extras" is to advise defendant of the extra labor or material furnished, it is error to instruct that no recovery can be had upon any claim for extra compensation not included within a claim for extras in so far as it limits the amount of recovery to the amount claimed in an itemized "bill for extras": *Griffiths v. Sanitary Dist. of Chicago*, 174 Ill. App. 100.

<sup>19</sup> *Olson v. Ostby*, 178 Ill. App. 165. In an action upon a contract, where the pleadings showed that a third person had no interest in the subject-

person may maintain an action thereon in his own name.<sup>20</sup> This is especially true in equity.<sup>21</sup> But it has been held that where the contract is under seal action thereon can be maintained only in the right of those who are made parties thereto by its express terms.<sup>22</sup> When the contract is joint as to all, all must be sued jointly, if objection is made against suit being brought against

matter of the action, except on a certain contingency, not alleged to have happened, failure to make him a party defendant did not render the complaint demurrable: *David v. City Nat. Securities Co.*, 174 App. Div. 593, 161 N. Y. S. 174. A written contract between two persons as first parties and another as second party, which contains a promise by the first parties for the benefit of third persons, does not make parties to the contract copartners, so as to make the second party a necessary party in an action by one of the third persons to recover on the contract, although both such first parties are proper parties to the action, if served, and if the question of their joint liability is raised in the trial court: *Andree v. Sheehan*, 194 Ill. App. 587. Claimants under stop notices served on the owner are not necessary parties in a building contractor's action against the owner for the difference between the amount paid on the contract plus the owner's expense in completing the building, and the agreed price: *Coppola v. Grande*, 88 N. J. L. 324, 96 Atl. 67. In suit to enforce a contract between joint owners of fund that the income therefrom should be paid to plaintiff for life against the residuary legatee of the survivor of such owners, his executrix or personal representatives and the former depository of the fund are not necessary parties, as the fund is in the legatee's possession: *Harbeck v. Harbeck*, 87 Misc. 420, 149 N. Y. S. 791. In an action for breach of a contract for the sale of corporate stock, by which it was agreed to deliver to plaintiffs and L 10,000 shares on their selling 10,000 other shares of defend-

ant's stock so as to net him \$50,000 in cash, it has been held that L was a necessary party: *Cristin v. Leonard*, 209 Fed. 49, 126 C. C. A. 191.

<sup>20</sup> *White v. Chicago & C. R. Co.*, 196 Ill. App. 459; *Moore v. Kirkland*, 112 Miss. 55, 72 So. 855 (promise to pay money to third person); *Rigney v. New York Cent. & C. R. Co.*, 161 App. Div. 187, 146 N. Y. S. 395 (contract between city and railway company, suit by property owners); *Oregon Mill & C. Co. v. Kirkpatrick*, 66 Ore. 21, 133 Pac. 69 (contract to pay debt of another, suit by creditor); *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779 (promise to pay money to third person). It may be inferred that a father, when he permitted another person to name his child in consideration of a promise to make some provision for it, was acting as agent for the child, and he then be entitled to maintain an action on the promise: *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359, L. R. A. (N. S.) 1108n. In some jurisdictions the action may be maintained in the name of the party making the agreement and not the third person: *Jordon v. Dixie Culvert & C. Co.*, 146 Ga. 284, 91 S. E. 68; *Shellberg v. McMahon*, 98 Kans. 46, 157 Pac. 268. A payee in possession of a note for the benefit of a third person may maintain an action thereon in his own name as trustee of an express trust in Missouri: *Security Nat. Bank v. Field* (Mo. App.), 182 S. W. 815.

<sup>21</sup> *Smith v. Robins*, 236 Fed. 114, 149 C. C. A. 324.

<sup>22</sup> *Weber v. Columbia Amusement Co.*, 160 App. Div. 835, 146 N. Y. S. 53.

less than all.<sup>23</sup> On the other hand, if the right vested in plaintiffs is joint the action to enforce the same must be brought jointly.<sup>24</sup>

**§ 2101. Quantum meruit.**—When there has not been complete performance, and the other party is in no way responsible for such failure to perform, there can usually be no recovery of the agreed compensation as to the part of the contract not performed,<sup>25</sup> but only such sum as the work is reasonably worth.<sup>26</sup> Likewise when performance is prevented by one of the parties to the contract such act releases the other party from further performance or tender of performance and fixes his right of recovery,<sup>27</sup> the actual amount earned under the contract and damages.<sup>28</sup>

**§ 2102. Partial or entire breach.**<sup>29</sup>—In a proper case a plaintiff may have compensation for work done under an express contract not entirely performed, subject to deductions for the incompleting parts or defects.<sup>30</sup> But if the contract is entire and has not been performed and the work done thereunder has not been accepted there can be no recovery thereon.<sup>31</sup> But where one of the parties dies before completion of such a contract, or performance is rendered impossible without his fault, no liability in damages attaches and the party benefited is liable on an implied promise to the extent of the net value received to an amount not exceeding the agreed price.<sup>32</sup>

<sup>23</sup> Anderson v. Stayton State Bank, 82 Ore. 357, 159 Pac. 1033. Defendants, who are jointly and severally bound, may be sued jointly: Bryne v. Dorey, 221 Mass. 399, 109 N. E. 146.

<sup>24</sup> National Electric Signaling Co. v. Fessenden, 207 Fed. 915, 125 C. C. A. 363.

<sup>25</sup> Brison v. Pacific Commercial Co., 158 N. Y. S. 625.

<sup>26</sup> Parkersburg &c. Sand Co. v. Smith, 76 W. Va. 246, 85 S. E. 516. Where workmanship and material in a building are defective owner can only recover reasonable value of building: W. Bateson & Co. v. Baldwin Forging &c. Co., 75 W. Va. 574, 84 S. E. 887.

<sup>27</sup> Wood v. United States, 49 Ct. Cl. 119; National Supply Co. v. United Kansas Portland Cement Co., 91 Kans. 509, 138 Pac. 599; Holden v. Lyons, 175 Mo. App. 165, 157 S. W.

811; Ferber v. Cona, 89 N. J. L. 135, 97 Atl. 720; Mitchell v. Davis, 73 W. Va. 352, 80 S. E. 491. See also Chicago &c. R. Co. v. Martin (Tex. Civ. App.), 163 S. W. 313; Brown v. Ehlinger, 90 Wash. 585, 156 Pac. 544.

<sup>28</sup> Order of Aztecs v. Noble (Tex. Civ. App.), 174 S. W. 623.

<sup>29</sup> See ante § 1878 et seq.

<sup>30</sup> Waite v. C. E. Shoemaker & Co., 50 Mont. 264, 146 Pac. 736; Olney v. Daniel Birdsall & Co., 151 N. Y. S. 907 (contract to install boiler).

<sup>31</sup> Brown v. Vestal, 112 Ark. 608, 166 S. W. 556. See also International Text-Book Co. v. Schwickrath (Mo. App.), 179 S. W. 723 (correspondence course. Failure to furnish instruction papers). It is otherwise where the work has been accepted: Block v. Happ, 144 Ga. 145, 86 S. E. 316.

<sup>32</sup> Williams v. Butler, 58 Ind. App. 47, 105 N. E. 387. Thus where the

§ 2103. **Recovery for part or for substantial performance.**<sup>33</sup>—There may be a recovery for part performance of a contract when the parties agree that the rest of the work will be dispensed with,<sup>34</sup> or when the contract provides for the payment for so much of the material as is furnished and work done before destroyed by fire, etc.,<sup>35</sup> or when failure to entirely perform is caused by the other party's breach.<sup>36</sup> Recovery may also be had for extra work and materials furnished outside the scope of the contract, although the main contract is not completed.<sup>37</sup> It is obvious, however, there can be no recovery where there has been no performance, or even substantial performance, through no fault of the other party.<sup>38</sup> And there can be no recovery when the action is based on complete performance and the evidence fails to show substantial performance.<sup>39</sup>

§ 2104. **Defenses — Generally.**—Defendant will not be heard to say that the plaintiff would have derived no benefit from the performance of the agreement.<sup>40</sup> And conversely the defendant can not set up that he derived no benefit from the execution

use of a steamer was hired every Sunday for a certain period, but after the second Sunday it burned, recovery may be had for the two Sundays: *Steamboat Co. v. Transportation Co.*, 166 N. Car. 582, 82 S. E. 956. When the party guilty of the breach has acted in bad faith there can be no recovery: *Evans v. Goist*, 90 Wash. 100, 155 Pac. 780 (building contract). Owner of building is entitled to recover damages sustained from contractor's substitution of beech for maple flooring, irrespective of whether he was liable to the vendee of the building, or received as much for the building as if it had contained maple floors: *Lindenmann v. Kopczynski*, 155 Wis. 164, 144 N. W. 196.

<sup>33</sup> See ante § 1878 et seq.

<sup>34</sup> *Swartzman v. Babcock*, 218 Mass. 334, 105 N. E. 1022.

<sup>35</sup> *Roughton v. Brookings Lumber & Co.*, 26 Cal. App. 752, 148 Pac. 539; *H. G. Vogel Co. v. Reinhardt*, 91 Misc. 60, 154 N. Y. S. 260.

<sup>36</sup> *Miller v. United States*, 49 Ct. Cl. 276; *Fernald Woodward Co. v. Conway Co.*, 229 Fed. 819; *Shopper Pub. Co. v. Skat Co.*, 90 Conn. 317, 97 Atl.

317; *Union Fibre Co. v. Aaron Poultry Co.*, 176 Mo. App. 26, 162 S. W. 1046; *Fulton v. Canno*, 162 App. Div. 203, 147 N. Y. S. 721; *Zadek v. Olds*, 166 App. Div. 60, 151 N. Y. S. 634; *Nelson v. Reynolds (Okla.)*, 158 Pac. 301. See also *Stearns-Roger Mfg. Co. v. Jackson Lake Reservoir & Co.*, 61 Colo. 403, 158 Pac. 137. Contractor may recover the entire unpaid balance due under contract when performance is prevented by the owner and the work is substantially complete: *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769.

<sup>37</sup> *Along-the-Hudson Co. v. Ayres*, 170 App. Div. 218, 156 N. Y. S. 58.

<sup>38</sup> *Schwartz v. Sable*, 154 N. Y. S. 121.

<sup>39</sup> *Fischer v. Schram*, 173 App. Div. 147, 159 N. Y. S. 496.

<sup>40</sup> *Henry Oil Co. v. Head (Tex. Civ. App.)*, 163 S. W. 311 (suit on contract to drill oil well). In a suit for damages for breach of written agreement concerning the assets and business management of a corporation, entitling plaintiff to purchase defendant's interest, defendant, after breach, could not successfully plead



of the contract so long as he received what he bargained for.<sup>41</sup> Neither is it a defense that one defendant has withdrawn from a building enterprise and has notified the plaintiff thereof, so long as he has not been released by plaintiff.<sup>42</sup> A plea of contributory negligence is not available as a defense to a count *ex contractu* for the breach of a contract.<sup>43</sup> Fraud which concerns merely the consideration or inducement to an agreement rather than in its execution is sufficient to set aside the contract in equity but does not constitute a defense at law. But fraud in the inducement of the contract of such a nature as to render it against public policy or illegal may be set up as a defense in an action at law on the contract.<sup>44</sup> It is a good defense in an action for breach of

that plaintiff would not have found a purchaser: *Powell v. Batchelor*, 192 Mo. App. 67, 179 S. W. 751.

<sup>41</sup> *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275.

<sup>42</sup> *Fogarty v. Witty*, 244 Pa. 91, 90 Atl. 463.

<sup>43</sup> *Hart v. Coleman*, 192 Ala. 447, 68 So. 315.

<sup>44</sup> *Maine Northwestern Development Co. v. Northern Commercial Co.*, 213 Fed. 103. Conversely a legal defense may not be available in a suit in equity when the defense is based on defendant's own default: *Klaustermeyer v. Cleveland Trust Co.*, 89 Ohio 142, 105 N. E. 278. Further illustrations of instances when the defense was held bad are: Payments by the owner to other of the contractor's creditors are no defense to a suit brought on the owner's prior promise to pay for certain materials out of money due the contractor: *Park-Robertson Hardw. Co. v. Copeland*, 11 Ala. App. 447, 66 So. 880. An architect may recover for services rendered in connection with the construction of a building notwithstanding the owner negligently paid the contractor the full amount, and retained no reserve fund to enable him to compel the contractor to complete the construction, and to correct minor defects, despite insolvency: *Johnson v. O'Neill*, 181 Mich. 326, 148 N. W. 364, 150 N. W. 835. Where defendants contracted to sell yarn to plaintiff and subsequently turned the contract over to a third party who agreed to make the deliveries at an excess

price, and defendants assumed liability for the excess to plaintiff, defendants can not allege in a suit for such excess a cancellation of the contract by themselves and the third party; the third party having delivered all the yarn and been paid therefor: *Skyland Hosiery Co. v. Hughes*, 56 Pa. Super. Ct. 39. Under contract to put in an automatic sprinkler system, the fact that a fire occurred before completion of the system which might have been extinguished had the system been installed does not relieve defendant from liability under contract for materials, etc., destroyed: *Roughton v. Brookings Lumber & Co.*, 26 Cal. App. 752, 148 Pac. 539. It is no defense, to an action for breach of a contract, to pay a note, that the note was claimed by different parties: *Stokes v. Robertson*, 143 Ga. 721, 85 S. E. 895. When reformation is not sought recovery can not be defeated on a contract on account of mutual mistake in some of its provisions: *Syenite Trap Rock Co. v. Williams*, 167 App. Div. 774, 153 N. Y. S. 74. That the privilege given the owners by a building contract to do work at the contractor's cost, on his failure, was not taken advantage of by them does not avail him as a defense in an action to recover therefor: *Appelbaum v. Spinner-Hay Lumber Co.* (Tex. Civ. App.), 186 S. W. 810. In a suit for damages for breach of a contract to purchase and resell property of a company on which an option was held, mere threatened suit to estab-

contract that plaintiff has breached the contract as well as defendant,<sup>45</sup> or that there is less acreage than represented by a lease,<sup>46</sup> that one's signature was obtained by fraud, or that the contract is for any reason void,<sup>47</sup> or that the agreement expired several months prior to the time up to which plaintiff is seeking to recover,<sup>48</sup> or that the contract sued on constituted one of several, which were by agreement to constitute one transaction, and that one of such contracts had been breached by plaintiff,<sup>49</sup> or that money was to be paid over on the happening of a contingency which has never occurred.<sup>50</sup>

§ 2112. **Counterclaim and cross-actions.**—Negligence in supervision by an architect gives the employer a right of action for recoupment and counterclaim, the services having been accepted, but does not constitute a defense in bar.<sup>51</sup> When a set-off is available to defendants it is their duty to plead and prove the same, and it is not plaintiff's duty to procure an accounting to ascertain whether defendants are entitled thereto.<sup>52</sup>

lish lien upon or title to the property purchased is not a defense: *Lord v. Miller*, 86 Wash. 436, 150 Pac. 631. In a suit for work done or the use of tools, it is no defense that a third person was by plaintiff known to have been obligated to defendant to do the work: *Monongahela &c. Dredging Co. v. Smith* (W. Va.), 88 S. E. 1085.

<sup>45</sup> *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala. App. 178, 62 So. 564 (suit on voting contest). To same effect: *W. D. Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171.

<sup>46</sup> *Conn. v. Rosamond* (Tex. Civ. App.), 161 S. W. 73.

<sup>47</sup> *Ward v. Union Trust Co.*, 166 App. Div. 762, 152 N. Y. S. 237.

<sup>48</sup> *Universal Audit Co. v. Cameron*, 169 App. Div. 879, 155 N. Y. S. 1025 (good as a partial defense).

<sup>49</sup> *Torrey v. Shea*, 29 Cal. App. 313, 155 Pac. 820. To same effect: *Dixon & Co. v. Bronston Bros. & Co.*, 171 App. Div. 552, 157 N. Y. S. 385.

<sup>50</sup> *Meurer v. Kilgus*, 86 N. J. L. 243, 90 Atl. 1011.

<sup>51</sup> *Lindeberg v. Hodgens*, 89 Misc. 454, 152 N. Y. S. 229.

<sup>52</sup> *Barnum v. White*, 128 Minn. 58, 150 N. W. 227.

## CHAPTER L

### DAMAGES FOR BREACH OF CONTRACT

§ 2121. **Nominal damages.**—An action may be maintained for nominal damages for breach of contract although no pecuniary loss has been sustained.<sup>1</sup> Upon proving a breach of the contract one is entitled to recover nominal damages, but substantial damages can be recovered only by proving them.<sup>2</sup>

§ 2123. **General and special damages.**—General damages are such as naturally and proximately result from the wrong complained of, which the law implies or presumes to result from such wrong. Special damages are such as actually result from the wrong done, but which do not necessarily result therefrom, and for that reason are not implied by law, and to be recovered must be alleged and proved.<sup>3</sup> Even though alleged, special damages can not be recovered unless contemplated by the parties at the time of making the contract.<sup>4</sup> Notice of special conditions is

<sup>1</sup> *Brown v. Mostoller*, 167 Iowa 568, 149 N. W. 908 (open instead of tile drain constructed); *Boston v. Alexander*, 185 Mo. App. 16, 171 S. W. 582 (refusal to receive cow after purchasing same).

<sup>2</sup> *Smith v. Holmes*, 167 N. Car. 561, 83 S. E. 833; *Rainier v. Masters*, 79 Ore. 534, 154 Pac. 426, 155 Pac. 1197, L. R. A. 1916E, 1175n. See also *Hutton v. Tullis*, 93 Misc. 548, 157 N. Y. S. 214. "Nominal damages" is a trivial sum properly awarded in certain cases for a mere technical injury: *Blake v. Atlas Supply Co.*, 51 Okla. 426, 152 Pac. 81.

<sup>3</sup> Damages which naturally follow the breach of an agreement, not accompanied by any notice of special circumstances or conditions, are direct damages, while damages accompanied by such notice are consequential: *McKibbin v. Pierce* (Tex. Civ. App.), 190 S. W. 1149.

<sup>4</sup> *Aufderheide v. Fulk* (Ind. App.), 112 N. E. 399; *B. P. Ducas Co. v.*

*Bayer Co.*, 163 N. Y. S. 32. Thus it has been held that the salary of a vaudeville troupe can not be recovered as an element of damage arising out of the breach of a contract where the theater building involved was rented for a moving picture show: *Brownsville v. Tumlinson* (Tex. Civ. App.), 179 S. W. 1107. And in a suit against a railroad for breach of contract to grade land, plaintiffs were not entitled to damages for defendant's failure to provide them with a passway, on the ground that it was not within contemplation of parties: *Sandy Valley &c. R. Co. v. Hughes*, 172 Ky. 65, 188 S. W. 894. But in case one party has breached a contract with another on account of a third party's default, if the third party knew of circumstances creating special damages, such damages are recoverable and are termed consequential damages: *McKibbin v. Pierce* (Tex. Civ. App.), 190 S. W. 1149.

not necessary, however, when the contract is made with reference to such special conditions producing increased liability.<sup>5</sup>

§ 2124. **Exemplary damages.**—In general, exemplary damages can not be recovered for the breach of a contract, unless the breach is tortious, and such tortious conduct must precede or be coincident with, and not follow, the breach.<sup>6</sup> But in a shipping contract where there has been a reckless disregard of the shipper's rights, it has been held that punitive damages may be recovered.<sup>7</sup>

§ 2125. **Liquidated damages.**—When the damages are hard to ascertain and it was the intention of the parties to liquidate them in advance, and the amount agreed upon is reasonable, the provision for liquidated damages will be enforced.<sup>8</sup> But

<sup>5</sup> McKibbin v. Pierce (Tex. Civ. App.), 190 S. W. 1149.

<sup>6</sup> Oklahoma Fire Ins. Co. v. Ross (Tex. Civ. App.), 170 S. W. 1062. See also McLennan v. Church, 163 Wis. 411, 158 N. W. 73. The words "punitive," "exemplary" and "vindictive damages" are synonyms: Michelson v. Turk (W. Va.), 90 S. E. 395. For a case holding a telegraph company liable for punitive damages even though the actual damage was nominal or trifling, see: Webb v. Western Union Tel. Co., 167 N. Car. 483, 83 S. E. 568. See also Reber v. Bell Tel. Co. (Mo. App.), 190 S. W. 612. Contra: Ramey v. Western Union Tel. Co., 94 Kans. 196, 146 Pac. 421.

<sup>7</sup> Piero v. Southern Express Co., 103 S. Car. 467, 88 S. E. 269.

<sup>8</sup> United States v. Rubin, 233 Fed. 125; Morris v. United States, 50 Ct. Cl. 154 (liquidated damages for delay); Schoolnick v. Gold, 89 Conn. 110, 93 Atl. 124; Rabinowitz v. Apter, 90 Conn. 1, 96 Atl. 157; Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000; Standard Brewery Co. v. Lynch, 195 Ill. App. 445 (sole agency contract); Joeckel v. Johnson (Iowa), 159 N. W. 672; Nostdal v. Morehart, 132 Minn. 351, 157 N. W. 584 (contract to convey land); Pamkonin v. Gorder, 97 Nebr. 337, 149 N. W. 811; Reinhardt v. Borders (Tex. Civ. App.), 184 S. W. 791; Foos Gas Engine Co. v. Fairview Land & Co. (Tex. Civ. App.), 185

S. W. 382. However, if the amount of actual damages is readily ascertainable, a provision for liquidated damages will be held void: Childs v. Moore (Okla.), 157 Pac. 333. In the following cases the amount stipulated in damages was held not unreasonable: Banta v. Stamford Motor Co., 89 Conn. 51, 92 Atl. 665 (fifteen dollars for each day's delay in delivering a motor boat); Pine Bluff Hotel Co. v. Monk, 122 Ark. 308, 183 S. W. 761 (\$100 per day for delay in performance); Dean v. Connecticut Tobacco Co., 88 Conn. 619, 92 Atl. 408 (twenty-five dollars per day for delay in completing work); Walsh v. Methodist Episcopal Church (Tex. Civ. App.), 173 S. W. 241 (ten dollars per day for delay in building church); Nelson v. Butler (Tex. Civ. app.), 190 S. W. 811 (retention of earnest money on failure to accept deed); Knight v. McNeil (Vt.), 99 Atl. 728 (retention of \$500 earnest money); Schoolnick v. Gold, 89 Conn. 110, 93 Atl. 124 (contract not to re-engage in business and on breach of promise to pay a designated sum); Glaser v. Schrader, 192 Ill. App. 478 (contract not to re-engage in business and on breach pay \$1,000). It has been held that the sum named will be considered as liquidated damages unless the amount specified is "grossly excessive" or "exorbitant": Baltimore Bridge Co. v. United R. & Co., 125 Md. 208, 93 Atl. 420. If both parties

where the intention of the parties is in doubt the courts are inclined to hold the amount stipulated as a penalty and not a provision for liquidated damages.<sup>9</sup> Or if the amount named is unreasonable or unjust it will be construed as a penalty.<sup>10</sup> And where the amount is not irrevocably fixed and settled by the parties the inference will be against the conclusion that a designated sum was intended as liquidated damages.<sup>11</sup> Also when the contract stipulates a certain sum as payable on any breach of the contract, and the agreement might be breached in several respects, some of which would entail great loss and others only a trifling damage, the amount so stipulated has been held a penalty.<sup>12</sup> When the damages on breach are stipulated the amount recoverable is limited to the amount designated in the contract.<sup>13</sup>

§ 2126. **Liquidated damages—How distinguished from penalty.**—A “penalty” is security for performance while “liquidated damages” is an amount to be paid in lieu of performance.<sup>14</sup>

have breached the contract the amount stipulated as damages can not be recovered: *Guastavino Co. v. United States*, 50 Ct. Cl. 115; *Malcomson-Houghton Co. v. Gregorian Bldg. Co.*, 191 Mich. 678, 158 N. W. 126.

<sup>9</sup> *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872, Ann. Cas. 1916C, 337n (holding the word “liquidated” not always controlling); *Zenor v. Pryor*, 57 Ind. App. 222, 106 N. E. 746. The intention of the parties will be gathered from the entire instrument: *Elzey v. Winterset*, 172 Iowa 643, 154 N. W. 901. The following cases are instances where the provision was construed as a penalty: *Ross Tin Mine v. Cherokee Tin Mining Co.*, 103 S. Car. 243, 88 S. E. 8 (stipulation against delay in performing); *Walshe Mfg. Co. v. Smith Lumber Co. (Ala.)*, 72 So. 73 (breach of agreement for sale of lease); *Eikenberry v. Thorn* (Ind. App.), 112 N. E. 112 (non-performance of any one of several acts); *Haber v. Schonzeit*, 159 N. Y. S. 68 (breach of contract for sale or lease). The use of the words “penalty,” “forfeiture,” “liquidated damages” or “stipulated damages” is not conclusive: *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 148 C. C. A. 257; *Mon-*

*tague v. Robinson*, 122 Ark. 163, 182 S. W. 558; *Decker v. Pierce*, 191 Mich. 64, 157 N. W. 384. See also *Reinhardt v. Borders* (Tex. Civ. App.), 184 S. W. 791.

<sup>10</sup> *Muller Bank & Co. v. Georgia R. & Co.*, 145 Ga. 484, 89 S. E. 615; *Joeckel v. Johnson* (Iowa), 159 N. W. 672. If the parties have disregarded the principle of compensation for the breach the provision for stipulated damages will not be enforced: *Decker v. Pierce*, 191 Mich. 64, 157 N. W. 384.

<sup>11</sup> *Advance Amusement Co. v. Franke*, 188 Ill. App. 457 (the words “at his option” used).

<sup>12</sup> *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 267, Ann. Cas. 1916C, 337n. To same effect: *Fleisher v. Friob*, 97 Misc. 343, 161 N. Y. S. 940; *City Nat. Bank v. Kelly* 51 Okla. 445, 151 Pac. 1172.

<sup>13</sup> *Dean v. Connecticut Tobacco Co.*, 88 Conn. 619, 92 Atl. 408; *Baltimore Bridge Co. v. United R. & Co.*, 125 Md. 208, 93 Atl. 420; *Nelson v. Butler* (Tex. Civ. App.), 190 S. W. 811. See also *Knight v. McNeil* (Vt.), 99 Atl. 728.

<sup>14</sup> *Kuter v. State Bank*, 96 Kans. 485, 152 Pac. 662. Forfeitures are strictly construed: *Ditton v. Ringleman* (Okla.), 155 Pac. 563; *Rainier*

§ 2127. **Liquidated damages—Illustrations.**—A provision in a contract that required defendant to pay \$3,500 to his wrongfully-divorced wife in case he failed to pay her \$35 per month for six successive months has been held to be for liquidated damages.<sup>15</sup> In an action on an agreement by which a saloon keeper contracted to sell no domestic beer other than that manufactured by a certain brewer, the contract providing that in case of breach a sum of money stipulated as liquidated damages should be paid plaintiff, the amount named was construed as liquidated damages.<sup>16</sup> A provision for the retention of \$1,000 as damages for loss, expense, inconvenience and delay on breach of a contract for the sale of land at an agreed price of \$14,875 has been construed as a provision for liquidated damages.<sup>17</sup>

§ 2129. **Damages for breach of contract are compensatory—Damages within contemplation of parties.**—The amount recoverable for the breach of a contract is the damages naturally resulting from the breach and also such damages as both parties might reasonably expect to be the consequences of the breach.<sup>18</sup> This rule covers special circumstances known and contracted with reference to by both parties.<sup>19</sup> But damages which can not be considered as having been contemplated by the parties, or loss of profits in a business, unless the data of estimation are so definite and certain that they can be ascertained by calculation, can not be recovered.<sup>20</sup> The purpose in allowing damages is to compensate

v. Masters, 79 Ore. 534, 154 Pac. 426, 155 Pac. 1197, L. R. A. 1916E, 1175n.

<sup>15</sup> Hughes v. Hughes, 162 Ky. 505, 172 S. W. 960.

<sup>16</sup> Standard Brewery v. Lynch, 195 Ill. App. 445.

<sup>17</sup> Jockel v. Johnson (Iowa), 159 N. W. 672. See also Nelson v. Butler (Tex. Civ. App.), 190 S. W. 811.

<sup>18</sup> Illinois Cent. R. Co. v. Brothers (Ala.), 67 So. 628; Dice v. Zweigart, 161 Ky. 646, 171 S. W. 195, Ann. Cas. 1916F, 1155n; Weber Implement Co. v. Acme Harvesting Mach. Co., 268 Mo. 363, 187 S. W. 874; Gourley v. American Hardwood Lumber Co., 185 Mo. App. 360, 170 S. W. 339; Davis v. New England Cotton Yarn Co., 77 N. H. 403, 92 Atl. 732; Lommen v. Danaher, 165 Wis. 15, 161 N. W. 14. Where labor is required to be employed as a result of the breach

the reasonable cost of the labor may be recovered: Allen Iron &c. Co. v. Provident Iron &c. Co., 63 Pa. Super. Ct. 459. There can be no recovery for matters not contemplated by the parties: Sandy Valley &c. R. Co. v. Hughes, 172 Ky. 65, 188 S. W. 894, 194 S. W. 344. There can be no recovery for expenses incurred or materials used when such expenses would have been incurred or materials used irrespective of the breach: Porth v. Talbot Boiler Co., 161 N. Y. S. 281.

<sup>19</sup> Grosse v. Petersen, 30 Cal. App. 482, 158 Pac. 511; Strashaugh v. Stewart Sanitary Can Co., 127 Md. 632, 96 Atl. 863.

<sup>20</sup> Illinois Cent. R. Co. v. Brothers (Ala.), 67 So. 628 (this rule applies to contracts of carriage). For breach of contract to employ foreign laborers

the party injured by the breach for any loss he may have sustained. Therefore one is not entitled to recover more than he would have received by the performance of the contract, unless it is a case in which exemplary damages may be awarded.<sup>21</sup> Thus when false representations are made as to the amount due under a written contract the measure of damage is the difference between the amount actually received by plaintiff and that to which it was entitled.<sup>22</sup>

**§ 2130. Difficulty of establishment of damages not a bar to recovery.**—The mere fact that the damages arising out of the breach of a contract are based on profits or other elements that make them more or less speculative and indefinite is no reason for denying recovery when they can be estimated with a reasonable degree of certainty.<sup>23</sup> And it has been held that one may

plaintiff could recover the proximate damage sustained but not for injuries to his reputation or business: *Mastoras v. Chicago & C. R. Co.*, 217 Fed. 153.

<sup>21</sup> *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487. In a suit for damages and expenses incurred by defendant's failure to place gasoline oyster boat in condition for use by a certain date, value of gasoline used by plaintiff during the time he did not have his own boat and which would have been used in his own boat was not allowable as an element of damages: *Porth v. Talbot Boiler Co.*, 161 N. Y. S. 281.

<sup>22</sup> *Brocklehurst & C. Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646. Where a construction company received a sum of money in advance from plaintiff for the construction of a spur track, held that, the construction company having defaulted in its contract with plaintiff and the railroad company having refused to carry it out, plaintiff may recover the amount advanced to the construction company: *Muskogee Co. v. Yahola Sand Co.* (Okla.), 159 Pac. 898. When through the breach of a contract plaintiff is deprived of the use of his tools the measure of his damage is the value of their use during the time he is deprived of them: *Sipes v. Barlow*, 197 Ill. App. 239. On breach of a con-

struction contract by failure to complete same the measure of damages is the cost to plaintiffs to complete the contract plus compensation for inconvenience, etc.: *Sandy Valley & C. R. Co. v. Hughes*, 172 Ky. 65, 188 S. W. 894, 194 S. W. 344. Also under a contract to burn brick at a certain price per thousand and through the negligent performance of such agreement the brick are rendered worthless, the measure of damages is, at least, the minimum price of a like number of merchantable brick: *Luce v. Arkansas Brick & C. Co.*, 125 Ark. 219, 188 S. W. 566. In an action to recover for the wrongful termination of a contract of employment for a period of five years at an agreed salary, which contract had been partly performed, the measure of damage is the present value of what would have become due under the contract if it had been fully performed: *Gilman v. Lamson Co.*, 234 Fed. 507, 148 C. C. A. 273. On a counterclaim to recover for breach of a contract to buy wood, the measure of damages is interest, expenses, and deterioration during the period of suspension, and not loss of profits on wood which could have been cut during such periods: *Champion Fiber Co. v. Hardin*, 172 N. Car. 767, 90 S. E. 919.

<sup>23</sup> *Young v. Tilley* (Mo. App.), 190 S. W. 95. To same effect: *Bridge-*

recover substantial damages for the builder's delay in delivering a motor boat, although it was merely for the personal use and pleasure of the owner.<sup>24</sup>

§ 2131. **Damages must be proximate and not remote or speculative.**—Damages that are uncertain, contingent or speculative can not be recovered.<sup>25</sup> Moreover, the damages recoverable are those resulting directly and proximately from defendant's breach,<sup>26</sup> and not such as are merely conjectural.<sup>27</sup> It has been held that an elevator could not recover for damages to grain caused by the elements on failure of defendant to thresh its grain as agreed on the theory that the damages were too remote.<sup>28</sup>

§ 2134. **Loss of profits as element of damages for breach.**—When the profits of a business are reasonably certain and were contemplated by the parties when the contract was made recovery may be had therefor on breach of the contract,<sup>29</sup> otherwise not.<sup>30</sup>

port v. Aetna Indemnity Co., 91 Conn. 197, 99 Atl. 566; Johnson v. Harper Transp. Co., 228 Fed. 730.

<sup>24</sup> Banta v. Stamford Motor Co., 89 Conn. 51, 92 Atl. 665.

<sup>25</sup> Birdsey Co. v. Porter, 18 Ga. App. 391, 89 S. E. 435; New England Iron Works Co. v. Jacob, 223 Mass. 216, 111 N. E. 867 (creditor's contract to advance money). In an action by the vice president of corporation against directors for exclusion from management, it was held that the court erred in ordering issue of what damage company suffered from plaintiff's exclusion tried by jury; the damages being too speculative: Momand v. Landers, 174 App. Div. 227, 160 N. Y. S. 1053. See also concerning intervening cause: Brookings Lumber & Co. v. Manufacturer's Automatic Sprinkler Co., 173 Cal. 679, 161 Pac. 266 (loss resulting from fire).

<sup>26</sup> Ritz Cycle Car Co. v. Driggs-Seabury Ordnance Corp., 237 Fed. 125.

<sup>27</sup> Damages are not allowable as a set-off in an action on the contract when the percentage of loss is conjectural and rests on conclusions of witnesses that appear too high: Peter-

man v. Goss, 93 Wash. 184, 160 Pac. 432. The above case holds that there may be a counterclaim for interest on money borrowed where it was necessary to borrow the money on account of delay of other party.

<sup>28</sup> Lynn v. Seby, 29 N. Dak. 420, 151 N. W. 31.

<sup>29</sup> Streudle v. Leroy, 122 Ark. 189, 182 S. W. 898, Ann. Cas. 1917D, 618n (contract of employment); United States Fidelity & Co. v. Ridge (Mo. App.), 179 S. W. 791 (insurance agency contract); Bokeshe Smokeless Coal Co. v. Bray (Okla.), 155 Pac. 226 (contract for operation of coal mine); Markey v. Boswell (Okla.), 162 Pac. 193 (failure to furnish supplies so that crop might be sown); McGinnis v. Studebaker Corp., 95 Ore. 519, 146 Pac. 825, 147 Pac. 525, L. R. A. 1916B, 868n, Ann. Cas. 1917B, 1190n; Grand Prairie Gravel Co. v. Wills Co. (Tex. Civ. App.), 188 S. W. 680 (contract to sell gravel); Loutzenhiser v. Peck, 89 Wash. 435, 154 Pac. 814 (contract not to re-engage in business).

<sup>30</sup> Sipes v. Barlow, 197 Ill. App. 239 (house moving contract); Detroit Fireproofing Tile Co. v. Vinton Co.,



§ 2136. **Loss of profits—Partial or entire breach.**—On the breach of an entire contract the prospective profits are recoverable when not contingent and speculative.<sup>31</sup>

§ 2139. **Loss of profits—Examples of profits disallowed for remoteness.**—The act of a contractor in leaving uncovered a hole in the roof of the building, through which it rained did not entitle plaintiff to recover for loss of profits.<sup>32</sup>

§ 2140. **Loss of profits—Examples of profits allowed.**—On breach of his contract by the company employing him an insurance agent is not barred from recovering profits he would have made out of his commissions on premiums, on the theory that the amount was to a certain extent speculative.<sup>33</sup> In a suit for the breach of an advertising contract, recovery may be had for the reasonable profits of the contract.<sup>34</sup>

§ 2141. **Prospective damages for breach of contract.**—Even though it is impossible at the time of the suit to show actual damage up to that time this does not preclude recovery for damages reasonably certain to result in the future.<sup>35</sup>

§ 2142. **Prospective damages — Continuing contracts.**—Also when there is a total or partial breach of a continuing contract there should be brought only one action in which recovery should be had for future as well as past damage.<sup>36</sup>

§ 2144. **Mental anguish as damages for breach of contract.**—In the majority of states there can be no recovery for mental anguish growing out of the breach of a contract, but in some jurisdictions recovery therefor may be had.<sup>37</sup>

§ 2150. **Measure of damages determined by the contract.**—On the breach of a contract the other party is entitled to full compensation for the loss sustained, measured by the natural and

190 Mich. 275, 157 N. W. 8; Yazoo &c. R. Co. v. Consumers Ice &c. Co. (Miss.), 67 So. 657.

<sup>31</sup> Muskogee Co. v. Yahola Sand Co. (Okla.), 159 Pac. 898.

<sup>32</sup> Welch v. Evans Bros. Const. Co., 189 Ala. 548, 66 So. 517.

<sup>33</sup> Oklahoma Fire Ins. Co. v. Ross (Tex. Civ. App.), 170 S. W. 1062.

<sup>34</sup> Shopper Pub. Co. v. Skat Co., 90 Conn. 317, 97 Atl. 317.

<sup>35</sup> Bridgeport v. Aetna Indemnity Co., 91 Conn. 197, 99 Atl. 566.

<sup>36</sup> Bridgeport v. Aetna Indemnity Co., 91 Conn. 197, 99 Atl. 566; Twitchell v. Glenwood-Inglewood Co., 131 Minn. 375, 155 N. W. 621.

<sup>37</sup> Pullman Co. v. Meyer, 195 Ala. 397, 70 So. 763 (breach of contract to furnish Pullman car).

proximate consequences of the breach.<sup>38</sup> Thus when there is a misrepresentation of the amount due under a written contract the measure of damage is the difference between the amount actually received and the amount to which he was entitled.<sup>39</sup> Or it may be the amount of money advanced under a contract,<sup>40</sup> or the value of the use of tools for the time plaintiff was deprived of their use,<sup>41</sup> or the cost of completing the contract, plus, perhaps, compensation for inconvenience,<sup>42</sup> or the value of goods destroyed by the breach.<sup>43</sup>

§ 2151. **Duty to mitigate damages.**—Upon the breach of a contract the person injured thereby is bound to make reasonable exertions to reduce the consequences of the injury and minimize his damages.<sup>44</sup> Thus where logs were injured by exposure it was the duty of the party damaged thereby to complete the contract and prevent damage.<sup>45</sup> Also where one contracted to plaster a building in a good workmanlike manner and make good any defective work, it is the duty of the other party, on breach of such agreement, to repair defects promptly and thus lessen his dam-

<sup>38</sup> *Johnson v. Harper Transp. Co.*, 228 Fed. 730; *Feldman v. Wear-U-Well Shoe Co.* (Mich.), 157 N. W. 395; *Lommen v. Danaher*, 165 Wis. 15, 161 N. W. 14. Damages are determined as of the time of the breach: *McLennan v. Church*, 163 Wis. 411, 158 N. W. 73. As to time of suing, see: *Stoner-McCray System v. Manhattan Oil Co.*, 176 Iowa 630, 156 N. W. 683.

<sup>39</sup> *Brocklehurst &c. Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646.

<sup>40</sup> *Muskogee Co. v. Yahola Sand Co.* (Okla.), 159 Pac. 898.

<sup>41</sup> *Sipes v. Barlow*, 197 Ill. App. 239.

<sup>42</sup> *Sandy Valley &c. R. Co. v. Hughes*, 172 Ky. 65, 188 S. W. 894, 194 S. W. 344.

<sup>43</sup> *Luce v. Arkansas &c. Mfg. Co.*, 125 Ark. 219, 188 S. W. 566.

<sup>44</sup> *Peck v. Chicago Rys. Co.*, 270 Ill. 34, 110 N. E. 414; *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737n; *Phillips v. Todd* (Mo. App.), 180 S. W. 1039; *National Nassau Bank v. Ludington's Sons*, 164 App. Div. 466, 149 N. Y. S. 967; *Mt. Gilead Cotton Oil Co. v. Western Union Tel. Co.*, 171 N. Car. 705, 89 S. E. 21; *Fewell v. Catawba Power*

*Co.*, 102 S. Car. 452, 86 S. E. 947; *Ft. Worth &c. R. Co. v. Allen* (Tex. Civ. App.), 189 S. W. 765 (shipment of live stock); *King County v. Seattle Cedar Lumber Mfg. Co.*, 94 Wash. 84, 162 Pac. 27, L. R. A. 1917C, 1184n. This rule applies to a contract of carriage: *Louisville R. &c. Co. v. Comley*, 169 Ky. 11, 183 S. W. 207. Plaintiff has no right to run up his damage: *Kennedy v. Meilicke*, 90 Wash. 238, 155 Pac. 1043. That plaintiff could have lessened or prevented the damages growing out of the breach of the contract is a matter of defense to be proved by defendant: *Wilson v. Scarboro*, 169 N. Car. 654, 86 S. E. 611, 171 N. Car. 606, 88 S. E. 872, 90 S. E. 780. One is entitled to recover the legitimate expenses incurred by him in an honest endeavor to reduce his damages: *Morrison v. Queen City Electric &c. Co.*, 193 Mich. 604, 160 N. W. 434. As to measure of damages where steps have been taken to mitigate them, see: *Collins v. Twin Falls &c. Water Co.*, 28 Idaho 1, 152 Pac. 200.

<sup>45</sup> *Ford Lumber Co. v. Cornett*, 171 Ky. 404, 188 S. W. 466.

ages.<sup>46</sup> And where a lessee abandons a lease the owner should, if possible, minimize his loss by finding tenants.<sup>47</sup> Likewise, where one obtained or could have obtained similar employment to that provided for in his contract, his damages for breach thereof will be reduced to that extent.<sup>48</sup>

**§ 2152. Duty to mitigate reasonably construed.**—The rule requiring one to mitigate his damages is given a reasonable construction, and it is said that the test is what a reasonably prudent man would do under the circumstances.<sup>49</sup> If the act of the party liable prevents the taking of steps to mitigate damages the party damaged is released from the necessity of trying to lessen his damages.<sup>50</sup> And the rule concerning mitigation of damages does not require one who has ordered cars for a shipment of grain and they are furnished him without grain doors to furnish such doors himself in order to lessen the damages resulting from delay,<sup>51</sup> nor is one suing to recover for misrepresentations as to patent right territory required to make reasonable efforts to realize on his investment.<sup>52</sup> Nor does the possibility that plaintiff may, in the future, breach conditions which were subsequent reduce plaintiff's recovery in an action for breach of contract.<sup>53</sup>

**§ 2153. Interest on Damages.**—When the damages arising out of the breach of a contract are unliquidated, interest, as a general rule, can not be recovered.<sup>54</sup> It is also held to be error to allow interest on the principal sum sued for in an action for breach of contract.<sup>55</sup> But it has been held that where one recovered only the actual damage sustained, as distinguished from

<sup>46</sup> *Craig v. McNichols Furniture Co.* (Mo. App.), 187 S. W. 793.

<sup>47</sup> *Henry Rose Mercantile & Co. v. Smith*, 139 La. 217, 71 So. 487.

<sup>48</sup> *Farrow Mercantile Co. v. Rig-gins*, 14 Ala. App. 529, 71 So. 963.

<sup>49</sup> *American Smelting & Co. v. Riverside Dairy & Co. Farm*, 236 Fed. 510, 149 C. C. A. 562.

<sup>50</sup> *Rull v. Rainey*, 99 Kans. 57, 160 Pac. 1016.

<sup>51</sup> *Fox v. Chicago & C. R. Co.*, 188 Ill. App. 11.

<sup>52</sup> *Berhenke v. Penfield*, 94 Kans. 532, 146 Pac. 1187. For further illustrations, see: *Burleigh & Sons v. Overton*, 173 Ky. 70, 190 S. W. 472; *Policastro v. Sprague*, 175 App. Div. 417, 161 N. Y. S. 912; *Wilson v. Trexler*, 106 S. Car. 15, 90 S. E. 180.

<sup>53</sup> *Ransom & Co. v. Pinches*, 234 Fed. 847, 148 C. C. A. 445.

<sup>54</sup> *Proctor & Co. v. Emerman*, 191 Ill. App. 530; *Stevens v. Lewis-Wilson-Hicks Co.*, 168 Ky. 648, 182 S. W. 840; *Levering & Co. v. Century Holding Co.*, 165 App. Div. 174, 150 N. Y. S. 649; *Regan v. New York*, 175 App. Div. 861, 162 N. Y. S. 400; *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, 80 Ore. 124, 156 Pac. 584; *Houston & C. R. Co. v. Lewis* (Tex. Civ. App.), 185 S. W. 593. See also *Johnson v. Jones*, 62 Ind. App. 4, 112 N. E. 830.

<sup>55</sup> *Georgia Refining Co. v. Atlanta Milling Co.*, 15 Ga. App. 460, 83 S. E. 795.

profits lost, he was entitled to recover interest from the date of the suit.<sup>56</sup> It has been held in Georgia that in a suit to recover the value of cars destroyed while in the custody of defendant as bailee, interest may be recovered, as the suit was based on the breach of the contract of bailment and did not sound in tort.<sup>57</sup>

§§ 2154-2267. **Damages in particular relations.**—A servant wrongfully discharged before the expiration of his term is entitled to recover damages in such amount as it is reasonably certain will be lost by the breach.<sup>58</sup> Where services have not been performed the measure of damages for the breach of the contract is the amount of wages to be paid less such sum as may be actually earned, or which could have been earned by the exercise of reasonable diligence from other employment.<sup>59</sup> As a general rule a carrier in case of loss or injury to property is liable for such damages as proximately result from its breach of duty or of special contract,<sup>60</sup> which is ordinarily the actual value of the property lost to the owner.<sup>61</sup> When a carrier breaches its contract to ship goods over a designated route by sending the goods over a different route, and the shipper is damaged thereby, compensatory damages may be recovered therefor even though the bill of lading limited the liability of the carrier. By breaching the contract the carrier has lost the benefit of the clause limiting its liability.<sup>62</sup> The damages recoverable for conversion by a carrier of articles delivered to it for transportation is the value of the articles at the time and place of conversion.<sup>63</sup> For the conversion

<sup>56</sup> *Gourley v. American Hardw. Co.*, 185 Mo. App. 360, 170 S. W. 339. See also *Lord v. Sanitary Drinking Cup Co.*, 191 Ill. App. 150; *Thompson v. Romack*, 174 Iowa 155, 156 N. W. 310.

<sup>57</sup> *Bunn v. Atlantic Coast Line R. Co.*, 18 Ga. App. 66, 88 S. E. 798. See also *Happ Bros. Co. v. Hunter Mfg. & Co.*, 145 Ga. 836, 90 S. E. 61; *Baltimore v. Clark*, 128 Md. 291, 97 Atl. 911. On the breach of a contract to sell shares of stock to be paid for out of the dividends thereon if plaintiff is credited with interest on the dividends defendant should be credited with interest on the purchase-price of the stock until paid for: *Darling v. Bradstreet*, 113 Maine 136, 93 Atl. 50.

<sup>58</sup> *Marx v. New York Ribbon Co.*, 95 Misc. 551, 159 N. Y. S. 853.

<sup>59</sup> *Hostettler v. Mushrush*, 194 Ill. App. 58. See also *Denniston v. Finnegan* (174 App. Div. 8), 160 N. Y. S. 5; *American Nat. Ins. Co. v. Van Dusen* (Tex. Civ. App.), 185 S. W. 634.

<sup>60</sup> *Pacific Express Co. v. Rudman* (Tex. Civ. App.), 145 S. W. 268.

<sup>61</sup> *St. Louis & C. R. Co. v. Dague*, 118 Ark. 277, 176 S. W. 138, Ann. Cas. 1917B, 577n.

<sup>62</sup> *O. K. Transfer & Co. v. Neill* (Okla.), 159 Pac. 272, L. R. A. 1917A, 58.

<sup>63</sup> *Southern Express Co. v. Reagin*, 228 Fed. 14, 142 C. C. A. 470; *Martin Woods Co. v. Chicago & C. R. Co.*, 161 Iowa 639, 143 N. W. 497; *Meek v. Union Pac. R. Co.*, 95 Kans. 111, 147

of household goods their value to the owner is the criterion for the fixing of damages.<sup>64</sup> As a general rule one is not entitled to recover the value of goods because of delay alone, regardless of the length of delay.<sup>65</sup> But if damage results from a failure to deliver property within a reasonable time the carrier is liable in damages.<sup>66</sup> And for such unreasonable delay in transportation the consignor is entitled to recover the difference between the market value of the goods at the time and place where delivery should have been made and their market value when the delivery is actually made.<sup>67</sup> Such rule is held to apply whether the property is shipped for resale or for some other purpose.<sup>68</sup> Where the property is not intended for market and consists of articles not having any rental value the measure of damages for delay is ordinarily the reasonable value of the use of the property to the owner during the period of delay.<sup>69</sup> As a general rule recovery may also be had for the necessary expenses incurred by the owner on account of the delay,<sup>70</sup> interest on the value of the property during its retention, and any depreciation in the value while withheld.<sup>71</sup> It has been held, however, that where the market price at destination increases the shipper is not injured by the delay and is not entitled to recover any damages.<sup>72</sup> In order to recover special damages, that is, beyond such as could be reasonably anticipated and such as may be said to follow as an ordinary con-

Pac. 1112; *Baltimore &c. R. Co. v. Sperber & Co.*, 117 Md. 595, 84 Atl. 72; *Texas &c. R. Co. v. Crowder* (Tex. Civ. App.), 165 S. W. 116; *Quannah &c. R. Co. v. Campbell* (Tex. Civ. App.), 170 S. W. 859.

<sup>64</sup> *Pecos &c. R. Co. v. Porter* (Tex. Civ. App.), 156 S. W. 267; *Whitely v. Gulf &c. R. Co.* (Tex. Civ. App.), 183 S. W. 36.

<sup>65</sup> *Higgins v. U. S. Express Co.*, 83 N. J. L. 398, 85 Atl. 450.

<sup>66</sup> *Mackin v. Minneapolis &c. R. Co.*, 176 Iowa 150, 157 N. W. 729; *Johnson v. New York &c. R. Co.*, 111 Maine 263, 88 Atl. 988; *St. Louis &c. R. Co. v. Dean* (Tex. Civ. App.), 152 S. W. 1127; *Gulf &c. R. Co. v. Marshall* (Tex. Civ. App.), 164 S. W. 446.

<sup>67</sup> *Idaho Sheep Co. v. Oregon Short Line R. Co.*, 188 Ill. App. 591; *McFadden v. Union Stockyards &c. Co.*, 185 Ill. App. 94; *Smith v. Chicago &c. R. Co.*, 183 Mo. App. 180, 170 S. W. 324; *Hunt v. Chicago &c. R. Co.*, 95

*Nebr.* 746, 146 N. W. 986. See also *Burtless v. Oregon Short Line R. Co.*, 180 Ill. App. 249; *McFall v. Chicago &c. R. Co.*, 181 Mo. App. 244, 168 S. W. 344; *Southerland v. Atlantic Coast Line R. Co.*, 158 N. Car. 327, 74 S. E. 102; *Blackwell v. Oregon &c. R. Co.*, 82 Ore. 303, 161 Pac. 565; *Gulf &c. R. Co. v. Ideus* (Tex. Civ. App.), 157 S. W. 173; *Chicago &c. R. Co. v. Simpson*, 23 Wyo. 342, 151 Pac. 902.

<sup>68</sup> *Muir v. Missouri &c. R. Co.*, 168 Mo. App. 542, 154 S. W. 877; *Texas-Mexican R. Co. v. Reed* (Tex. Civ. App.), 165 S. W. 4.

<sup>69</sup> *Pecos &c. R. Co. v. Grundy* (Tex. Civ. App.), 171 S. W. 318.

<sup>70</sup> *Idaho Sheep Co. v. Oregon &c. R. Co.*, 188 Ill. App. 591.

<sup>71</sup> *Missouri &c. R. Co. v. Long* (Tex. Civ. App.), 167 S. W. 769.

<sup>72</sup> *Stevens v. St. Louis Southwestern R. Co.* (Tex. Civ. App.), 178 S. W. 810.

sequence of the breach, they must be alleged and proved.<sup>73</sup> As a general rule, whether the damages sought to be recovered are within the contemplation of the parties to the contract, is a question for the jury.<sup>74</sup> The measure of damages for a breach of contract for carriage of a passenger is compensation for the actual damages he sustains as a natural and proximate result of the breach,<sup>75</sup> and such as could reasonably have been anticipated might result from the breach. Damages for wrongful or improper ejectment in the absence of malice or wantonness are compensatory only,<sup>76</sup> and in a number of jurisdictions punitive damages are not allowed against the corporation even then when it did not authorize, participate in, or satisfy the set. Where no other damages are sustained from a refusal of sleeping-car accommodations, the amount paid therefor with interest is recoverable.<sup>77</sup> A party having a contract with a telephone company for service and who fails to receive it because of the negligence of the employes is entitled to nominal damages and such actual damages as he suffered in consequence of such breach.<sup>78</sup> The damages recoverable in the suits against telegraph companies for negligence or defaults in the transmission or delivery of messages is ordinarily the loss actually sustained by the plaintiff.<sup>79</sup> For every actionable breach of duty nominal damages may be recovered without proof of actual damages;<sup>80</sup> but unless actual damages are proved the recov-

<sup>73</sup> *Southern R. Co. v. Langley*, 184 Ala. 524, 63 So. 545; *Missouri &c. R. Co. v. Foote*, 46 Okla. 578, 149 Pac. 223, Ann. Cas. 1917D, 173n; *Foster v. International &c. R. Co.* (Tex. Civ. App.), 175 S. W. 762; *Ft. Worth &c. R. Co. v. Shank* (Tex. Civ. App.), 167 S. W. 1093.

<sup>74</sup> *Pecos &c. R. Co. v. Maxwell* (Tex. Civ. App.), 156 S. W. 548.

<sup>75</sup> *Dodge v. Northern Electric R. Co.*, 22 Cal. App. 239, 133 Pac. 1161; *Chesapeake &c. R. Co. v. Gatewood*, 155 Ky. 102, 159 S. W. 660; *Cuozzo v. Maine Cent. R. Co.*, 112 Maine 560, 91 Atl. 1006; *St. Louis &c. R. Co. v. Davis*, 37 Okla. 340, 132 Pac. 337; *Chicago &c. R. Co. v. Wells* (Okla.), 156 Pac. 314.

<sup>76</sup> *Voves v. Great Northern R. Co.*, 26 N. Dak. 110, 143 N. W. 760, 48 L. R. A. (N. S.) 30n, and cases on both

sides of the question reviewed in note. See also *Reasor v. Paducah &c. Ferry Co.*, 152 Ky. 220, 153 S. W. 222, 43 L. R. A. (N. S.) 820n.

<sup>77</sup> *Pullman Co. v. Custer* (Tex. Civ. App.), 140 S. W. 847.

<sup>78</sup> *Vinson v. Southern Bell Tel. &c. Co.*, 188 Ala. 292, 66 So. 100, L. R. A. 1915C, 450n.

<sup>79</sup> *Jackson v. Western Union Tel. Co.*, 174 Mo. App. 70, 156 S. W. 801; *Kerns v. Western Union Tel. Co.*, 174 Mo. App. 435, 160 S. W. 556; *Gardner v. Postal Tel. &c. Co.*, 171 N. Car. 405, 88 S. E. 630, L. R. A. 1916E, 484; *Levy v. Western Union Tel. Co.*, 39 Okla. 416, 135 Pac. 423.

<sup>80</sup> *Vinson v. Southern Bell Tel. &c. Co.*, 188 Ala. 292, 66 So. 100, L. R. A. 1915C, 450n; *Howard v. Western Union Tel. Co.*, 106 Ark. 559, 153 S. W. 803.

ery is limited to nominal damages.<sup>81</sup> The general rule, that such damages are recoverable as may fairly and reasonably be considered as arising naturally from the breach of the contract and such as may be supposed to have been within the contemplation of the parties at the time of making the contract, is applicable to such contracts.<sup>82</sup> The plaintiff is entitled to recover such general damages as are the direct and natural result of the breach itself, and this generally includes the charges for transmission;<sup>83</sup> but the company is not liable for special or consequential damages unless it had notice in some manner, either from the terms of the message or from the facts and circumstances, that such damages would probably result.<sup>84</sup> The damages must be certain in their nature and in the cause from which they proceed.<sup>85</sup> There can be no recovery of damages that are not the natural and direct and proximate consequence of the default complained of.<sup>86</sup> Where messages are written in cipher and unintelligible except to the sender and addressee and the company has no information otherwise as to its character or purport the party injured is limited to nominal damages or at most the sum paid for transmission.<sup>87</sup> The measure of damages where a bailee delays returning the property within the time stipulated in the contract is ordinarily the value of the use of the property during the time it is withheld.<sup>88</sup> And where goods are left with a bailee for alterations or repairs and by reason of negligence or unskilfulness the work is improperly done, the bailor may bring an action for breach of

<sup>81</sup> Fox v. Tel. Co., 201 Ill. App. 477; Stark v. Western Union Tel. Co., 107 Miss. 332, 65 So. 279.

<sup>82</sup> Western Union Tel. Co. v. Holder, 117 Ark. 210, 174 S. W. 552; Cain v. Western Union Tel. Co., 89 Kans. 797, 133 Pac. 874; Tippin v. Western Union Tel. Co., 194 Mo. App. 80, 185 S. W. 539; Nash Co. v. Western Union Tel. Co., 98 Nebr. 210, 152 N. W. 387; Gardner v. Postal Tel. & C. Co., 171 N. Car. 405, 88 S. E. 630, L. R. A. 1916E, 484.

<sup>83</sup> Western Union Tel. Co. v. Jackson Lumber Co., 187 Ala. 629, 65 So. 962; Ramey v. Western Union Tel. Co., 94 Kans. 196, 146 Pac. 421; Cain v. Western Union Tel. Co., 89 Kans. 797, 133 Pac. 874.

<sup>84</sup> Western Union Tel. Co. v. Johnson (Tex. Civ. App.), 164 S. W. 903; Western Union Tel. Co. v. Chamber-

lain (Tex. Civ. App.), 169 S. W. 370; Western Union Tel. Co. v. Tucker (Tex. Civ. App.), 194 S. W. 130.

<sup>85</sup> Davies v. Western Union Tel. Co., 93 S. Car. 318, 76 S. E. 820; Greer v. Western Union Tel. Co., 96 S. Car. 423, 81 S. E. 517.

<sup>86</sup> Mueller v. Western Union Tel. Co., 173 Iowa 402, 155 S. W. 827; Cain v. Western Union Tel. Co., 89 Kans. 797, 133 Pac. 874; Western Union Tel. Co. v. Caumissar, 160 Ky. 569, 169 S. W. 1026; Western Union Tel. Co. v. Bloede Co., 127 Md. 344, 96 Atl. 685.

<sup>87</sup> Nash Co. v. Western Union Tel. Co., 98 Nebr. 210, 152 N. W. 387; Bertuch v. United States & Hayti Tel. & C. Co., 79 Misc. 10, 139 N. Y. S. 289.

<sup>88</sup> Missouri River Trans. Co. v. Minneapolis & C. R. Co., 34 S. Dak. 1, 147 N. W. 82.

contract and recover for his damages the difference in the value of the article in its present condition and what it would have been worth if the work had been done properly.<sup>89</sup> Where the article bailed is injured while in the possession of the bailee, the measure of damages recoverable is the difference between the value of the property before and after the injury,<sup>90</sup> or an amount sufficient to place the property in the condition required under the contract.<sup>91</sup> In conformity with the principle announced in this section in the original work it has been held that where a policy of insurance provides for the payment of a stated sum and monthly instalments until a designated sum is paid and gives commuted value of instalments, the beneficiary is entitled, on insurer's breach, to recover the present value of the instalments plus interest at the legal rate from date of demand.<sup>92</sup> Damages may be recovered when a building contractor fails to loan the owner money to make payments when such damages were reasonably in contemplation by both parties at the time the agreement was made, as a probable result of its breach.<sup>93</sup> The ordinary rule for assessing damages under contracts for the purchase and sale of real estate is the difference between the contract price and the value at the time the deed should be delivered.<sup>94</sup> But before the plaintiff may recover more than nominal damages, where there is no stipulation for liquidated damages, he must show actual and substantial loss.<sup>95</sup> And where after the purchaser's breach of the contract the property is resold the damages recoverable is held to be the difference between the contract price and the amount received on resale.<sup>96</sup> Where the contract provides for a certain sum to

<sup>89</sup> *Cohn v. Reliable Fur Dressing &c. Co.*, 133 N. Y. S. 446; *Heyman v. Barretts &c. Dyeing Establishment*, 156 N. Y. S. 418.

<sup>90</sup> *Union Stone Co. v. Wilmington Transfer Co.*, 5 Del. (Boyce) 59, 90 Atl. 407.

<sup>91</sup> *Traut v. Winslow*, 201 Ill. App. 83.

<sup>92</sup> *Metropolitan Life Ins. Co. v. Day*, 145 Ga. 425, 89 S. E. 576.

<sup>93</sup> *Lloyd Inv. Co. v. Illinois Surety Co.*, 164 Wis. 282, 160 N. W. 58.

<sup>94</sup> *Dean v. Hawes*, 21 Cal. App. 350, 131 Pac. 885; *King v. Brice*, 145 Ga. 65, 88 S. E. 960; *Millikan v. Hunter*, 180 Ind. 149, 100 N. E. 1041; *First M. E. Church v. North*, 92 Kans. 381,

140 Pac. 888; *Wilson v. Hoy*, 120 Minn. 451, 139 N. W. 817; *Hayden v. Pinchot*, 172 App. Div. 102, 158 N. Y. S. 215; *Eisenstadt v. Lucke*, 25 Ohio Cir. Ct. (N. S.) 225; *Stinson v. Sneed* (Tex. Civ. App.), 163 S. W. 989.

[§ 2160 quoted in *Frederick v. Hillebrand* (Mich.), 165 N. W. 810, 813.]

<sup>95</sup> *Millikan v. Hunter*, 180 Ind. 149, 100 N. E. 1041; *Roper v. Milbourn*, 98 Neb. 466, 153 N. W. 557. See also *Denver-Laramie Realty Co. v. Wyoming Trout &c. Co.*, 219 Fed. 155, 135 C. C. A. 53.

<sup>96</sup> *Goodritz v. McMahon*, 64 Pa. Super. Ct. 479.



be paid in case of breach it may, according to the intention of the parties, be either liquidated damages or a penalty.<sup>97</sup> If the provision is for liquidated damages it is only necessary to show the contract and its breach to entitle the plaintiff to recover.<sup>98</sup> The general rules applicable to other contracts, that the measure of damages should be just compensation to the vendor for the actual loss or injury sustained by reason of the breach,<sup>99</sup> and such as might reasonably have been contemplated by the parties,<sup>1</sup> apply to contracts for the purchase and sale of real estate. The general rule is that damages for the breach of a covenant are to be measured by the actual loss to the covenantee.<sup>2</sup> Thus in a suit for the breach of a covenant of title the measure of damages would be the sum paid under the contract of sale.<sup>3</sup> The rule of damages in fraud cases, that the measure is the difference between the consideration given for the land and its value, does not apply to breaches of warranty.<sup>4</sup> In an action for breach of warranty against an existing lease the measure of damages is the fair rental value of the premises to the expiration of the term.<sup>5</sup> Plaintiff is entitled to nominal damage where a breach is shown, but to recover substantial damages he must prove actual injury or expense.<sup>6</sup> Where a party sues for the breach of a covenant, the ordinary measure of damages, in absence of fraud, is the consideration paid for the land with interest and costs.<sup>7</sup> The measure of damages for a breach of a covenant in a lease is, as a general rule, the difference between the rental value of the premises and the rent stipulated in the lease.<sup>8</sup> In case of a breach by the lessor the lessee may recover such damages as are caused as a direct result of the breach,

<sup>97</sup> *Addesso v. Garagalli*, 26 Pa. Dist. Ct. 169.

<sup>98</sup> *Addesso v. Garagalli*, 26 Pa. Dist. Ct. 169. See also *Joyce v. Hagelstein* (Tex. Civ. App.), 163 S. W. 356.

<sup>99</sup> *Norris v. Letchworth*, 167 Mo. App. 553, 152 S. W. 421; *Munday's Exrs. v. Garland*, 116 Va. 922, 83 S. E. 491.

<sup>1</sup> *Roper v. Milbourn*, 93 Nebr. 809, 142 N. W. 792, Ann. Cas. 1914B, 1225; *Roper v. Milbourn*, 98 Nebr. 466, 153 N. W. 557.

<sup>2</sup> *Bass v. Starnes*, 108 Ark. 357, 158 S. W. 136; *Shaw v. Guthrie*, 14 Ga. App. 303, 80 S. E. 735; *Gallon v. Hus-sar*, 172 App. Div. 393, 158 N. Y. S.

895; *Ridpath v. Clausin*, 88 Wash. 185, 152 Pac. 711.

<sup>3</sup> *Coleman v. Luettke* (Tex. Civ. App.), 164 S. W. 1117, 1120.

<sup>4</sup> *Luckenbach v. Thomas* (Tex. Civ. App.), 166 S. W. 99.

<sup>5</sup> *Bass v. Starnes*, 108 Ark. 357, 158 S. W. 136.

<sup>6</sup> *Bass v. Starnes*, 108 Ark. 357, 158 S. W. 136; *Ledowsky v. Gordon*, 194 Ill. App. 442; *Rockwell v. Utz*, 79 Misc. 120, 139 N. Y. S. 529.

<sup>7</sup> *Hanlon v. Conrad-Kammerer Glue Co.*, 53 Ind. App. 504, 102 N. E. 48; *Diggs v. Henson*, 181 Mo. App. 34, 163 S. W. 565; *Arnold v. Joines*, 50 Okla. 4, 150 Pac. 130.

<sup>8</sup> *Wertheimer v. Rosenbaum*, 146 N. Y. S. 177.

such as the difference in rental value, plus any necessary expense occasioned thereby.<sup>9</sup> Where a lessee abandons his lease without just cause the landlord's measure of damages is the difference between the amount of rent stipulated and the rental value of the premises to the end of the term.<sup>10</sup>

<sup>9</sup> Rull v. Rainey, 99 Kans. 57, 160 Pac. 1016; Geary v. Taylor, 166 Ky. 501, 179 S. W. 426; Murdock v. Roe, 186 Mich. 233, 152 N. W. 969; Chansky v. William Const. Co., 144 N. Y. S. 687.  
<sup>10</sup> Brown v. Hayes, 92 Wash. 300, 159 Pac. 89.

## CHAPTER LI

### SPECIFIC PERFORMANCE

§ 2275. **Definition, origin and purpose of remedy.**—Specific performance is not a remedy of right and whether it will be granted depends on all the circumstances of the case.<sup>1</sup>

§ 2276. **Enforcing partial performance.**—Partial performance is generally enforced in contracts for the sale of land, as where the vendor by his own act renders himself incapable of wholly performing the same, in which case the vendee may obtain specific performance in so far as the vendor is able to give it with an abatement of the contract price.<sup>2</sup> Or in case the vendor does not have title to all the land he contracts to sell he may be compelled to convey that to which he has title with an abatement of price.<sup>3</sup> In rare instances the vendor may compel specific performance even though he can not completely perform his contract, as where a failure of title is discovered as to an insignificant portion of the whole which is not necessary to the purchaser's enjoyment of the rest, he may enforce performance as to the balance on allowing a rebate in price.<sup>4</sup>

§ 2277. **Grounds of jurisdiction in general.**—When no adequate remedy exists at law and the contract is legal, perfectly fair in its terms, and the parties stand upon an equality with respect to the remedy, and where its specific enforcement, in the light of all the circumstances existing at the time it is sought,

<sup>1</sup> Brody, Adler & Koch Co. v. Hochstadter, 160 App. Div. 310, 144 N. Y. S. 631.

<sup>2</sup> Wellington Realty Co. v. Gilbert, 24 Colo. App. 118, 131 Pac. 803.

<sup>3</sup> Barthel v. Engle, 261 Mo. 307, 168 S. W. 1154. Where a vendor is unable to convey a good title to a portion of the property, the vendee may elect whether he will take specific performance as far as the vendor can perform, or damages for breach of contract: Neill v. McClung, 71 W. Va. 458, 76 S. E. 878. One agreeing to purchase land which included in part

a wife's homestead may enforce the contract as to the non-homestead land, if adequate protection were given the wife: Mosnat v. Berkeheimer, 158 Iowa 177, 139 N. W. 469. When the vendor's wife refuses to join in the conveyance, the purchaser may obtain specific performance, with abatement in price of the value of the contingent dower interest: Hirschman v. Forehand, 114 Ark. 436, 170 S. W. 98.

<sup>4</sup> Charles B. James' Land &c. Co. v. Vernon, 129 Tenn. 637, 168 S. W. 156, 52 L. R. A. (N. S.) 959n.

would work no hardship or injustice to either party and such relief will put them in the position contemplated by the contract, specific performance will be granted.<sup>5</sup>

§ 2278. **Existence of other remedy.**—When an adequate remedy exists at law it must be pursued instead of an action for specific performance.<sup>6</sup> But if the remedy, such as damages, is inadequate, specific performance will be granted.<sup>7</sup>

§ 2279. **Adequate remedy at law.**—Where the breach was prospective, and the damage not irreparable and there is nothing to show that defendant can not respond in damages an adequate legal remedy exists and specific performance will be denied.<sup>8</sup>

§ 2280. **Inadequate remedy at law.**—Before equity will grant relief by specific performance the legal remedy must be inadequate. In certain cases the inadequacy of the legal remedy may be assumed, as in actions to enforce contracts for the sale of lands.<sup>9</sup> The action may be maintained to enforce the agreement and for an accounting.<sup>10</sup>

§ 2281. **Mutuality of obligation.**—As a general rule a contract will not be specifically enforced unless the obligations thereof are mutual.<sup>11</sup> Thus if the contract is executory and only one of the parties thereto is bound and the party not bound has not acted on the agreement the same is not enforceable in equity by either party.<sup>12</sup> The foregoing principle does not apply to op-

<sup>5</sup> McCall v. Atchley, 256 Mo. 39, 164 S. W. 593.

<sup>6</sup> Marian Coal Co. v. Peale, 204 Fed. 161, 122 C. C. A. 397.

<sup>7</sup> Berry v. Second Baptist Church of Stillwater, 37 Okla. 117, 130 Pac. 585.

<sup>8</sup> Thruston v. Bailey, 157 Ky. 29, 162 S. W. 525.

<sup>9</sup> Cummings v. Nielson, 42 Utah 157, 129 Pac. 619.

<sup>10</sup> Grand Rapids & I. R. Co. v. Grand Rapids, K. & C. R. Co., 174 Mich. 534, 140 N. W. 906.

<sup>11</sup> Cline v. Strong, 52 Ind. App. 286, 100 N. E. 569; Heth v. Smith, 175 Mich. 328, 141 N. W. 583. Lacking mutuality: Denver Pressed Brick Co. v. Le Fevre, 25 Colo. App. 304, 138 Pac. 434; Smith v. Guffey, 202 Fed. 106, 120 C. C. A. 436; Tyson v. Miller-Tyson Co., 33 Ohio Cir. Ct. R.

418. Not lacking mutuality: Condit v. Johnson, 158 Iowa 209, 139 N. W. 477; Farm & Land Co. v. Roseman, 93 S. Car. 350, 76 S. E. 979; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239.

<sup>12</sup> Volz v. Scully, 159 Ky. 226, 166 S. W. 1015. Plaintiff's wife did not join in a contract to exchange their homestead for other land and had not ratified it. Held a suit by plaintiff for specific performance was properly dismissed because of want of mutuality: Steltzer v. Compton, 167 Iowa 266, 149 N. W. 243. It is otherwise where the contract has been acted upon, as where a testator agreed to make provision for a child in his will in case the parents surrendered its custody to him: Oles v. Wilson, 57 Colo. 246, 141 Pac. 489. Or where the purchaser

tion contracts or to one who did not sign the contract but is seeking specific performance against the party who did sign the same.<sup>13</sup> And when a contract for the conveyance of land is otherwise valid, it will be enforced in a proper case although it lacked mutuality of remedy.<sup>14</sup>

§ 2282. **Mutuality of remedy.**—As a general rule a contract must be mutual with respect to the rights of the parties if the equitable remedy of specific performance is to be obtained.<sup>15</sup> This principle has been applied in the case of a suit by a tenant to enforce a lease when the landlord had no right to enforce it.<sup>16</sup>

§ 2283. **When mutuality of remedy not necessary.**—When it is not essential to the validity of the contract or to plaintiff's right to specific performance that there should be a reciprocal obligation or mutuality of remedy as where plaintiff has performed all the conditions of the contract on his part to be performed and has brought himself clearly within the terms of the contract he is entitled to specific performance.<sup>17</sup>

§ 2284. **Discretion of court.**—Specific performance is not generally a matter of strict right, but rests in the sound discretion of the court,<sup>18</sup> as controlled by settled principles of law and equity applied to the particular facts.<sup>19</sup>

had the right of inspection and before time for performance did inspect the premises and notified defendant that the property was satisfactory to him: *Gibson v. Riehle*, 26 Colo. App. 127, 140 Pac. 933. Or where the purchaser has gone into and retained possession of the premises: *Caplan v. Buckner*, 123 Md. 590, 91 Atl. 481.

<sup>13</sup> *Copple v. Aigeltinger*, 167 Cal. 706, 140 Pac. 1073.

<sup>14</sup> *Gregory Co. v. Shapiro*, 125 Minn. 81, 145 N. W. 791.

<sup>15</sup> *McCall v. Atchley*, 256 Mo. 39, 164 S. W. 593 (attorney's contract for contingent fee held wanting in mutuality of remedy). A married woman as vendee, though not as vendor, can be compelled to specifically perform and, as between her heirs and the vendor, the remedy is mutual: *Weidenbaum v. Raphael*, 83 N. J. Eq. 17, 90 Atl. 683.

<sup>16</sup> *Heth v. Smith*, 175 Mich. 328, 141 N. W. 583.

<sup>17</sup> *Johnson v. Mansfield* (Tex. Civ. App.), 166 S. W. 927 (contract for conveyance of land).

<sup>18</sup> *Cronen v. Moore*, 210 Fed. 239; *Gachet v. Morton*, 181 Ala. 179, 61 So. 817; *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489; *Gaskins v. Byrd*, 66 Fla. 432, 63 So. 824; *Bennett v. Burkhalter*, 257 Ill. 572, 101 N. E. 189, 44 L. R. A. (N. S.) 733n; *Warren Mfg. Co. v. Baltimore*, 119 Md. 188, 86 Atl. 502; *Thomas v. Shonsey*, 96 Nebr. 318, 147 N. W. 686; *Northrup v. Scott*, 85 Misc. 515, 148 N. Y. S. 846; *Penn Gas Coal Co. v. Greensboro Gas Co.*, 238 Pa. 97, 85 Atl. 1093. The evidence must be clear and satisfactory and the contract fair and fairly procured: *Muench v. Barnell*, 163 Iowa 352, 144 N. W. 602. The trial court has a wide discretion in such cases: *McGinn v. Willey*, 24 Cal. App. 303, 141 Pac. 49.

<sup>19</sup> *Drake Lumber Co. v. Branning*,

§ 2285. **Impossible performance.**—A contract which is not capable of being performed will not be specifically enforced.<sup>20</sup> As where the property does not belong to the person contracting to convey the same;<sup>21</sup> or where one holds an executory contract to purchase from a mortgagor against whom there has been a foreclosure and sale.<sup>22</sup> It has also been held that an attorney's contract for a contingent fee is so incapable of execution that specific performance will be denied, where the client breached the contract by a secret compromise.<sup>23</sup> But a specific performance of a contract to convey land has been granted when plaintiff claimed that defendant had not disqualified himself to convey title. The defendant is not concerned with controversies plaintiff may subsequently have with others concerning the title.<sup>24</sup> Where the defendant has not entirely divested himself of the legal title on which the decree can operate specific performance will be granted.<sup>25</sup> It is no objection to the specific performance of a contract that the consent of a third person is necessary where he does or will consent, but where the defendant can not perform without the consent of a third person and such consent is with-

66 Fla. 543, 64 So. 263 (contract for sale of land); *Heller v. McGuin*, 261 Ill. 588, 104 N. E. 158 (court can not arbitrarily refuse relief); *Gibb v. Mintline*, 175 Mich. 626, 141 N. W. 538; *Lemp Hunting & Fishing Club v. Hackmann*, 172 Mo. App. 549, 156 S. W. 791; *In re Dunbar's Estate*, 51 Pa. Super. Ct. 216. See also *Edwards v. Watson*, 258 Mo. 631, 167 S. W. 1119; *Gove v. Armstrong*, 88 Vt. 115, 92 Atl. 10.

<sup>20</sup> *Cline v. Strong*, 52 Ind. App. 286, 100 N. E. 569 (contract for sale of real estate). Where partners in a business employed a third person to carry on the business for a time necessary to pay the partnership debts and to make advances for that purpose, and the partners subsequently contracted to exchange the business for plaintiff's real estate, plaintiff, in the absence of proof of the completion of the third person's contract of employment, could not compel specific performance of the contract of exchange: *Hill v. Lofgren-Harris Mercantile Co.*, 53 Colo. 566, 129 Pac. 208.

<sup>21</sup> *Blair v. Lowrey* (Tex. Civ. App.), 164 S. W. 14. When a contract provides that, if the vendor is unable to give title, the obligations of either party shall cease, the purchaser can not compel the vendor to remove a cloud, or convey with a suitable deduction because of the cloud: *Old Colony Trust Co. v. Chauncey*, 214 Mass. 271, 101 N. E. 423. One can not obtain specific performance, who knew, when the contract was executed by the secretary of defendant company, that it did not own the property, and that a firm was the real owner's agent: *Vacarezza v. Realty Inv. Co.* (Tex. Civ. App.), 165 S. W. 516.

<sup>22</sup> *Bennett v. United States Land &c. Co.*, 16 Ariz. 138, 141 Pac. 717. To same effect: *Roach v. Irvin*, 245 Pa. 162, 91 Atl. 243.

<sup>23</sup> *McCall v. Atchley*, 256 Mo. 39, 164 S. W. 593.

<sup>24</sup> *Wright v. Suydam*, 72 Wash. 587, 131 Pac. 239.

<sup>25</sup> *McGinn v. Willey*, 24 Cal. App. 303, 141 Pac. 49.

held, the contract will not be enforced.<sup>26</sup> Thus a contract to sell land signed by a husband alone will not be specifically enforced when the purchaser prays an abatement of the purchase-price or an indemnity to protect himself from her claim for dower, the wife having refused to join in the conveyance.<sup>27</sup> Specific performance of the delivery of a deed by a married woman will be refused when the same is void because the husband has not joined.<sup>28</sup>

§ 2286. **Enforcement involving hardship.**—Specific performance will be refused if, under all the circumstances, it would be inequitable to grant such relief,<sup>29</sup> even though no fraud or mistake appears.<sup>30</sup> Also where there has been a substantial performance of a contract, specific performance of an immaterial matter will be refused when it would work undue hardship on defendant without advantage accruing to plaintiff.<sup>31</sup> But the mere fact that the expense of the work will be heavier than anticipated when the contract was made will not defeat specific performance.<sup>32</sup>

§ 2287. **Persons entitled to specific performance.**—The vendor,<sup>33</sup> the vendee,<sup>34</sup> the heirs of the vendee,<sup>35</sup> or his assignee<sup>36</sup>

<sup>26</sup> Citronelle Turpentine Co. v. Buhlig, 184 Ala. 404, 63 So. 951.

<sup>27</sup> Haden v. Falls, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034n. Otherwise where plaintiff is willing to accept a deed from defendant without the latter's wife joining therein and does not ask for abatement or indemnities: Stratford v. Lukens, 52 Pa. Super. Ct. 355.

<sup>28</sup> Jackson Lumber Co. v. Bass, 181 Ala. 169, 61 So. 271.

<sup>29</sup> Ranck v. Wickwire, 255 Mo. 42, 164 S. W. 460. An agreement for the sale of land to be conveyed upon termination of litigation, the vendee in the meantime to have possession without paying interest or taxes, has been held so inequitable as to justify the conclusion that a speedy termination of the litigation was anticipated, and the hardship from a delay in its termination warranted a denial of specific performance: Watters v. Ryan, 31 S. Dak. 536, 141 N. W. 359. Plaintiff, an attorney, honestly thought he was employed to prosecute a claim, but in fact was only sought for advice as to what attorney would best be

chosen to prosecute it. He recommended defendant, and defendant was given the case by the client, held specific enforcement of a subsequent agreement between plaintiff and defendant to divide the fees, founded on the assertion by plaintiff that he had been given the control of the case, there being no other consideration, as plaintiff was not to help, would be inequitable: Breed v. Berenson, 216 Mass. 397, 103 N. E. 937.

<sup>30</sup> Lemp Hunting & Fishing Club v. Hackmann, 172 Mo. App. 549, 156 S. W. 791.

<sup>31</sup> Penn Gas Coal Co. v. Greensboro Gas Co., 238 Pa. 97, 85 Atl. 1093.

<sup>32</sup> Fox v. Spokane International R. Co., 26 Idaho 60, 140 Pac. 1103.

<sup>33</sup> Perrin v. Chidester, 159 Iowa 31, 139 N. W. 930 (suit by referees in partition).

<sup>34</sup> Stevens v. Los Angeles Dock & Terminal Co., 20 Cal. App. 743, 130 Pac. 197.

<sup>35</sup> Weidenbaum v. Raphael, 83 N. J. Eq. 17, 90 Atl. 683.

<sup>36</sup> Record v. Littlefield, 218 Mass. 483, 106 N. E. 142 (wife, real party

may, in a proper case, compel specific performance of a contract to convey land. But while the assignee of a contract to convey land may ordinarily enforce specific performance, a contract to convey to "A and associates," will not be enforced in favor of the assignees of A alone, when it is not made to appear that such assignees were also the associates of A.<sup>37</sup> A third person who is not an assignee of one of the parties to the agreement or who does not stand in privity of relationship to one of the parties is not entitled to specific performance thereof.<sup>38</sup>

**§ 2288. Persons against whom specific performance may be had.**—Where the defendant in an action to enforce specific performance has an interest in the subject-matter of the action, as where, in an action for specific performance of a contract for the sale of real estate, it appears that the vendor, though without title, can obtain it, he may be required to acquire title and then specific performance be decreed.<sup>39</sup> And in case a vendor, after executing a contract for the sale of real estate, subsequently conveys such land to another with notice of such contract, his grantee may be held liable for specific performance of the contract, in the absence of any countervailing equities.<sup>40</sup> A purchaser of land may be compelled to specifically perform a lease executed by his grantor.<sup>41</sup> Specific performance of a contract may be obtained against the personal representative of a decedent, the con-

in interest, considered as husband's assignee).

<sup>37</sup> Goodwin v. Rosser, 64 Fla. 299, 60 So. 341.

<sup>38</sup> Van Reen v. Aetna Life Ins. Co., 209 Fed. 691 (action to enforce an automobile liability insurance policy). See also Bartley v. Pleasure Driveway and Park Dist. of Peoria, 257 Ill. 363, 100 N. E. 904.

<sup>39</sup> Beckman v. Sonntag Inv. Co., 67 Fla. 293, 64 So. 948. A mortgagee is entitled to specific performance of defendant's contract to purchase property at foreclosure of a prior mortgage and execute new mortgages in lieu of the one foreclosed, in lieu of plaintiff's mortgage, and for an amount advanced by plaintiff, but he is not entitled to any relief as against the holder of the mortgage executed in lieu of that foreclosed: Castelli

v. Burns, 156 App. Div. 200, 140 N. Y. S. 1057.

<sup>40</sup> Copple v. Aigeltinger, 167 Cal. 706, 140 Pac. 1073; Drake Lumber Co. v. Branning, 66 Fla. 543, 64 So. 263; Horgan v. Russell, 24 N. Dak. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150n; Dillinger v. Ogden, 244 Pa. 20, 90 Atl. 446, Ann. Cas. 1915C, 533n. Where a vendor, after making a parol contract of sale and placing his vendee in possession, who makes valuable improvements, sells the land to another with knowledge of the prior contract, equity will compel specific performance against such other, upon the original purchaser's paying or tendering the purchase-money: Grooms v. Grooms, 141 Ga. 478, 81 S. E. 210.

<sup>41</sup> Lemp Hunting & Fishing Club v. Cottle, 172 Mo. App. 574, 156 S. W. 799.



tract being that of the decedent.<sup>42</sup> But a wife can not be compelled to join with her husband in conveying land which he has contracted to sell, when she is not a party to the agreement.<sup>43</sup>

§ 2289. **What contracts enforceable.**—A contract will not be specifically enforced unless it appears that it is prima facie fair, is founded on an adequate consideration and is definite as to the conditions imposed.<sup>44</sup> The remedy is available only when a valid and binding contract exists. The execution of a deed without delivery is not sufficient to constitute a contract to convey which can be specifically enforced, unless such deed was deposited in escrow.<sup>45</sup> A variance between the offer and acceptance will also defeat the remedy.<sup>46</sup> Likewise if it would be inequitable to enforce the contract specific performance will be denied.<sup>47</sup> But where nothing remains to be done but to carry into effect the agreement already made and executed by the parties equity may enforce the contract and decree that to be done which should have been done.<sup>48</sup> And even though the contract may be uncertain in some of its terms if it is rendered certain when construed with certain contemporaneous papers the agreement may be enforced.<sup>49</sup>

§ 2290. **Certainty of contracts in general.**—The terms of a contract must be expressed with reasonable certainty and definiteness before a court of equity will grant specific performance thereof.<sup>50</sup> Furthermore, its terms must be so expressed as to en-

<sup>42</sup> Gove v. Armstrong, 88 Vt. 115, 92 Atl. 10.

<sup>43</sup> Haden v. Falls, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034n. A husband can not enforce specific performance of a contract to exchange community property when his wife was neither a party to the contract nor to the suit: Chapman v. Hill, 77 Wash. 475, 137 Pac. 1041. That a vendor's wife did not sign a contract to convey the surface rights in coal lands in exchange for stock in a corporation held not to defeat specific performance where the vendor had sufficient other real estate out of which dower could be assigned: Bartley v. Big Branch Coal Co., 160 Ky. 123, 169 S. W. 601.

<sup>44</sup> Parsons v. Cashman, 23 Cal. App. 298, 137 Pac. 1109, 1111; Baumann v. Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756n.

<sup>45</sup> Minnesota & Oregon Land & Timber Co. v. Hewitt Inv. Co., 201 Fed. 752.

<sup>46</sup> Wiggins v. Lynn, 139 Ga. 297, 77 S. E. 157 (in such case petition demurrable).

<sup>47</sup> Steltzer v. Compton, 167 Iowa 266, 149 N. W. 243.

<sup>48</sup> Hodalski v. Hodalski, 181 Ill. App. 158. A written contract for the sale of land, which describes the land, states the price, and contains a promise to convey on receipt of the price, delivered to the vendee, in the absence of fraud or mistake will entitle the purchaser to specific performance: Iske v. Iske, 95 Nebr. 603, 146 N. W. 918.

<sup>49</sup> Edwards v. Watson, 258 Mo. 631, 167 S. W. 1119.

<sup>50</sup> Citronelle Turpentine Co. v. Buhlig, 184 Ala. 404, 63 So. 951; Oles v. Wilson, 57 Colo. 246, 141 Pac. 489;

able the court to frame its decree in accordance with the intent of the parties.<sup>51</sup> When the foregoing rule is complied with agreements to make a will,<sup>52</sup> dismiss a suit to contest a will,<sup>53</sup> or for the exchange of water for irrigation<sup>54</sup> have been specifically enforced.

§ 2291. **Certainty of contracts relating to realty.**—A contract for the sale of real estate which is not definite and certain will not be specifically enforced in equity.<sup>55</sup> The evidence must be clear and satisfactory, but it need not be direct. Neither is it necessary that the contract be specific in all its terms. Thus it has been held an oral agreement which provided that a sister was to have a brother's property at his death in consideration of her removal to another state and caring for him could be specifically enforced, when performed by her.<sup>56</sup> Likewise it has been held that a contract to will one-third of one's property to another might be specifically enforced and that it was not necessary that the testator should designate the one-third to be devised.<sup>57</sup>

§ 2292. **Certainty as to time of performance.**—Certainty as to time may be an element essential to the specific performance

Gould v. Gunn, 161 Iowa 155, 140 N. W. 380.

<sup>51</sup> *Tharp University School v. Komus Realty Co.*, 159 Ky. 386, 167 S. W. 136.

<sup>52</sup> *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489; *Smith v. Cameron*, 92 Kans. 652, 141 Pac. 596, 52 L. R. A. (N. S.) 1057. Compare with: *Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109, 1111.

<sup>53</sup> *Korte v. O'Neill*, 34 S. Dak. 241, 148 N. W. 12.

<sup>54</sup> *Mathews v. Berrett*, 42 Utah 174, 129 Pac. 419.

<sup>55</sup> *Georgia S. & F. R. Co. v. Taylor*, 142 Ga. 350, 82 S. E. 1058; *Cline v. Strong*, 52 Ind. App. 286, 100 N. E. 569; *McCall v. Atchley*, 256 Mo. 39, 164 S. W. 593. The above rule applies to parol contracts: *Kimball v. Batley*, 174 Mich. 544, 140 N. W. 915. A written contract between plaintiffs and defendants, whereby defendants, in consideration of a dismissal by plaintiff of an action to contest a will, agreed to convey to plaintiffs two specified quarter sections of land, a particular town lot, and pay \$800 in money or note, was sufficiently definite and certain in

its terms to permit of specific performance: *Korte v. O'Neill*, 34 S. Dak. 241, 148 N. W. 12. A contract for the exchange of properties which failed to specify that the deeds should be subject to certain mortgages on each party's land may be specifically enforced in the absence of fraud or mistake, where deeds subject to such mortgage were executed by each party and delivered in escrow: *Waldo v. Lockard*, 96 Nebr. 490, 148 N. W. 510. But an agreement by which an attorney was to defend a will for one-fourth of the property in value willed to the client, or one-fourth of whatever was recovered by compromise or otherwise, after the client's breach by secret compromise whereby he acquired 200 acres, five-sixths of the land claimed, held too uncertain and ambiguous to be enforceable by specific performance: *McCall v. Atchley*, 256 Mo. 39, 164 S. W. 593.

<sup>56</sup> *Smith v. Cameron*, 92 Kans. 652, 141 Pac. 596, 52 L. R. A. (N. S.) 1057.

<sup>57</sup> *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489.

of a contract as in a contract for personal services.<sup>58</sup> But it has been held that a contract for the exchange of water for irrigation which was to be in force until terminated by the mutual consent of both parties thereto was sufficiently definite as to time.<sup>59</sup>

§ 2293. **Certainty as to description of subject-matter.**—The essential basis of a decree for specific performance of a contract for the sale or exchange of property is a definite present agreement in regard to specific property, sufficiently designated as present to the minds of both parties, which is to be transferred by one to the other.<sup>60</sup> But even though the description of the property set out in the contract proper is insufficient if the evidence establishes a state of facts taking the case out of the statute of frauds, and supplying the description, the contract may be specifically enforced.<sup>61</sup> The uncertainty in the description may be removed by extrinsic evidence.<sup>62</sup>

§ 2294. **Completeness of contract.**—Before a contract will be specifically enforced it must be complete in all its essential elements. In case it is a contract of sale, the price must be fixed with sufficient certainty.<sup>63</sup> The foregoing principle applies not

<sup>58</sup> *Parsons v. Cashman*, 23 Cal. App. 298, 137 Pac. 1109 (time for continuation of services not appearing).

<sup>59</sup> *Mathews v. Berrett*, 42 Utah 174, 129 Pac. 419. A lease which recited that defendant agreed to lease plaintiff certain land for a term of three years, at a rental of \$200 per year, to be paid in advance before taking possession, held sufficiently definite, as to the term and time of payment of rent, as to be specifically enforced: *Joyce v. Tomasini*, 168 Cal. 234, 142 Pac. 67. See also *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619 (option to purchase).

<sup>60</sup> *Brown v. Hughes*, 244 Pa. 397, 90 Atl. 651 (specific performance denied); *Young v. Flournoy*, 139 Ga. 634, 77 S. E. 807.

<sup>61</sup> *Hirschman v. Forehand*, 114 Ark. 436, 170 S. W. 98.

<sup>62</sup> *Joyce v. Tomasini*, 168 Cal. 234, 142 Pac. 67; *Clark v. Cagle*, 141 Ga. 703, 82 S. E. 21, L. R. A. 1915A, 317. Thus a contract which describes the land sold as "my place adjoining W. T. Mosher, S. E.," is not too vague and uncertain to be specifically en-

forced: *Mosher v. Rogers*, 141 Ga. 557, 81 S. E. 852. A contract for the exchange of land headed "Atlanta, Ga., June 7, 1912," and describing the property as "401 Spring known as the Cob Home 50x160 more or less," is not too indefinite to preclude specific performance: *Bush v. Black*, 142 Ga. 157, 82 S. E. 530. A contract to sell real estate consisting of four lots in a certain town, when it appeared that vendor owned only one place in that town which consisted of four lots, described the property with sufficient certainty to entitle the purchaser to specific performance: *Beaton v. Fussell* (Tex. Civ. App.), 166 S. W. 458; *Ranck v. Wickwire*, 255 Mo. 42, 164 S. W. 460; *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619.

<sup>63</sup> *Citronelle Turpentine Co. v. Buhlig*, 184 Ala. 404, 63 So. 951; *Marshall v. Bason* (Tex. Civ. App.), 165 S. W. 75; *Gilfallan v. Gilfallan*, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784n (sale of corporate stock. Price and manner of payment held sufficiently certain); *Caplan v. Buck-*

only to the price but the time of payment as well.<sup>64</sup> Thus an option in a lease to purchase the property but not naming any price is not enforceable.<sup>65</sup> Likewise an agreement to lease is not a definite contract enforceable by specific performance.<sup>66</sup>

**§ 2296. Contracts of married women.**—In case a wife is the owner of certain real estate and her husband contracts for the sale thereof the purchaser can not specifically enforce the agreement unless he shows that the husband was the wife's agent or that she knew he was acting as such and ratified the contract.<sup>67</sup> The contract of a married woman not executed as required by statute is not enforceable.<sup>68</sup>

**§ 2297. Contracts of corporations.**—A court of equity will not specifically enforce a contract for the purchase of land by a corporation where such corporation has no power to hold land.<sup>69</sup>

**§ 2298. Oral contracts within the statute of frauds.**—The statute of frauds will not bar the specific performance of an oral contract to leave property, in consideration of services or support, to the one rendering the services or support when the agreement has been faithfully kept by the party to receive the property.<sup>70</sup> And where the defendant admits the contract and does not rely on the defense of the statute of frauds, a parol agreement may be enforced against him.<sup>71</sup> But where a statute specifically requires a contract to be in writing equity will not decree specific performance.<sup>72</sup>

**§ 2299. Part performance of parol contract.**—A parol contract for the sale of land may be enforced in equity where there

ner, 123 Md. 590, 91 Atl. 481 (sale of real estate. Price held sufficiently definite). The vendor may enforce the contract on default of the vendee when the price is fixed with sufficient definiteness: *Clark v. Cagle*, 141 Ga. 703, 82 S. E. 21, L. R. A. 1915A, 317.

<sup>64</sup> *Tharp University School v. Komus Realty Co.*, 159 Ky. 386, 167 S. W. 136 (contract held too indefinite); *Cline v. Strong*, 52 Ind. App. 286, 100 N. E. 569.

<sup>65</sup> *Wolf v. Lodge*, 159 Iowa 162, 140 N. W. 429. Contra: *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619.

<sup>66</sup> *Goldstine v. Tolman*, 157 Wis. 141, 147 N. W. 7.

<sup>67</sup> *Ross v. Blunt* (Tex. Civ. App.), 166 S. W. 913.

<sup>68</sup> *Hudgins v. Thompson* (Tex. Civ. App.), 163 S. W. 659.

<sup>69</sup> *Kohlruss v. Zachery*, 139 Ga. 625, 77 S. E. 812, 46 L. R. A. (N. S.) 72n.

<sup>70</sup> *Pugh v. Bell*, 21 Cal. App. 530, 132 Pac. 286; *Smith v. Cameron*, 92 Kans. 652, 141 Pac. 596, 52 L. R. A. (N. S.) 1057.

<sup>71</sup> *Ranck v. Wickwire*, 255 Mo. 42, 164 S. W. 460.

<sup>72</sup> *Morris v. Marshall*, 185 Ala. 179, 64 So. 312; *Cline v. Strong*, 52 Ind. App. 286, 100 N. E. 569.

has been a partial performance by the party seeking the aid of the court, under the doctrine of equitable fraud.<sup>73</sup> A partly performed oral contract may also be specifically enforced when a fiduciary relation exists and the court's aid is necessary to prevent injustice.<sup>74</sup>

· § 2300. **Acts constituting part performance of parol contract.**—Where reliance is placed upon certain acts as constituting part performance of an oral contract they must refer to the contract and must not be explainable on any other theory.<sup>75</sup> Where the evidence shows a contract to convey for a specified price, payment of such price, possession by plaintiff, recognition of ownership by defendant, payment of taxes, and the making of valuable improvement, specific performance may be decreed.<sup>76</sup>

§ 2301. **Payment as part performance.**—The payment of the reasonable rental value of property is not such part payment as will render a parol contract for the conveyance of land enforceable.<sup>77</sup>

§ 2302. **Possession is an element of part performance of an oral contract.**—When possession has been taken and the purchase-price paid it is sufficient performance to enable the purchaser to obtain specific performance.<sup>78</sup>

§ 2303. **Improvements as part performance of parol contract.**—Where pursuant to an oral contract for the gift or conveyance of property the donee or grantee goes into possession and makes valuable improvement the contract will be enforced.<sup>79</sup> In order for improvements to be considered they must be valuable and permanent, and the court will scrutinize carefully all cases

<sup>73</sup> Bonner v. Kimball-Lacy Lumber Co., 114 Ark. 42, 169 S. W. 242; Willis v. Zorger, 258 Ill. 574, 101 N. E. 963; Caplan v. Buckner, 123 Md. 590, 91 Atl. 481; Sursa v. Cash, 171 Mo. App. 396, 156 S. W. 779; Damkroeger v. James, 95 Nebr. 784, 146 N. W. 936; Wisconsin Cent. R. Co. v. Schug, 155 Wis. 563, 145 N. W. 177.  
<sup>74</sup> Willis v. Zorger, 258 Ill. 574, 101 N. E. 963; Nelson v. Schoonover, 89 Kans. 388, 131 Pac. 147; Becker v. Buffalo Package Co., 85 Misc. 503, 148 N. Y. S. 782; Kelley v. Devin, 65 Ore. 211, 132 Pac. 535.

<sup>75</sup> Hersman v. Hersman, 253 Mo. 175, 161 S. W. 800; Tonseth v. Lar-

sen, 69 Ore. 387, 138 Pac. 1080; Moore v. Moore, 72 W. Va. 260, 78 S. E. 99.

<sup>76</sup> Beemer v. Hughes, 179 Mich. 110, 146 N. W. 198.

<sup>77</sup> Tonseth v. Larsen, 69 Ore. 387, 138 Pac. 1080.

<sup>78</sup> Davis v. Martin Stave Co., 113 Ark. 325, 168 S. W. 553.

<sup>79</sup> Bastian v. Crawford, 180 Ind. 697, 103 N. E. 792; Messiah Home for Children in City of New York v. Rogers, 212 N. Y. 315, 106 N. E. 59 (action to enforce gift of real estate); Gove v. Armstrong, 88 Vt. 115, 92 Atl. 10.

involving contracts to convey land sought to be enforced, and especially when in parol.<sup>80</sup>

**§ 2304. Necessity of consideration.**—A contract, to be specifically enforced, must be supported by a valuable consideration, but the mutual promises of each party, as in a contract to exchange real estate, may be sufficient consideration to support an action for specific performance.<sup>81</sup> Although mere inadequacy of consideration, when standing alone, may not bar the right to specific performance,<sup>82</sup> it is a strong circumstance which, with others, may influence a court in withholding its decree.<sup>83</sup> In actions for specific performance of contracts for the purchase and sale of real estate market value furnishes the proper test of value.<sup>84</sup>

**§ 2305. Fairness and reasonableness of consideration.**—A court of equity will not lend its aid to enforce a contract which is unfair, unreasonable,<sup>85</sup> or inequitable.<sup>86</sup> This rule has been ap-

<sup>80</sup> Moore v. Moore, 72 W. Va. 260, 78 S. E. 99.

<sup>81</sup> Christian Church at Pilgrims' Rest v. Littleville Camp No. 58, Woodmen of the World, 185 Ala. 80, 64 So. 9; Gibson v. Riehle, 26 Colo. App. 127, 140 Pac. 933.

<sup>82</sup> Ward v. Albertson, 165 N. Car. 218, 81 S. E. 168.

<sup>83</sup> Hobbs v. Davis, 168 Cal. 556, 143 Pac. 733 (contract to purchase stock worth \$624,000 for \$255,000 consideration held inadequate); Reich v. Reich, 83 N. J. Eq. 448, 91 Atl. 899 (property value \$6,000. Promise to pay annual interest on \$2,000 at 5 per cent. Consideration inadequate). Title to land was taken in the name of defendant's ancestor, who gave a bond for title to A in order to defraud the latter's creditors. The rights under the bond passed by quitclaims to plaintiff's ancestor. Held plaintiff's rights were based on the bond independent of any fraud on the creditors of A, and was enforceable without reference to the consideration passing between the intervening parties: Taft v. Henry, 219 Mass. 78, 106 N. E. 553; Baumann v. Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756n; Gaskins v. Byrd, 66 Fla. 432, 63 So. 824; Cline v. Strong, 52 Ind. App. 286, 100 N. E. 569; War-

ren Mfg. Co. of Baltimore County v. City of Baltimore, 119 Md. 188, 86 Atl. 502; Nickerson v. Bridges, 216 Mass. 416, 103 N. E. 939; Sweeney v. Brow, 35 R. I. 227, 86 Atl. 115, Ann. Cas. 1915C, 1075n; Cummings v. Nielson, 42 Utah 157, 129 Pac. 619; McKinley Telephone Co. v. Cumberland Telephone Co., 152 Wis. 359, 140 N. W. 38.

<sup>84</sup> Waratah Oil Co. v. Reward Oil Co., 23 Cal. App. 638, 139 Pac. 91.

<sup>85</sup> Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784n; Cline v. Strong, 52 Ind. App. 286, 100 N. E. 569. An agreement for the sale of mining stock of the value of \$624,000 for the sum of \$255,000, where only \$1,000 had been paid, is not just and reasonable, and specific performance will be denied under Civ. Code, § 3391: Hobbs v. Davis, 168 Cal. 556, 143 Pac. 733; Oles v. Wilson, 57 Colo. 246, 141 Pac. 489. When a railroad company, with knowledge of the facts, contracts to maintain a crossing over its track, it can not afterward complain that the contract was unfair, and, by reason of conditions subsequently arising, became more onerous than anticipated: Fox v. Spokane International R. Co., 26 Idaho 60, 140 Pac. 1103.

<sup>86</sup> Indianapolis Northern Traction

plied to oral contracts to make a devise, or bequest,<sup>87</sup> or to convey.<sup>88</sup> Mere inadequacy of consideration is not sufficient to defeat specific performance, but where inadequacy of consideration is coupled with fraud, specific performance will be denied.<sup>89</sup>

§ 2306. **Mistake in execution of contract.**—Specific performance of a contract will usually be denied where there has been a mistake in its execution or where the contract does not express the intention of the parties.<sup>90</sup>

§ 2307. **Misrepresentation and fraud.**—Specific performance will be denied where there has been misrepresentation of material matter relied on by defendant or fraud in the execution of the contract.<sup>91</sup> Thus where one misrepresents the value of land,<sup>92</sup> the date of maturity of mortgages on lands to be exchanged,<sup>93</sup> or where the purpose for which the land is to be used is concealed,<sup>94</sup> specific performance will be denied. And such principle is held to apply to misrepresentations made by an agent, even though the defendant conceals such representations from the plaintiff.<sup>95</sup>

§ 2308. **Illegal contracts.**—A party to an illegal contract can not have it specifically enforced. But the mere fact that a contract results in illegal acts is not sufficient ground for denying relief.<sup>96</sup>

Co. v. Essington, 54 Ind. App. 286, 99 N. E. 757, 100 N. E. 765; Bartley v. Big Branch Coal Co. (Ky.), 160 Ky. 123, 169 S. W. 601; Cummings v. Nielson, 42 Utah 157, 129 Pac. 619.

<sup>87</sup> Parsons v. Cashman, 23 Cal. App. 298, 137 Pac. 1109; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812.

<sup>88</sup> Hersman v. Hersman, 253 Mo. 175, 161 S. W. 800.

<sup>89</sup> Warren Mfg. Co. v. Baltimore, 119 Md. 188, 86 Atl. 502. Where an attorney, engaged in a suit involving real estate, obtains from his client a contract for the sale thereof, upon a grossly inadequate consideration, equity will not, in an action by the attorney, decree specific performance: Ralphsnyder v. Titus, 74 W. Va. 204, 82 S. E. 257.

<sup>90</sup> Caplan v. Buckner, 123 Md. 590, 91 Atl. 481.

<sup>91</sup> Heitman v. Clancy, 167 Iowa 58,

148 N. W. 1011; Bartley v. Big Branch Coal Co., 160 Ky. 123, 169 S. W. 601; Warren Mfg. Co. of Baltimore County v. City of Baltimore, 119 Md. 188, 86 Atl. 502.

<sup>92</sup> Muench v. Barnell, 163 Iowa 352, 144 N. W. 602.

<sup>93</sup> Chapman v. Hill, 77 Wash. 475, 137 Pac. 1041.

<sup>94</sup> Where plaintiff bought land and agreed not to use it for a purpose which would interfere with or in any way lessen the value of defendants' adjoining land, and concealed the intended use of the land for an inter-urban railroad right of way. Held ground for the denial of specific performance: Gibb v. Mintline, 175 Mich. 626, 141 N. W. 538.

<sup>95</sup> Heitman v. Clancy, 167 Iowa 58, 148 N. W. 1011.

<sup>96</sup> McQuitty v. Wilhite, 247 Mo. 163, 152 S. W. 598.

§ 2309. **Alternative stipulations in contracts.**—Where a contract stipulates in the alternative for performance of certain acts or the payment of a certain amount of money in lieu thereof specific performance will not be granted.<sup>97</sup>

§ 2310. **Optional contracts.**—Option contracts, whereby one acquires, for a limited period, the right to purchase another's property, are generally recognized as filling an important purpose in our business life and in proper instances they may be enforced by specific performance.<sup>98</sup> Lack of mutuality or consideration is not necessarily fatal to the enforcement of such contracts, although the early cases seemed to recognize such rule.<sup>99</sup> And where there is an unqualified and unconditional acceptance of an option to buy land a contract is created which equity will enforce.<sup>1</sup>

§ 2311. **Stipulations for liquidated damages.**—Where it appears from the contract that the object of a provision for liquidated damages is to give the obligor an option to pay damages in lieu of performance specific performance should be denied.<sup>2</sup>

§ 2312. **Contracts subject to conditions.**—A court of equity will not, as a general rule, decree specific performance of a conditional contract unless the condition has occurred or has been performed.<sup>3</sup> But before relief will be denied the condition must be of some force.<sup>4</sup>

§ 2313. **Modification or rescission.**—While courts of equity will not ordinarily compel specific performance of a contract where it has been changed by parol, the acceptance in a sale of lands of performance in a different form from that agreed upon in writing will not defeat an action for specific performance as an oral modification within the statute of frauds.<sup>5</sup> One is en-

<sup>97</sup> Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940, 45 L. R. A. (N. S.) 52n.

<sup>98</sup> Ward v. Albertson, 165 N. Car. 218, 81 S. E. 168 (purchase of timber).

<sup>99</sup> Wolf v. Lodge, 159 Iowa 162, 140 N. W. 429; Brewer v. Sowers, 118 Md. 681, 86 Atl. 228.

<sup>1</sup> Brewer v. Sowers, 118 Md. 681, 86 Atl. 228; Horgan v. Russell, 24 N. Dak. 490, 140 N. W. 99, 43 L. R. A.

(N. S.) 1150n. See also Winders v. Kenan, 161 N. Car. 628, 77 S. E. 687.

<sup>2</sup> Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940, 45 L. R. A. (N. S.) 52n.

<sup>3</sup> Hodalski v. Hodalski, 181 Ill. App. 158; Allen v. Angus, 69 Ore. 494, 133 Pac. 1190, 138 Pac. 1074, 139 Pac. 721.

<sup>4</sup> Ministers, &c. of Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co., 148 N. Y. S. 519.

<sup>5</sup> Welch v. McIntosh, 89 Kans. 47, 130 Pac. 641. To same effect, see:



titled to the defense of abandonment of a contract in an action for specific performance.<sup>6</sup>

**§ 2314. Subject-matter of contracts—In general.**—The remedy of specific performance extends to a breach of covenant in an oil and gas lease;<sup>7</sup> but by reason of the nature of the work and the inability of the court to supervise, a contract to drill oil wells will not be enforced specifically.<sup>8</sup> A contract for submission to arbitration is not a proper subject for specific performance.<sup>9</sup> Courts of equity will enforce an executory contract for the conveyance of land.<sup>10</sup>

**§ 2315. Contracts relating to realty.**—A court of equity may compel the specific performance of an executory contract for the conveyance of real estate;<sup>11</sup> for exchange,<sup>12</sup> or lease,<sup>13</sup> except mining leases.<sup>14</sup> Equity will not lend its aid where the consideration is grossly inadequate,<sup>15</sup> or where the plaintiff has an adequate remedy at law.<sup>16</sup>

**§ 2316. Enforcement of contract by purchaser of realty.**—In the case of a contract for the sale of land where the terms are fair, certain and definite and the purchaser tenders the purchase-money he is entitled to specific performance.<sup>17</sup> Specific performance, however, will be denied where a husband contracted to convey the homestead without the wife's knowledge.<sup>18</sup>

**§ 2317. Enforcement of contract by vendor of realty.**—Under the equitable rule of mutuality the vendor of real estate may sue for specific performance.<sup>19</sup> He may proceed in equity

Nickerson v. Bridges, 216 Mass. 416, 103 N. E. 939.

<sup>6</sup> Martin v. Spaulding, 40 Okla. 191, 137 Pac. 882.

<sup>7</sup> Lockwood v. Carter Oil Co., 73 W. Va. 175, 80 S. E. 814, 52 L. R. A. (N. S.) 765n.

<sup>8</sup> Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701, 64 So. 684.

<sup>9</sup> Ferrell v. Ferrell, 253 Mo. 167, 161 S. W. 719.

<sup>10</sup> Mallow v. Eastes, 179 Ind. 267, 100 N. E. 836 (antenuptial contract).

<sup>11</sup> Clark v. Cagle, 141 Ga. 703, 82 S. E. 21, L. R. A. 1915A, 317; McCall v. Atchley, 256 Mo. 39, 164 S. W. 593; Biddison v. Interurban Land Co. (Tex. Civ. App.), 152 S. W. 1167.

<sup>12</sup> Waldo v. Lockard, 96 Nebr. 490, 148 N. W. 510.

<sup>13</sup> Shea v. Keeney, 155 App. Div. 628, 140 N. Y. S. 912.

<sup>14</sup> Browning v. Boswell, 215 Fed. 826, 132 C. C. A. 168.

<sup>15</sup> Reich v. Reich, 83 N. J. Eq. 448, 91 Atl. 899.

<sup>16</sup> David Stevenson Brewing Co. v. Junction Realty Co., 156 App. Div. 271, 141 N. Y. S. 271.

<sup>17</sup> Dillinger v. Ogden, 244 Pa. 20, 90 Atl. 446, Ann. Cas. 1915C, 533n; Matney v. Barnes, 116 Va. 713, 82 S. E. 801.

<sup>18</sup> Hudgins v. Thompson (Tex. Civ. App.), 163 S. W. 659.

<sup>19</sup> McClurg v. Crawford, 209 Fed. 340, 126 C. C. A. 266; Waters v. Pear-

for specific performance, although some relief may be obtained at law.<sup>20</sup> It is held the exercise of such remedy where the contract is fair and just is within the discretion of the court.<sup>21</sup>

**§ 2318. Contracts relating to personalty.**—Ordinarily a contract for the sale of personal property will not be enforced in equity because of the remedy at law,<sup>22</sup> but where the contract has been partly performed or is of such nature that the breach can not be measured by pecuniary standards there seems to be no distinction in this respect between personal property and real property.<sup>23</sup>

**§ 2319. Specific chattels, stock or patent articles.**—Ordinarily an action for specific enforcement of a contract relating to chattels will not lie, as the law affords complete redress in an action for damages;<sup>24</sup> but where the chattel is such as not to be readily obtainable on the market, and hence has no market value,<sup>25</sup> or where the value is speculative<sup>26</sup> it is otherwise, and a contract for the assignment of a patent right is enforceable.<sup>27</sup> A contract may be amenable to specific performance as to some of its provisions and not as to others.<sup>28</sup>

**§ 2320. Contracts of service.**—As a general rule a contract for personal services involving special knowledge, skill and

son, 163 Iowa 391, 144 N. W. 1026. In a suit for the performance of a contract for the sale of real estate against the vendee. Held the vendor is entitled to a decree for the balance of the purchase-money and for sale of the land to satisfy the same: *Marshall v. Porter*, 73 W. Va. 258, 80 S. E. 350.

<sup>20</sup> *Shelton v. Wallace*, 41 Okla. 325, 137 Pac. 694.

<sup>21</sup> *Caplan v. Buckner*, 123 Md. 590, 91 Atl. 481.

<sup>22</sup> Where a vendor breached a contract to supply orange trees, which could be bought and sold in the market, the vendee could not demand specific performance, as he could be fully compensated in damages: *Emirzian v. Asato*, 23 Cal. App. 251, 137 Pac. 1072. It is held the presumption created by statute that a breach of such contracts can be compensated is a dis-

putable one: *Gilfallan v. Gilfallan*, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784n.

<sup>23</sup> *Phillips v. Bishop*, 92 Kans. 313, 140 Pac. 834.

<sup>24</sup> *A. G. Lehman Co. v. Island City Pickle Co.*, 208 Fed. 1014; *Gleason v. Earles*, 78 Wash. 491, 139 Pac. 213.

<sup>25</sup> *Gilfallan v. Gilfallan*, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784n; *Colorado &c. R. Co. v. Blair*, 148 N. Y. S. 671. It is held government securities are readily obtainable on the market and specific performance will not lie: *Misenheimer v. Alexander*, 162 N. Car. 226, 78 S. E. 161.

<sup>26</sup> *Gilfallan v. Gilfallan*, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784n (contract for sale of oil stock).

<sup>27</sup> *Thompson v. Automatic Fire Protection Co.*, 211 Fed. 120.

<sup>28</sup> *Longino v. Webb Press Co.*, 132 La. 25, 60 So. 707.

judgment will not be specifically enforced.<sup>29</sup> In some states it is so provided by statute.<sup>30</sup>

**§ 2321. Contracts to construct and repair buildings or other structures.**—The general rule is that contracts for the construction or repair of buildings will not be specifically enforced.<sup>31</sup> But courts of equity may decree specific performance of a contract whereby a railroad company contracts to establish and maintain a flag station.<sup>32</sup>

**§ 2322. Contracts for continuous acts.**—Where a contract is continuing and would require continuous supervision, or special skill, courts of equity will not decree specific performance.<sup>33</sup>

**§ 2323. Contracts to indemnify or secure and to insure.**—A court of equity will enforce specific performance of a contract for insurance, or give a decree for the losses incurred.<sup>34</sup>

**§ 2324. Gifts.**—As a general rule equity will not enforce a mere agreement to give land; but, where the donee has taken possession and made valuable improvements on the strength of and in reliance on the gift the remedy will lie.<sup>35</sup>

**§ 2325. Contracts for testamentary provisions.**—Contracts for the testamentary disposition of property will be specifically enforced in equity where the agreement is sufficiently proved and is definite and where the services rendered are incapable of pecuniary valuation,<sup>36</sup> and this regardless of the particular form the contract may assume.<sup>37</sup>

<sup>29</sup> *Emirzian v. Asato*, 23 Cal. App. 251, 137 Pac. 1072; *Heth v. Smith*, 175 Mich. 328, 141 N. W. 583. But it is held the making of a mutual invoice for a stock of goods is not such personal service as would defeat the right to specific performance of a contract for the exchange of land: *Waldo v. Lockard*, 96 Nebr. 490, 148 N. W. 510.

<sup>30</sup> *Emirzian v. Asato*, 23 Cal. App. 251, 137 Pac. 1072.

<sup>31</sup> *Caldwell v. Donaghey*, 108 Ark. 60, 156 S. W. 839, 45 L. R. A. (N. S.) 721n, Ann. Cas. 1915B, 133n.

<sup>32</sup> *Parrott v. Atlantic & C. R. Co.*, 165 N. Car. 295, 81 S. E. 348, Ann. Cas. 1915D, 265n.

<sup>33</sup> *Blue Point Oyster Co. v. Haagen-*  
*son*, 209 Fed. 278; *Houston Electric*  
*Co. v. Glen Park Co.* (Tex. Civ.  
App.), 155 S. W. 965.

<sup>34</sup> *Otis v. Provident Savings Life*  
*Assur. Society*, 173 Ill. App. 70; *Tuck-*  
*er v. Farmers' Mut. Fire Assn.*, 71  
W. Va. 690, 77 S. E. 279.

<sup>35</sup> *Thayer v. Thayer*, 69 Ore. 138,  
138 Pac. 478; *Tonseth v. Larsen*, 69  
Ore. 387, 138 Pac. 1080; *Gove v. Arm-*  
*strong*, 88 Vt. 115, 92 Atl. 10.

<sup>36</sup> *Oles v. Wilson*, 57 Colo. 246, 141  
Pac. 489. Where a party assumes a  
personal relation as a member of the  
promisor's family under an agree-  
ment to bequeath, and gives the prom-  
isor his society and services, which  
can not be measured in money, spe-  
cific performance will lie: *Robertson*  
*v. Corcoran*, 125 Minn. 118, 145 N. W.  
812; *Brasch v. Reeves*, 124 Minn. 114,  
144 N. W. 744.

<sup>37</sup> *Daniels v. Butler*, 169 Iowa 65,  
149 N. W. 265; *Romary v. Romary*,  
91 Kans. 240, 137 Pac. 982; *Wanger*

§ 2326. **Good faith of party seeking specific performance.**—Where one refuses to accept performance under a contract he can not afterward obtain specific performance of it.<sup>38</sup>

§ 2328. **Necessity of diligence of party seeking specific performance.**—A party must be diligent in the assertion of a claim for specific performance of a contract for the sale of land and such rule applies to the heirs.<sup>39</sup>

§ 2329. **Time for performance by plaintiff.**—A vendor may compel specific performance of a contract for the sale of real estate, although he had no title when the contract was executed, if he perfect his title pending suit;<sup>40</sup> but if he fails to comply with the conditions of the contract or puts it beyond his power to carry it out, equitable relief will not be granted.<sup>41</sup> Generally, a party can not enforce specific performance of a contract to convey until he has demanded performance, but formal demand or notice may be rendered unnecessary.<sup>42</sup>

§ 2330. **Time as of the essence of the contract.**—Where time is of the essence of the contract, specific performance will not be decreed to one who has omitted to execute his part of the contract within the time fixed;<sup>43</sup> but, where by consent one of the parties performs after the time for performance is passed he is entitled to specific performance.<sup>44</sup>

§ 2331. **Sufficiency of performance by plaintiff.**—As a general rule neither party to a contract will be entitled to a decree of specific performance against the other until he has shown that he has done, or offered to do, or is ready and willing to do all acts required of him in the execution of the contract.<sup>45</sup>

v. Marr, 257 Mo. 482, 497, 165 S. W. 1027, 1032.

<sup>38</sup> Marshall v. Beason (Tex. Civ. App.), 165 S. W. 75.

<sup>39</sup> Where the heirs of a purchaser learned the vendor was treating the sale as rescinded, it was their duty to make known their intention to perform the contract of purchase within a reasonable time: Hargis v. Edrington, 113 Ark. 433, 168 S. W. 1095.

<sup>40</sup> Heller v. McGuin, 261 Ill. 588, 104 N. E. 158; Egen v. Pettus, 80 Misc. 120, 140 N. Y. S. 765.

<sup>41</sup> Button Land Co. v. Noon, 163 Iowa 547, 145 N. W. 67; Strater v.

Flynn (N. J. Ch.), 91 Atl. 591.

<sup>42</sup> Gove v. Armstrong, 88 Vt. 115, 92 Atl. 10. Where a purchaser filed a bill for specific performance and tendered the price of the land this was sufficient notice to the vendor: Nickerson v. Bridges, 216 Mass. 416, 103 N. E. 939.

<sup>43</sup> Coyle v. Kierski (Del. Ch.), 89 Atl. 598.

<sup>44</sup> Studdard v. Hawkins, 139 Ga. 743, 78 S. E. 116.

<sup>45</sup> Glenwood Springs v. Glenwood Light & Water Co., 202 Fed. 678, 121 C. C. A. 88, L. R. A. 1915C, 438n; Montana Water Co. v. Billings, 214

§ 2332. **Sufficiency of vendor's title.**—It is the duty of a vendor to tender to his vendee a safe title and a purchaser is never bound to accept a defective title in absence of express agreement. Equity will not compel a purchaser to perform his contract for the purchase of real estate where the title is doubtful.<sup>46</sup> And where there was a failure to furnish an abstract showing a clear title as stipulated in the contract specific performance will be denied.<sup>47</sup>

§ 2333. **Conveyance or tender thereof.**—The burden is upon plaintiff in a suit for the specific performance of a contract for the exchange of land of tendering performance in accordance with the contract.<sup>48</sup>

§ 2334. **Payment or tender of consideration.**—A contract for the conveyance of land on payment of purchase-price can not be specifically enforced, in the absence of excuse or waiver, without an unconditional tender of the purchase-price.<sup>49</sup> A substantial compliance, however, with the contract will ordinarily

Fed. 121; *Grooms v. Grooms*, 141 Ga. 478, 81 S. E. 210; *Bush v. Black*, 142 Ga. 157, 82 S. E. 530; *Bennett v. Burkhalter*, 257 Ill. 572, 101 N. E. 189, 44 L. R. A. (N. S.) 733n; *Robertson v. Corcoran*, 125 Minn. 118, 145 N. W. 812; *Brody, Adler & Koch Co. v. Hochstadter*, 160 App. Div. 310, 144 N. Y. S. 631. Where plaintiff contracted with defendant for the exchange of property and each party was to furnish the other a merchantable abstract of title, the plaintiff's contract to furnish the abstract as stipulated, is independent of requisitions by defendant, and, on default, he is not entitled to specific performance: *Billick v. Davenport*, 164 Iowa 105, 145 N. W. 470; *Keene v. Zindorf*, 81 Wash. 152, 142 Pac. 484.

<sup>46</sup> *Pierce v. Marrs*, 153 Ky. 748, 156 S. W. 404; *Barthel v. Engle*, 261 Mo. 307, 168 S. W. 1154; *Knolhoff v. Mark*, 68 Ore. 437, 136 Pac. 893, Ann. Cas. 1915D, 1229n (deed improperly executed).

<sup>47</sup> *Eller v. Newell*, 159 Iowa 711, 141 N. W. 52; *Ranck v. Wickwire*, 255 Mo. 42, 164 S. W. 460; *Neill v. McClung*, 71 W. Va. 458, 76 S. E. 878.

<sup>48</sup> *Billick v. Davenport*, 164 Iowa 105, 145 N. W. 470.

<sup>49</sup> *Northwestern Lumber Co. v. Grays Harbor &c. R. Co.*, 208 Fed. 624; *Cronen v. Moore*, 210 Fed. 239, 127 C. C. A. 57; *Bennett v. United States Land &c. Legacy Co.*, 16 Ariz. 138, 141 Pac. 717; *Coyle v. Kierski* (Del. Ch.), 89 Atl. 598; *Martin v. Thompson*, 141 Ga. 31, 80 S. E. 318; *Burkhalter v. Roach*, 142 Ga. 344, 82 S. E. 1059; *Strauss v. Borg*, 172 Ill. App. 466; *Sheffield v. Hancock County*, 164 Iowa 561, 146 N. W. 439; *Harvey v. Bross*, 216 Mass. 57, 104 N. E. 350; *Edwards v. Watson*, 258 Mo. 631, 167 S. W. 1119; *Tevis v. Tevis*, 259 Mo. 19, 167 S. W. 1003, Ann. Cas. 1917A, 865n; *Golden Valley Land & Cattle Co. v. Johnstone*, 25 N. Dak. 148, 141 N. W. 76; *Merchant Land Co. v. Barbour*, 65 Ore. 235, 130 Pac. 976, 132 Pac. 710; *Groves v. Whittenberg* (Tex. Civ. App.), 165 S. W. 889; *Ross v. Blunt* (Tex. Civ. App.), 166 S. W. 913; *Johnson v. Mansfield* (Tex. Civ. App.), 166 S. W. 927; *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619; *Matney v. Barnes*, 116 Va. 713, 82 S. E. 801; *Columbus Onyx & Marble Co. v. Miller*, 74 W. Va. 686, 82 S. E. 1078.

suffice to entitle a party to his equitable remedy.<sup>50</sup> And, where the purchaser is able and willing to pay the amount found due upon accounting specific performance will not be denied.<sup>51</sup> Likewise, where a purchaser takes possession and makes improvements, he may be entitled to specific performance without tender of payment.<sup>52</sup>

§ 2335. **Effect of delay or default of plaintiff.**—Mere delay on the part of the plaintiff will not, as a rule, defeat a suit for specific performance where the defendant is not prejudiced by the delay.<sup>53</sup>

§ 2336. **Effect of change in value of property during delay.**—If property contracted for undergoes considerable change in value a delay in filing suit may prevent specific performance. Thus it is held a delay of a year and a half where the lessor spent money for repairs and leased the premises to another is a bar to specific performance.<sup>54</sup>

§ 2337. **Waiver and estoppel to urge objections to delay.**—A defendant can not set up a breach or delay in the performance of a contract of which he was the cause to defeat specific performance.<sup>55</sup> This is likewise true where by his conduct he has acquiesced in a delay of performance.<sup>56</sup>

§ 2338. **Form of remedy.**—It is held an action to recover the value of a fractional interest in a vessel is equivalent to a suit for specific performance.<sup>57</sup> But an action to recover dividends was held not capable of serving the purpose of a complaint for specific performance of an agreement providing for their transfer.<sup>58</sup>

§ 2339. **Jurisdiction.**—Suits to compel the specific performance of contracts to convey land are suits in personam and

<sup>50</sup> Welch v. McIntosh, 89 Kans. 47, 130 Pac. 641; Brewer v. Sowers, 118 Md. 681, 86 Atl. 228; Horgan v. Russell, 24 N. Dak. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150n.

<sup>51</sup> Hill v. Alber, 261 Ill. 124, 103 N. E. 612.

<sup>52</sup> Eller v. Motley, 99 S. Car. 20, 82 S. E. 992.

<sup>53</sup> Caplan v. Buckner, 123 Md. 590, 91 Atl. 481.

<sup>54</sup> Goldstine v. Tolman, 157 Wis. 141, 147 N. W. 7.

<sup>55</sup> Studdard v. Hawkins, 139 Ga. 743, 78 S. E. 116.

<sup>56</sup> Berry v. Second Baptist Church of Stillwater, 37 Okla. 117, 130 Pac. 585; Wright v. Suydam, 72 Wash. 587, 131 Pac. 239.

<sup>57</sup> Young v. Matthew Turner Co., 168 Cal. 671, 143 Pac. 1029.

<sup>58</sup> Hamil v. Flowers, 184 Ala. 301, 63 So. 994.

not in rem and therefore a decree of specific performance against a nonresident served only by publication can not be rendered.<sup>59</sup> But where a third person holds in trust for another, jurisdiction over such person may be sufficient to compel conveyance although jurisdiction of the vendor is not secured.<sup>60</sup> An action to enforce a written contract to make a will the effect of which is to impress a trust on the property of the decedent must be brought in a court of general and original jurisdiction.<sup>61</sup>

§ 2340. **Venue.**—A suit for specific performance operates only on the person and may, it has been held, be brought either in the county of the defendant's residence or in the county where the land is located.<sup>62</sup>

§ 2341. **Accrual of cause of action.**<sup>62a</sup>—Suits for specific performance may be brought as soon as the contract is wholly broken, but a complaint should not be filed until the time for conveyance has arrived.<sup>63</sup> It may be stated as a general rule that where a purchaser is placed in possession laches is not a defense to specific performance, as his possession is a continuous assertion of his claim.<sup>64</sup> Where a purchaser is in possession of land with the consent of the vendor mere delay in suing to compel conveyance will not defeat relief where time is not of the essence and the vendor has not tried to rescind.<sup>65</sup> Likewise, where a plaintiff has been insisting on a contract he can not withdraw on the ground of laches.<sup>66</sup> It is generally essential that a party seeking performance should not have been backward and that he should not hold off until circumstances have changed to his advantage.<sup>67</sup>

<sup>59</sup> *Snell v. Hill*, 263 Ill. 211, 105 N. E. 16.

<sup>60</sup> *Snell v. Hill*, 263 Ill. 211, 105 N. E. 16.

<sup>61</sup> *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489.

<sup>62</sup> *Burrow v. Clifton*, 186 Ala. 297, 65 So. 58.

<sup>62a</sup> [Main section cited in *Parks v. Monroe* (Kans.), 161 Pac. 638.]

<sup>63</sup> *Burrow v. Clifton*, 186 Ala. 297, 65 So. 58; *Mosher v. Rogers*, 141 Ga. 557, 81 S. E. 852.

<sup>64</sup> *Sewell v. Peavey*, 187 Ala. 322, 65 So. 803; *Hargis v. Ederington*, 113 Ark. 433, 168 S. W. 1095; *Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968; *Master v. Roberts*, 244 Pa. 342, 90 Atl. 735.

<sup>65</sup> *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 Pac. 21; *West Palm Beach v. Lakeside Cemetery Assn.*, 67 Fla. 176, 64 So. 751. See also *Snell v. Hill*, 263 Ill. 211, 105 N. E. 16.

<sup>66</sup> *Fletcher v. Wireman*, 152 Ky. 565, 153 S. W. 982.

<sup>67</sup> The following cases are held not to be barred by laches: *Crawford v. Wilson*, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773; *Asher v. Simpson*, 154 Ky. 183, 156 S. W. 1067 (exchange of land); *Taft v. Henry*, 219 Mass. 78, 106 N. E. 553; *In re Dunbar's Estate*, 51 Pa. Super. Ct. 216; *Johnson v. Mansfield* (Tex. Civ.

§ 2343. **Parties to action.**—As a general rule the only proper parties to a suit for specific performance are the parties to the contract except in case of assignment of the entire contract or unless there are some special circumstances authorizing a departure from the rule.<sup>68</sup> So in a suit by an executor for specific performance of a contract for the purchase of land of his decedent, the heirs of law of such decedent are necessary parties.<sup>69</sup> Likewise the children of a deceased father are necessary parties to an action to enforce the contract for purchase of a homestead.<sup>70</sup>

§ 2345. **Injunction.**—An injunction is often necessary to preserve the rights of the parties during the pendency of specific performance, and it is under this rule that a foreclosure sale of property covered by the contract may be enjoined.<sup>71</sup>

§ 2346. **Payment of consideration into court.**—Where a cash payment required by a contract for the purchase of land is tendered by the pleadings this will be sufficient without paying into court,<sup>72</sup> and such is the statutory rule in some states.<sup>73</sup>

§ 2347. **Pleading—In general.**—An amendment of a pleading to compel specific performance may be permitted.<sup>74</sup> An allegation in a pleading of a mere offer to pay, or a willingness to pay will not take the place of an allegation of tender unless tender is waived.<sup>75</sup>

App.), 166 S. W. 927; Gove v. Armstrong, 88 Vt. 115, 92 Atl. 10. But see Wilkinson v. Poling, 74 W. Va. 399, 82 S. E. 47.

<sup>68</sup> Schnuettgen v. Frank, 213 Fed. 440, 130 C. C. A. 76; McKeown v. Lawrence, 56 Colo. 106, 136 Pac. 1014; Oles v. Wilson, 57 Colo. 246, 141 Pac. 489; Williams v. Shuman, 141 Ga. 114, 80 S. E. 625; Chicago & Western Indiana R. Co. v. Chicago & E. I. R. Co., 172 Ill. App. 156; Welch v. McIntosh, 89 Kans. 47, 130 Pac. 641 (contract for purchase of realty); Henriott v. Cood, 153 Ky. 418, 155 S. W. 761 (parties barred); Janochsky v. Kurr, 120 Minn. 471, 139 N. W. 944 (widow of mortgagor); Wrightsville Hardware Co. v. Assets Realization Co., 159 App. Div. 849, 144 N. Y. S. 991 (officers and corporation); Claremont College v. Riddle,

165 N. Car. 211, 81 S. E. 283 (trustees and church); McLanahan v. Mills, 73 W. Va. 246, 80 S. E. 351 (vendee and heirs).

<sup>69</sup> Haar v. Schloss, 168 N. Car. 97, 83 S. E. 306; Beaton v. Fussell (Tex. Civ. App.), 166 S. W. 458.

<sup>70</sup> Burrow v. Clifton, 186 Ala. 297, 65 So. 58.

<sup>71</sup> Lowery v. Cole, 47 Mont. 64, 130 Pac. 410. See also Dooley v. Merrill, 216 Mass. 500, 104 N. E. 345.

<sup>72</sup> Beaton v. Fussell (Tex. Civ. App.), 166 S. W. 458.

<sup>73</sup> Berry v. Second Baptist Church, 37 Okla. 117, 130 Pac. 585.

<sup>74</sup> Studdard v. Hawkins, 139 Ga. 743, 78 S. E. 116; Van Abel v. Wemmering, 33 S. Dak. 544, 146 N. W. 697 (amendment of description).

<sup>75</sup> Williams v. Shuman, 141 Ga. 114, 80 S. E. 625.



§ 2348. **Bill, complaint or petition.**—Every complaint for specific performance must show that the consideration for the contract is sufficient, and that the contract is fair and reasonable;<sup>76</sup> and in an action to convey land the title must be shown together with a sufficient description of the property.<sup>77</sup> But a complaint need not allege special circumstances which show plaintiff has no adequate remedy at law.<sup>78</sup> In case of personal property it is held the facts must show that damages will not furnish adequate relief.<sup>79</sup> Where the date of the purchase of property,<sup>80</sup> the terms of a lease,<sup>81</sup> part performance,<sup>82</sup> or tender,<sup>83</sup> are material they should be alleged in the petition. It is not necessary, however, to allege a specific declination to execute title,<sup>84</sup> or to allege a deposit of the deed with the clerk of the court, where the complaint shows a tender and refusal.<sup>85</sup>

§ 2355. **Demurrer.**—A demurrer will be sustained to a complaint where the defendants are not parties to the contract and no mistake is claimed in the contract.<sup>86</sup> Likewise a complaint which shows on its face that the vendor has no title is demurrable as to the portion seeking specific performance.<sup>87</sup> But a petition for specific performance of a contract to convey land is not subject to demurrer on the ground that it was without consideration, that it was ultra vires, or was not shown to be in writing.<sup>88</sup> And as against demurrer an allegation that another was interested with the plaintiff in the contract was held sufficient to authorize a joinder with plaintiff.<sup>89</sup> Where a petition shows that the contract was obtained by fraud and duress it is demurrable.<sup>90</sup>

<sup>76</sup> McGinn v. Willey, 24 Cal. App. 303, 141 Pac. 49; Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67; Young v. Matthew Turner Co., 168 Cal. 671, 143 Pac. 1029.

<sup>77</sup> Joyce v. Tomasini, 168 Cal. 234, 142 Pac. 67; Lyle v. Phillips, 141 Ga. 618, 81 S. E. 867; Hollander v. Lustik, 79 Misc. 103, 140 N. Y. S. 659.

<sup>78</sup> Lowery v. Cole, 47 Mont. 64, 130 Pac. 410.

<sup>79</sup> Young v. Matthew Turner Co., 168 Cal. 671, 143 Pac. 1029.

<sup>80</sup> Williams v. Shuman, 141 Ga. 114, 80 S. E. 625.

<sup>81</sup> Tracy v. Deshon, 157 Ky. 226, 162 S. W. 1116.

<sup>82</sup> Fahey v. Benedetti (Tex. Civ. App.), 161 S. W. 896.

<sup>83</sup> Herring v. Smith, 141 Ga. 825, 82 S. E. 132.

<sup>84</sup> Eason v. Roe, 185 Ala. 71, 64 So. 55.

<sup>85</sup> Lowery v. Cole, 47 Mont. 64, 130 Pac. 410.

<sup>86</sup> Le Grand Co. v. Richman, 82 N. J. Eq. 481, 91 Atl. 723.

<sup>87</sup> Bird v. Lester (Tex. Civ. App.), 166 S. W. 112.

<sup>88</sup> City of Quitman v. Jelks & McLeod, 139 Ga. 238, 77 S. E. 76.

<sup>89</sup> Tolar v. South Texas Development Co. (Tex. Civ. App.), 153 S. W. 911.

<sup>90</sup> Herring v. Smith, 141 Ga. 825, 82 S. E. 132. But see McCrocklin v. O'Donoghue, 159 Ky. 564, 167 S. W. 901.

§ 2356. **Issue, proof and variance.**—Where the complaint in an action for specific performance does not disclose it, the burden of showing that the contract sought to be enforced is unfair or inequitable is upon the defendant.<sup>91</sup> In an action by an assignee the original contract upon which the suit is based is admissible in evidence where all parties interested are before the court.<sup>92</sup>

§ 2357. **Evidence in general.**—Where it is sought to specifically enforce the performance of a contract to convey land, the proof must conform to the allegations.<sup>93</sup> Thus a new contract averred to have been substituted must be pleaded if relied upon.<sup>94</sup> Likewise a plaintiff can not allege a contract which provides for payment at a definite time and sustain it by proof that it was subsequently modified so as to provide for payment at an indefinite time.<sup>95</sup> But an allegation in a suit to enforce a contract of lease by specific performance, that the plaintiff has no adequate remedy at law is sufficient to admit proof showing the necessity for equitable relief.<sup>96</sup>

§ 2358. **Weight and sufficiency of evidence.**—Where the evidence in a suit for specific performance shows but a vague and uncertain contract a court of equity will not enforce it.<sup>97</sup> The terms of the contract must be established by clear and satisfactory proof.<sup>98</sup> Thus proof of a parol contract to convey land must be clear and convincing.<sup>99</sup> It has been held, however, that notwithstanding the rule that such contracts must be clearly established, equity will not suffer a promisor to obtain an undue ad-

<sup>91</sup> Indianapolis Northern Trac. Co. v. Essington, 54 Ind. App. 286, 100 N. E. 765.

<sup>92</sup> Tolar v. South Texas Development Co. (Tex. Civ. App.), 153 S. W. 911. To same effect, see: Hand Trading Co. v. Chason, 139 Gr. 156, 76 S. E. 1622 (subsequent assignee).

<sup>93</sup> Kimball v. Batley, 174 Mich. 544, 140 N. W. 915 (parol contract).

<sup>94</sup> McGinn v. Willey, 24 Cal. App. 303, 131 Pac. 49.

<sup>95</sup> Gachet v. Morton, 181 Ala. 179, 61 So. 817. To same effect, see: Citronelle Turpentine Co. v. Buhlig, 184 Ala. 404, 63 So. 951.

<sup>96</sup> Shea v. Keeney, 155 App. Div. 628, 140 N. Y. S. 912.

<sup>97</sup> Willis v. Zorger, 258 Ill. 574, 101 N. E. 963; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812; Hersman v. Hersman, 253 Mo. 175, 161 S. W. 800; McQuitty v. Wilhite, 247 Mo. 163, 152 S. W. 598; Northrup v. Scott, 85 Misc. 515, 148 N. Y. S. 846; Kroeger v. Warren, 31 S. Dak. 395, 141 N. W. 395.

<sup>98</sup> Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812; Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287; Hersman v. Hersman, 253 Mo. 175, 161 S. W. 800; McQuitty v. Wilhite, 247 Mo. 163, 152 S. W. 598.

<sup>99</sup> Blanc v. Connor, 167 Cal. 719, 141 Pac. 217; Daniels v. Butler, 169 Iowa 65, 149 N. W. 265; Campbell v.

vantage of the promisee and secure the performance of services without a conveyance.<sup>1</sup> And while such contract must be proved by clear and satisfactory evidence, the proof is not limited to any particular form and may be established by circumstances.<sup>2</sup> The proof necessary to sustain a contract to make wills is governed by the ordinary rule applicable to parol contracts.<sup>3</sup> Less convincing proof is necessary to resist an action for specific performance than is necessary to sustain it.<sup>4</sup> The questions of abandonment and repudiation are for the jury.<sup>5</sup>

§ 2359. **Relief awarded.**—A court of equity can only grant specific performance of the exact contract made by the parties.<sup>6</sup> It has been held, however, where the contract renders it obvious what land is intended to be conveyed a pertinent description will be inserted by the court in its decree.<sup>7</sup> Jurisdiction ordinarily extends to those persons only who are parties to the contract.<sup>8</sup> But having properly acquired jurisdiction the court will proceed to do complete justice by adjudicating all matters involved. Thus where the plaintiff sues for specific performance of a contract which he has performed he is entitled not only to specific performance but to a decree for any profits realized by the vendor while holding the legal title.<sup>9</sup> And although an administrator be not a party he may be compelled to assign the interest of a deceased partner in accordance with a contract between the partners.<sup>10</sup> It is also held that relief may be granted to persons not parties.<sup>11</sup> Under its broad powers a court of equity in addition to enforcing the terms of a contract may compel the performance of other conditions, not expressed but relating to the same subject-matter,<sup>12</sup> and where the possession of property is withheld may include in its decree an allowance for the use of the property,

Hayden, 181 Mo. App. 681, 168 S. W. 363; Fisher v. Fallon, 142 N. Y. S. 72.

<sup>1</sup> McQuitty v. Wilhite, 247 Mo. 163, 152 S. W. 598.

<sup>2</sup> Willis v. Zorger, 258 Ill. 574, 101 N. E. 963.

<sup>3</sup> Wanger v. Marr, 257 Mo. 482, 497, 165 S. W. 1027, 1032.

<sup>4</sup> Ranck v. Wickwire, 255 Mo. 42, 164 S. W. 460.

<sup>5</sup> Groves v. Whittenberg (Tex. Civ. App.), 165 S. W. 889.

<sup>6</sup> Gachet v. Morton, 181 Ala. 179, 61 So. 817; Barrett v. Durbin, 106 Ark. 332, 153 S. W. 265; W. M. Ostrander,

Inc. v. United New Jersey R. & Co., 83 N. J. Eq. 645, 91 Atl. 319.

<sup>7</sup> St. Xavier College v. Briggs, 33 Ohio Cir. Ct. R. 468.

<sup>8</sup> Bartak v. Isvolt, 261 Ill. 279, 103 N. E. 967.

<sup>9</sup> McGinn v. Willey, 24 Cal. App. 303, 141 Pac. 49.

<sup>10</sup> Murphy v. Murphy, 217 Mass. 233, 104 N. E. 466.

<sup>11</sup> Eason v. Roe, 185 Ala. 71, 64 So. 55.

<sup>12</sup> Cronen v. Moore, 210 Fed. 239, 127 C. C. A. 57 (where a defendant in settlement of a suit for breach of marriage promise agreed with

such as rents and profits and interest,<sup>13</sup> or it may so shape its decree as to award expenses incurred in the removal of liens.<sup>14</sup> Where specific performance is impossible or is denied the court may assess damages,<sup>15</sup> or declare a lien.<sup>16</sup> Likewise payments made on a contract enforceable in part only may be credited to the valid part.<sup>17</sup> A refusal to assess damages has been held error.<sup>18</sup> Where a vendor of land can not convey all the land which he has agreed to convey a decree may be entered for specific performance of that which he is able to convey with an abatement in the price for the balance.<sup>19</sup> Relief may also be granted conditionally as upon payment of purchase-price.<sup>20</sup> As a general rule a decree carries with it the right to costs.<sup>21</sup>

§ 2360. **Decree.**—A party may be relieved from a decree of specific performance where the plaintiff fails within the time limited to carry out his part of the contract.<sup>22</sup> It is held a decree of specific performance is not discharged by the performance of some act not mentioned therein.<sup>23</sup>

plaintiff to furnish a certificate retracting certain assertions against her character and certifying to her good character, plaintiff was not entitled to specific performance until such statement was furnished, though the requirement was not part of the written contract of settlement).

<sup>13</sup> *Clark v. Cagle*, 141 Ga. 703, 82 S. E. 21, L. R. A. 1915A 317; *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228; *Mentlikowski v. Wisniewski*, 173 Mich. 642, 139 N. W. 874; *Castelli v. Burns*, 156 App. Div. 200, 140 N. Y. S. 1057. Contra: *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228.

<sup>14</sup> *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228; *Weidenbaum v. Raphael*, 83 N. J. Eq. 17, 90 Atl. 683. See also *Howard v. Cave*, 162 Iowa 506, 144 N. W. 307.

<sup>15</sup> *McCormick v. Oklahoma City*, 203 Fed. 921, 122 C. C. A. 215; *Lane v. Lodge*, 139 Ga. 93, 76 S. E. 874; *Wentworth v. Manhattan Market Co.*, 216 Mass. 374, 103 N. E. 1105; *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939; *Wentworth v. Manhattan Market Co.*, 218 Mass. 91, 106 N. E. 118.

<sup>16</sup> *Klett v. Klett*, 175 Mich. 224, 141 N. W. 668. See also *Smith v. Mathis*, 140 Mich. 262, 140 N. W. 548.

<sup>17</sup> *Sargent v. Realty Traders*, 82 N. J. Eq. 331, 88 Atl. 1043, Ann. Cas. 1915C, 488n.

<sup>18</sup> *McCarten v. Smith*, 163 App. Div. 900, 148 N. Y. S. 89. See also *Roach v. Irvin*, 245 Pa. 162, 91 Atl. 243.

<sup>19</sup> *Williams v. Pearman* (Tex. Civ. App.), 164 S. W. 43. See also *Haden v. Falls*, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034n.

<sup>20</sup> *Hooper v. Davies*, 166 N. Car. 236, 81 S. E. 1063.

<sup>21</sup> *Bartak v. Isvolt*, 261 Ill. 279, 103 N. E. 967; *Hicks v. Smith*, 183 Mich. 37, 148 N. W. 766. The plaintiff was granted specific performance of a contract to convey land, but did not tender payment within the time limited, and defendants were granted relief from the decree; this had the effect of vacating the entire decree, and complainant lost the right to costs given by the original decree: *Rosenstein v. Burr*, 83 N. J. Eq. 491, 90 Atl. 1037. But see *Castelli v. Burns*, 156 App. Div. 200, 140 N. Y. S. 1057.

<sup>22</sup> *Rosenstein v. Burr*, 83 N. J. Eq. 491, 90 Atl. 1037.

<sup>23</sup> *Wright v. Suydam*, 79 Wash. 550, 140 Pac. 578.

## CHAPTER LII

### REFORMATION

§ 2365. **Nature of remedy.**—A court of equity has power, on a proper showing, to reform a written instrument which on account of mutual mistake, fraud or inequitable conduct on the part of one of the parties, fails to express the real contract between the parties.<sup>1</sup> Equity will not reform a writing into a contract to which the parties did not mutually agree. They will merely reform the writing to speak the real agreement.<sup>2</sup> The

<sup>1</sup> *Ackerlind v. United States*, 49 Ct. Cl. 635; *Goulding Fertilizer Co. v. Blanchard*, 178 Ala. 298, 59 So. 485; *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118; *Kepner v. John M. C. Marble Co.*, 26 Cal. App. 696, 148 Pac. 231 (holding there may be reformation even though fraud or mistake suspected); *Lindenberger v. Rowland*, 158 Ky. 760, 166 S. W. 242; *Meacham Contracting Co. v. Hopkinsville*, 164 Ky. 103, 176 S. W. 187 (clause not to be given meaning it expressed); *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Barnum v. White*, 128 Minn. 58, 150 N. W. 227; *Stephens v. Stephens* (Mo.), 183 S. W. 572; *Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 144 Pac. 469, Ann. Cas. 1916A, 681n; *Cleveland v. Bate-man*, 21 N. Mex. 675, 158 Pac. 648; *Baird v. Erie R. Co.*, 210 N. Y. 225, 104 N. E. 614; *Manheimer v. Kuhn*, 173 App. Div. 135, 159 N. Y. S. 437 (stipulation omitted from lease); *Fitzgerald v. Arcade Theater Co.*, 153 N. Y. S. 618; *Ray v. Patterson*, 170 N. Car. 226, 87 S. E. 212; *Freeman v. Croom*, 172 N. Car. 524, 90 S. E. 523; *Markwart v. Kliever*, 75 Ore. 574, 147 Pac. 553; *Coates v. Smith*, 81 Ore. 556, 160 Pac. 517; *Forrester v. Moon*, 100 S. Car. 157, 84 S. E. 532; *Van Brunt v. Ferguson*, 163 Wis. 540, 158 N. W. 295. Before equity will change the terms of a written instrument on the ground that it does not express the real agreement, it must appear that they were inserted

through accident, fraud, or mutual mistake, or, if the mistake be unilateral, it must be material and go to the substance of the contract: *Arden v. Boone* (Tex. Civ. App.), 187 S. W. 995. A grantee, whose deed by mistake or fraud causes him to assume a mortgage, may have it reformed in an action to foreclose, provided mortgagee has not acted on faith of assumption clause, so that its rescission will work injury to him: *Renz v. Ernst*, 160 N. Y. S. 577.

<sup>2</sup> *William Cramp & Co. Engine Bldg. Co. v. United States*, 46 Ct. Cl. 521; *Jordy v. Dunlevie*, 139 Ga. 325, 77 S. E. 162 (the remedy is rescission when the contract is obtained by fraud). See also *Macey v. Furman*, 90 Wash. 580, 156 Pac. 548 (rescission held the remedy). Compare with: *First Nat. Bank v. Hartford Fire Ins. Co.*, 17 N. Mex. 334, 127 Pac. 1115. A contract will not be reformed so as to make a different contract from that intended: *Frost v. Reagon*, 32 Okla. 849, 124 Pac. 13. Fraud, mistake or some special reason must exist before the courts will reform a binding contract: *Seidel v. Walker* (Tex. Civ. App.), 173 S. W. 1170; *William Cramp & Co. Engine Bldg. Co. v. United States*, 46 Ct. Cl. 521; *Miles v. Shreve*, 179 Mich. 671, 146 N. W. 374; *Stumpf v. Norton*, 124 Minn. 93, 144 N. W. 469; *Brinkerhoff v. Juden*, 255 Mo. 698, 164 S. W. 523; *Dearing v. Juden*, 256 Mo. 1, 164 S. W. 532; *Plockzek v. St. Paul Fire*

remedy can not be invoked to reform a void instrument.<sup>3</sup> This rule applies to deeds of a wife, the husband not joining,<sup>4</sup> or the deed of a married woman seeking to relinquish her dower,<sup>5</sup> or an executor's deed when by so doing an invalid option to sell would be enforced.<sup>6</sup> In case the minds of the parties have not met there is no contract that can be reformed.<sup>7</sup> It is only agreements that have been reduced to writing that will be reformed.<sup>8</sup>

§ 2366. **Grounds for reformation.**—A contract may be reformed in order to make it express the actual agreement and intention of the parties<sup>9</sup> where, because of fraud, accident, or mistake of the scrivener, or by any other means, it fails to express such intention.<sup>10</sup> Thus, where stipulations have been omitted

&c. Ins. Co. (N. J. Ch.), 91 Atl. 812; Ward v. Union Trust Co., 172 App. Div. 569, 159 N. Y. S. 54; Allen v. Roanoke R. & Lumber Co., 171 N. Car. 339, 88 S. E. 492; Baltimore &c. R. Co. v. Bing, 89 Ohio 92, 105 N. E. 142; Thraves v. Greenlees, 42 Okla. 764, 142 Pac. 1021; Bell v. Bancroft (Okla.), 155 Pac. 594; Smith v. Board of Education of Parkersburg Dist., 76 W. Va. 239, 85 S. E. 513; R. D. Johnson Milling Co. v. Read, 76 W. Va. 557, 85 S. E. 726. A mere misunderstanding of the facts is not sufficient: Britton v. Metropolitan Life Ins. Co., 165 N. Car. 149, 80 S. E. 1072. The power to reform is an extraordinary power and should be exercised only in a clear case: Ackerslind v. United States, 49 Ct. Cl. 635. See also Britton v. Metropolitan Life Ins. Co., 165 N. Car. 149, 80 S. E. 1072. A suit to reform an agreement will not lie, depriving party of trial by jury, where the intent of parties can be determined by construction and reformation is unnecessary: I. M. Ludington's Sons v. Fidelity &c. Co., 96 Me. 243, 160 N. Y. S. 600. An agreement will not be reformed to permit one to recover nominal damages for its breach: Whitley v. Willingham, 176 Ala. 264, 57 So. 816. But where a conveyance of water rights by mistake conveyed only 75 cubic inches, instead of 75 miner's inches, the grantee's right to a reformation of the agreement did not necessarily depend upon a showing of actual damage: Lillis v. Silver Creek

&c. Water Co., 21 Cal. App. 234, 131 Pac. 344.

<sup>3</sup> Ainsworth v. Morrill, 31 Cal. App. 509, 160 Pac. 1089; Bliss v. Linden Cemetery Assn., 85 N. J. Eq. 501, 96 Atl. 1001 (held improper to merely strike out invalid part); Cleveland v. Bateman, 21 N. Mex. 675, 158 Pac. 648.

<sup>4</sup> Jackson Lumber Co. v. Bass, 181 Ala. 169, 61 So. 271.

<sup>5</sup> Morris v. Covey, 104 Ark. 226, 148 S. W. 257.

<sup>6</sup> R. O. Campbell Coal Co. v. Baker, 142 Ga. 434, 83 S. E. 105.

<sup>7</sup> Fidelity Phenix Fire Ins. Co. v. Hilliard, 65 Fla. 443, 62 So. 585.

<sup>8</sup> Allgood v. Fahrney, 164 Iowa 540, 146 N. W. 42. Reformation will not be granted when nothing could be gained thereby for either party: King v. Edward Thompson Co., 56 Ind. App. 274, 104 N. E. 106; Grieb v. Equitable Life Assur. Society of United States, 194 Fed. 1021, 114 C. C. A. 658.

<sup>9</sup> Codd v. Langley, 75 Wash. 45, 134 Pac. 467.

<sup>10</sup> Allen v. Purcell, 141 Ga. 226, 80 S. E. 713; Allen v. Bollenbacher, 49 Ind. App. 589, 97 N. E. 817; Day v. Dyer, 171 Iowa 437, 152 N. W. 53; Kinman v. Hill (Iowa), 156 N. W. 168; Buck Auto Carriage &c. Co. v. Tietge, 174 Iowa 103, 156 N. W. 313; Mahoney v. Minnesota Farmers' Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217; Parchen v. Chessman, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681n

contrary to the intention of the parties, the contract may be reformed.<sup>11</sup> The omission of the time of payment of a note,<sup>12</sup> or the guaranty of a freight rate,<sup>13</sup> or the agreement to extend purchase-price notes of mining lease<sup>14</sup> may be supplied in an action to reform.<sup>15</sup> It may be reformed even though the exact language is used that was intended, when it fails to express the intention of the parties.<sup>16</sup> But one who purchases property at a judicial sale on foreclosure proceedings can not have corrected an alleged error in his deed when the correction would cause a variance from the judgment or proceedings in the action.<sup>17</sup>

**§ 2367. Mistake as ground for remedy.**—A written instrument will be reformed because of mistake only when it appears: (1) That the mistake, in general, is one of fact and not of law; (2) that the mistake be proved by clear and convincing evidence; and (3) that such mistake be mutual and common as to both parties.<sup>18</sup>

(even though defendant signed and delivered without reading); *MacDonald v. Crissey*, 215 N. Y. 609, 109 N. E. 609; *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636; *Herndon v. St. Louis & S. F. R. Co.*, 37 Okla. 256, 128 Pac. 727; *Silbon v. Pacific Brewing & Malting Co.*, 72 Wash. 13, 129 Pac. 581; *Hertzog v. Riley*, 71 W. Va. 651, 77 S. E. 138. When the words used in an instrument are so indefinite and uncertain that their meaning can not be determined by oral testimony, the parties can have the instrument reformed so as to express the real agreement entered into: *Korte v. O'Neill*, 34 S. Dak. 241, 148 N. W. 12. When a contract contains a clerical error and such error is apparent on the face of the instrument, a party thereto may enforce the contract as corrected without first obtaining a reformation: *Castle v. Gleason*, 31 S. Dak. 590, 141 N. W. 516.

<sup>11</sup> *Ackerlind v. United States*, 49 Ct. Cl. 635 (will not be relieved from consequences of negligence). Otherwise when omitted on account of mistake of judgment in that one of the parties relied on performance of some provisions not incorporated in the contract: *Doniphan, K. & S. R. Co. v. Missouri & N. A. R. Co.*, 104 Ark. 475, 149 S. W. 60. To same ef-

fect: *Luckenbach v. Thomas* (Tex. Civ. App.), 166 S. W. 99; *White v. Hall*, 113 Va. 427, 74 S. E. 212. The same is true where it was not intended to include them in the written agreement: *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118; *Birch v. Baker*, 81 N. J. Eq. 264, 86 Atl. 932.

<sup>12</sup> *In re Philpott's Estate*, 169 Iowa 555, 151 N. W. 825, Ann. Cas. 1917B, 839n.

<sup>13</sup> *Schirmer v. Union Brewing & Malting Co.*, 26 Cal. App. 169, 146 Pac. 194.

<sup>14</sup> *Consumers' Coal & Fuel Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897.

<sup>15</sup> But equity can not reform a will on the theory of mistake: *Mudd v. Cunningham* (Mo.), 181 So. 386.

<sup>16</sup> *F. P. Cutting Co. v. Peterson*, 164 Cal. 44, 127 Pac. 163.

<sup>17</sup> *Goulding Fertilizer Co. v. Blanchard*, 178 Ala. 298, 59 So. 485.

<sup>18</sup> *Baker v. Pierce*, 197 Ill. App. 158. The mistake must be material and mutual, or, if made by one of the parties, that it was not caused by the party seeking relief, but by the negligence or fraud of the party benefited by the mistake: *Kolb v. Dubois*, 150 Ky. 92, 149 S. W. 1134. To same effect: *Kepler v. John M. C. Marble Co.*, 26 Cal. App. 696, 148 Pac. 231;

§ 2368. **Mistake of fact.**—Broadly speaking, a written instrument can be reformed only because of mistakes of fact.<sup>19</sup> And when no mistake but a mere misapprehension of the legal effect or meaning of the acts performed or writing executed exists the instrument will not be reformed.<sup>20</sup> The subject-matter of the mutual mistake is not confined to a mistake with reference to a past event, or to the present existence of some fact or thing but may extend to a future event.<sup>21</sup> A mistake concerning the laws of another state is a mistake of fact and an instrument may be reformed therefor.<sup>22</sup>

§ 2369. **Mistake of law.**—A mistake of law which involves the legal effect of the instrument actually made will seldom, if ever, be reformed,<sup>23</sup> but in case of a mistake of law in reducing the agreement to writing so that it does not give expression to the intention of the parties,<sup>24</sup> or where the mistake is such that the instrument fails to comply with legal requirements, reformation may be had.<sup>25</sup>

Ison v. Sanders, 163 Ky. 605, 174 S. W. 505.

<sup>19</sup> Baker v. Pierce, 197 Ill. App. 158.

<sup>20</sup> Mighill v. Inhabitants of Town of Rowley, 224 Mass. 586, 113 N. E. 569.

<sup>21</sup> F. P. Cutting Co. v. Peterson, 164 Cal. 44, 127 Pac. 163.

<sup>22</sup> Schlosser v. Nicholson, 184 Ind. 283, 111 N. E. 13. Omitting from a deed a provision that the conveyance was made subject to all unpaid taxes and assessments levied against the land is a mistake of fact, and equity will insert the omitted provision: Rieder v. White, 182 Ill. App. 430.

<sup>23</sup> William Cramp & Co. Engine Bldg. Co. v. United States, 46 Ct. Cl. 521 (reformation of release); Louis Werner Sawmill Co. v. Sessoms, 120 Ark. 105, 179 S. W. 185; King v. Edward Thompson Co., 56 Ind. App. 274, 104 N. E. 106 (contract for sale of books); Regal Realty & Investment Co. v. Gallagher (Mo.), 188 S. W. 151; Campbell v. Newman, 51 Okla. 121, 151 Pac. 602; Korte v. O'Neill, 34 S. Dak. 241, 148 N. W. 12. See also: McIntyre v. Casey (Mo.), 182 S. W. 966. Where one, seeking to reform a mortgage, read the contract stipulating his liability, this alone does not charge him as a matter of law

with knowledge that it made him personally liable: Carvalho v. Sudderly, 155 N. Y. S. 413, 169 App. Div. 652.

<sup>24</sup> Aetna Const. Co. v. United States, 46 Ct. Cl. 113; Hyde Park Inv. Co. v. Glenwood Coal Co., 170 Iowa 593, 153 N. W. 181; Myer v. Idlewood Assn., 146 N. Y. S. 469; Pelletier v. Interstate Cooperation Co., 158 N. Car. 403, 74 S. E. 112 (reformation of deed); Gross Const. Co. v. Hales, 37 Okla. 131, 129 Pac. 28. See also Good Milking Mach. Co. v. Galloway, 168 Iowa 550, 150 N. W. 710. Where, on account of a misapprehension of law by all the parties and the scrivener, a written instrument does not express the real agreement of the parties, a court of equity will reform the instrument: Korte v. O'Neill, 34 S. Dak. 241, 148 N. W. 12.

<sup>25</sup> Where parties, because of mutual mistake or ignorance, fail to insert in a deed a clause showing it is given as security, or the amount of the debt, and the purpose was not to evade the mortgage tax, the instrument may be reformed to conform to Laws 1907, ch. 328, which requires a conveyance of real estate as security to show that it was given for such purpose: Staples v. East St. Paul



§ 2370. **Mutuality of mistake.**—Equity will intervene and correct a mutual mistake of fact as to a material matter in a written instrument so as to make it conform to the intention of the parties.<sup>26</sup> And in a proper case equity will decree a reformation

State Bank, 122 Minn. 419, 142 N. W. 721. See also *Medical Society of South Carolina v. Gilbreth*, 208 Fed. 899. But it has been held that where sureties upon a bond intended the state to be the obligee instead of the guardian, where such a bond to the state is not recognized at law, such bond will not be reformed to make the guardian the obligee: *Gaver v. Gaver*, 119 Md. 634, 87 Atl. 396.

<sup>26</sup> *Wright v. Wright*, 180 Ala. 343, 60 So. 931; *Williams v. American Assn.*, 197 Fed. 500, 118 C. C. A. 1 (deed); *Stromberg-Carlson Telephone Mfg. Co. v. Simmons*, 199 Fed. 256 (promissory notes); *Doniphan, K. & S. R. Co. v. Missouri & N. A. R. Co.*, 104 Ark. 475, 149 S. W. 60, F. P. Cutting Co. v. Peterson, 164 Cal. 44, 127 Pac. 163 (printed prices assumed to exist); *Capital City Bank v. Hilson*, 64 Fla. 206, 60 So. 189, Ann. Cas. 1914B, 1211n; *Right v. Gaskin*, 139 Ga. 379, 77 S. E. 390; *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387; *Jones v. Parker*, 177 Ill. App. 155 (wrong figure inserted in lease); *Buck Auto Carriage & Implement Co. v. Tietge*, 174 Iowa 103, 156 N. W. 313; *Cecil v. Kentucky Livestock Ins. Co.*, 165 Ky. 211, 176 S. W. 986; *Tarbox v. Tarbox*, 111 Maine 374, 89 Atl. 194 (mistake defined); *Ætna Indemnity Co. v. Baltimore, S. P. & C. R. Co.*, 117 Md. 523, 84 Atl. 166 (indemnity bond); *Gaver v. Gaver*, 119 Md. 634, 87 Atl. 396; *Henley v. Sullivant*, 248 Mo. 672, 154 S. W. 706; *Wolz v. Venard*, 253 Mo. 67, 161 S. W. 760 (deed of trust); *Birch v. Baker*, 81 N. J. Eq. 264, 86 Atl. 932; *Dearborn v. Niagara Fire Ins. Co.*, 17 N. Mex. 223, 125 Pac. 606 (insurance contract); *Salomon v. North British & Mercantile Ins. Co.*, 150 App. Div. 728, 135 N. Y. S. 806 (mistake need not be precisely as to same facts); *Shook v. Love*, 170 N. Car. 99, 86 S. E. 1007; *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636; *Cleveland v. Rankin*, 48 Okla. 99, 149 Pac. 1131; *Carroll v. Ryder*, 34 R. I. 383, 83 Atl. 845 (deed describ-

ing wrong land); *Pittsburg Lumber Co. v. Shell*, 136 Tenn. 466, 189 S. W. 879; *Perkins v. Kirby* (R. I.), 97 Atl. 884 (lessee paying taxes for years held to show mistake mutual); *First State Bank of Amarillo v. Jones*, 107 Tex. 623, 183 S. W. 874 (release of deed of trust); *Bailey v. Culver* (Tex. Civ. App.), 175 S. W. 1083 (chattel mortgage); *Melott v. West*, 76 W. Va. 739, 86 S. E. 759 (deed); *Pedersen v. Hansen*, 161 Wis. 355, 154 N. W. 363; *Van Brunt v. Ferguson*, 163 Wis. 540, 158 N. W. 295 (deed establishing charitable trust). If the instrument expresses the intention of the parties it will not be reformed: *Anderson v. Freeman*, 88 Wash. 608, 153 Pac. 307. The mistake of one who owns the fee of part of a street in supposing that, to put a tunnel under it, he needed a permit for the entire width, his contract to pay for the permit will not be reformed as to amount to be paid: *New York v. Matthews*, 213 N. Y. 563, 108 N. E. 80. A grantor can not have a deed reformed when the grantee bargained for the land actually conveyed and acted in good faith and is not responsible for the grantor's mistake: *Forrester v. Moon*, 100 S. Car. 157, 84 S. E. 532. Under Civil Code, § 1577, which defines a mistake of fact, a finding that the failure to insert the date in a contract was the result of inadvertence and unconscious forgetfulness or mutual mistake, compels the trial court to decree reformation: *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91. No fraud or inequitable conduct entering in the mistake must be clearly shown to be common and mutual: *Ackerlind v. United States*, 49 Ct. Cl. 635; *Fry v. Jenkins*, 173 Ill. App. 486; *Abner M. Harper v. Newburgh*, 159 App. Div. 695, 145 N. Y. S. 59; *Yantis v. Jones* (Tex. Civ. App.), 184 S. W. 572. And if it is not mutual there will be no reformation decreed: *Grieb v. Equitable Life Assur. Soc.*, 194 Fed. 1021. 114

for a mutual mistake of fact of either an executory or an executed contract.<sup>27</sup>

§ 2371. **Mistake and fraud.**—Equity will reform a written instrument upon a clear showing of mistake of one party accompanied by fraud or inequitable conduct on the part of the other party.<sup>28</sup> When a cancellation clause is inserted in a lease by mistake or fraud of the lessee, the lessor is entitled to reformation.<sup>29</sup>

C. C. A. 658; *Kant v. Atlanta, B. & A. R. Co.*, 189 Ala. 48, 66 So. 598; *Louis Werner Sawmill Co. v. Sessions*, 120 Ark. 105, 179 S. W. 185 (deed); *Woerner v. Woerner*, 171 Cal. 298, 152 Pac. 919 (stipulation in divorce proceeding); *Seery v. Catholic Order of Foresters*, 176 Ill. App. 307 (insurance contract); *Perry v. Elliott*, 261 Ill. 553, 104 N. E. 196; *Buffalo Specialty Co. v. Indiana Rubber & Insulated Wire Co.*, 59 Ind. App. 465, 109 N. E. 782; *Bivins v. Kerr*, 268 Ill. 164, 108 N. E. 996 (mistake by grantor); *Johns v. Rice*, 165 Iowa 233, 145 N. W. 290 (mortgage); *Hesson v. Hesson*, 121 Md. 626, 89 Atl. 107; *A. E. Wood & Co. v. Standard Drug Store*, 192 Mich. 453, 158 N. W. 844 (lessor intentionally omitted provision to heat leased floors); *Robinson v. Kornis*, 250 Mo. 663, 157 S. W. 790 (deed); *Spelman v. Delano*, 187 Mo. App. 119, 172 S. W. 1163; *R. M. Cobban Realty Co. v. Chicago, M. & St. P. R. Co.*, 52 Mont. 256, 157 Pac. 173 (mistake by grantee of land); *Stolitzky v. Linscheid*, 150 App. Div. 253, 134 N. Y. S. 805 (deed); *Dressler v. Mulhern*, 77 Misc. 476, 136 N. Y. S. 1049 (deed); *Syenite Trap Rock Co. v. Williams*, 167 App. Div. 774, 153 N. Y. S. 74; *Fitzgerald v. Arcade Theater Co.*, 153 N. Y. S. 618; *First Nat. Bank v. Hartford Fire Ins. Co. of Hartford, Conn.*, 17 N. Mex. 334, 127 Pac. 1115; *Baynes v. Harris*, 160 N. Car. 307, 76 S. E. 230; *Raby v. Greater New York Development Co.*, 151 App. Div. 72, 135 N. Y. S. 813 (executory contract to convey); *Dameron v. Rowland Lumber Co.*, 161 N. Car. 495, 77 S. E. 694 (timber deed); *Hyde v. Kirkpatrick*, 78 Ore. 466, 153 Pac. 41 (sale of stock of groceries); *Forrester v. Moon*, 100 S. Car. 157, 84 S. E. 532; *Dickey v. For-*

*rester* (Tex. Civ. App.), 148 S. W. 1181 (deed); *Memphis Cotton Oil Co. v. Gist* (Tex. Civ. App.), 179 S. W. 1090 (deed of trust); *Fife v. Cate*, 85 Vt. 418, 82 Atl. 741 (contract affecting homestead interest of wife). See, however: *Gilroy v. Strauss Building & Realty Co.*, 157 N. Y. S. 162. In case the mistake is that of the scrivener it will not be relieved against unless he was acting for both parties: *Miles v. Shreve*, 179 Mich. 671, 146 N. W. 374. Mere misapprehension of one of the parties as to the facts does not warrant reformation: *Wilson v. Scarboro*, 163 N. Car. 380, 79 S. E. 811.

<sup>27</sup> *Knobloch v. Kracke*, 151 App. Div. 19, 135 N. Y. S. 381.

<sup>28</sup> *Grieb v. Equitable Life Assur. Society*, 194 Fed. 1021, 114 C. C. A. 658; *American Nat. Ins. Co. v. Schlossberg*, 117 Ark. 655, 174 S. W. 1158; *Exchange Bank v. Schultz*, 167 Iowa 136, 149 N. W. 99 (mistake by secretary of corporation and fraud on part of other party); *Cleveland v. Bateman*, 21 N. Mex. 675, 158 Pac. 648; *Fischer v. Schram*, 173 App. Div. 147, 159 N. Y. S. 496; *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636; *Fotheringham v. Lockhart*, 30 S. Dak. 394, 138 N. W. 804. See also: *Hyde v. Kirkpatrick*, 78 Ore. 466, 153 Pac. 41, 488. The instrument may, in a proper case, be reformed or cancelled: *Torrey v. McFadyen*, 165 N. Car. 237, 81 S. E. 296. Failure to read not such negligence as will in every case bar reformation: *Bradshaw v. Provident Trust Co.*, 81 Ore. 55, 158 Pac. 274. To same effect: *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866. Compare with: *Kepner v. John M. C. Marble Co.*, 26 Cal. App. 696, 148 Pac. 231.

<sup>29</sup> *Schlehofer v. United States Brewing Co.*, 189 Ill. App. 470.

§ 2372. **Fraud as ground for remedy.**—As a general proposition fraud alone is not ground for reformation of a contract but is ground for the rescission and cancellation thereof.<sup>30</sup> But if the fraud is of such a nature as to make the written instrument not give expression to the agreement of the parties it may be reformed at the instance of the innocent party, as where a purchaser fraudulently induces the vendor to omit from the deed any reference to the fact that the former was assuming a mortgage,<sup>31</sup> or where certain provisions are improperly inserted by an attorney in a contract,<sup>32</sup> or fraud in inserting reservations into a deed not agreed upon by the parties.<sup>33</sup>

§ 2373. **Matters subject to reformation.**—As a general rule leases,<sup>34</sup> even though the lease may have expired but the circumstances are such as to require reformation,<sup>35</sup> deeds,<sup>36</sup>

<sup>30</sup> Long v. Greene County Abstract & Loan Co., 252 Mo. 158, 158 S. W. 305. See also: Cobb Real Estate Co. v. Holmes, 138 Ga. 589, 75 S. E. 652. One can not obtain the reformation of a sublease, where the property subleased was that intended and the terms were those agreed upon; it merely appearing that defendant had misrepresented the rent that he paid his lessor and thus secured a larger rental: Tedford Auto Co. v. Thomas, 108 Ark. 503, 158 S. W. 500. While fraud alone does not give equity jurisdiction, if equity obtains jurisdiction for other reasons it will also grant relief by reforming a deed because of fraud, by which a vendor substituted in his deed a different tract of land from that sold: Jones v. Johnston, 193 Ala. 265, 69 So. 427.

<sup>31</sup> Wollan v. McKay, 24 Idaho 691, 135 Pac. 832.

<sup>32</sup> Funk v. Fowler, 179 Ill. App. 356.

<sup>33</sup> Hesson v. Hesson, 121 Md. 626, 89 Atl. 107.

<sup>34</sup> Schlehofer v. United States Brewing Co., 189 Ill. App. 470 (contained cancellation clause by mistake); Stephens v. Coryell, 169 Mich. 48, 134 N. W. 1094 (contract reformed to make it a lease with option to purchase); St. Louis House & Window Cleaning Co. v. York Realty Co., 193 Mo. App. 28, 180 S. W. 576 (assignment of lease).

<sup>35</sup> See, however: St. Louis House,

etc., Co. v. York Realty Co., 193 Mo. App. 28, 180 S. W. 576; Perkins v. Kirby (R. I.), 97 Atl. 884.

<sup>36</sup> Knight v. Herriman, 37 App. D. C. 236; Hutto v. Hutto, 66 Fla. 504, 63 So. 914 (deed executed to deceased grantee); Stead v. Sampson (Iowa), 155 N. W. 978; McAllister v. Richardson, 103 Miss. 418, 60 So. 570; Butler v. Butler, 93 Misc. 258, 157 N. Y. S. 188 (suit to divest wife's interest); Van Brunt v. Ferguson, 163 Wis. 540, 158 N. W. 295 (deed establishing charitable trust). The statute of frauds does not apply to a suit to correct the description in a deed, for mistake, to make it conform to the intention of the parties: Wykle v. Bartholomew, 258 Ill. 358, 101 N. E. 597. Where a deed contains a warranty only against parties claiming under the grantor, the grantee may nevertheless maintain a suit to reform a prior deed in his chain of title for mistake: Williams v. American Assn., 197 Fed. 500, 118 C. C. A. 1. Before a deed will be reformed it should be made to appear that the mistake did not arise from the gross negligence of plaintiff, that an unfair advantage exists and that the mistake is against good conscience and should not stand: Sayre v. Moir, 68 Ore. 381, 137 Pac. 215. A deed will not be reformed by the insertion of a stipulation therein, unless the stipulation was omitted by fraud,

bonds,<sup>37</sup> guaranties,<sup>38</sup> bills of lading,<sup>39</sup> building contracts,<sup>40</sup> assignment of interest in an estate,<sup>41</sup> vendor's agreement to satisfy a drainage tax lien,<sup>42</sup> contracts of insurance,<sup>43</sup> may be reformed. Award of arbitrators may also be reformed.<sup>44</sup> But an unaccepted order of sale,<sup>45</sup> a will,<sup>46</sup> or the terms of sale stated by a receiver who is selling the property under order of court,<sup>47</sup> is not susceptible of reformation.

§ 2374. **Defective execution.**—When on account of mistake or oversight a seal necessary to the validity of the agreement is omitted but the instrument purports, on its face, to be a sealed instrument, it will ordinarily itself furnish the evidence showing the oversight or mistake, and equity will correct it.<sup>48</sup> But a voluntary conveyance will not be reformed on behalf of the grantee as against the grantor, unless all the parties consent thereto.<sup>49</sup>

§ 2375. **Defective description.**—Where on partition of land a mutual mistake is made in the description of the property partitioned the deed may be reformed so as to apportion the shortage occasioned thereby.<sup>50</sup> Erroneous descriptions of the

accident or mistake: Luckenbach v. Thomas (Tex. Civ. App.), 166 S. W. 99. In case it is sought to reform a deed for mutual mistake made by a draftsman, it must be established that draftsman was agent for both parties: Stephens v. Stephens (Mo.), 183 S. W. 572.

<sup>37</sup> Russell v. Russell, 156 Iowa 674, 137 N. W. 925 (supersedeas bond); Sailing v. Morrell, 97 Nebr. 454, 150 N. W. 195 (surety bond); Archer v. McClure, 166 N. Car. 140, 81 S. E. 1081, Ann. Cas. 1916C, 180n (wrong beneficiary named).

<sup>38</sup> J. P. Duffy Co. v. Todebush, 173 App. Div. 205, 159 N. Y. S. 299.

<sup>39</sup> Aradalous v. New York, N. H. & H. R. Co., 225 Mass. 235, 114 N. E. 297.

<sup>40</sup> Zarecki v. Guarantee Realty Co., 82 N. J. Eq. 489, 89 Atl. 513.

<sup>41</sup> Leary v. Leary, 85 Misc. 591, 148 N. Y. S. 1067.

<sup>42</sup> Greiner v. Swartz, 167 Iowa 543, 149 N. W. 598.

<sup>43</sup> Vial v. Norwich Union Fire Ins. Soc., 172 Ill. App. 134 (mutual mistake); Holden v. Law Union & Rock

Ins. Co., 63 Ore. 253, 127 Pac. 547 (misdescription of property insured).

<sup>44</sup> Baker v. Pierce, 197 Ill. App. 158.

<sup>45</sup> Patterson v. Vetsch, 75 Ore. 399, 146 Pac. 829.

<sup>46</sup> Hertford v. Harned (Ind.), 113 N. E. 727. But see: Lewis v. Reed's Exr., 168 Ky. 559, 182 S. W. 638, Ann. Cas. 1917D, 1155n.

<sup>47</sup> Schwartz v. Cahill, 175 App. Div. 68, 161 N. Y. S. 750.

<sup>48</sup> People v. Lyons, 168 Ill. App. 396.

<sup>49</sup> Christian Church v. Littleville Camp, Woodmen of the World, 185 Ala. 80, 64 So. 9. Equity will refuse to reform a mistake in a voluntary deed without the consent of all parties: Tuthill v. Katz, 174 Mich. 217, 140 N. W. 519.

<sup>50</sup> Boone v. Robinson, 151 Ky. 715, 152 S. W. 753, Ann. Cas. 1915A, 352n. But a deed will not be reformed in such a way as to render it vague and uncertain and change its legal import: Christian Church v. Littleville Camp, Woodmen of the World, 185 Ala. 80, 64 So. 9.

tracts to be conveyed,<sup>51</sup> the interest transferred,<sup>52</sup> or the erroneous inclusion<sup>53</sup> or omission of land<sup>54</sup> may be reformed.<sup>55</sup> The

<sup>51</sup> *Daniel v. Williams*, 177 Ala. 140, 58 So. 419; *Nolen v. Henry*, 190 Ala. 540, 67 So. 500, Ann. Cas. 1917B, 792n; *Hataway v. Carnley* (Ala.), 73 So. 382; *Deniston v. Phillips*, 121 Ark. 550, 181 S. W. 911 (suit by widow to correct deed of husband to her); *Lindell v. Peters*, 129 Minn. 288, 152 N. W. 648, Ann. Cas. 1916E, 1130n. (conveyance of portion of homestead); *McAllister v. Richardson*, 103 Miss. 418, 60 So. 570; *Myer v. Idlewood Assn.*, 146 N. Y. S. 469 (mistake in boundary line); *Pickens v. Pickens*, 72 W. Va. 50, 77 S. E. 365; *Gimbel Bros. v. Tolman*, 161 Wis. 382, 154 N. W. 628 (lease of lands). Compare: *Creekmore v. Bryant*, 158 Ky. 166, 164 S. W. 337. Complainant need not be in possession to maintain such suit: *Nolen v. Henry*, 190 Ala. 540, 67 So. 500, Ann. Cas. 1917B, 792n. It is error for equity to fail to correct an improper description in a deed: *Soderman v. Bell*, 102 Ark. 83, 143 S. W. 595. The correction of a mutual mistake in description of property in a conveyance does not make a new contract, but the written evidence of the contract is merely made to speak the truth and conform to the intention of the parties: *Hodges v. Moore* (Tex. Civ. App.), 186 S. W. 415. One who seeks reformation of a contract for exchange of lands must show that it does not locate the lands as claimed by him because of fraud, accident or mutual mistake of the parties: *Stromberg v. Alexander*, 171 Iowa 707, 154 N. W. 414. A mistake in the name of one of the natural boundaries of the land will not be reformed when there is no mistake in the identity of the land itself: *Pittsburg Lumber Co. v. Shell*, 136 Tenn. 466, 189 S. W. 879.

<sup>52</sup> *Whittaker v. Lewis*, 264 Mo. 208, 174 S. W. 369 (intention to create estate by entirety); *Fallen v. Weatherford* (Tex. Civ. App.), 158 S. W. 1174. Where X agreed with Y to convey certain land to Y, and Z agreed to move thereon and maintain X during his lifetime, X to have the rents and profits from one building and retain a life estate in the proper-

ty conveyed, in an action by X to set aside his deed of conveyance, equity will reform the conveyance so as to reserve the life estate to X and make Z a party so that both Y and Z should be bound by the decree: *Mangin v. Kellogg*, 22 Idaho 137, 124 Pac. 651.

<sup>53</sup> *Haines v. Stare*, 249 Pa. 494, 95 Atl. 81; *Holbrook v. Schofield*, 211 Mass. 234, 98 N. E. 97; *Fischer v. Dent*, 259 Mo. 86, 167 S. W. 977; *Burke v. Welch*, 92 Nebr. 773, 139 N. W. 684; *Moynihan v. Brennan*, 77 N. H. 273, 90 Atl. 964. When it appears that standing timber had been sold prior to the sale of the land itself and the grantee knew that it had been sold the deed will be reformed to exclude such timber: *Sansom v. Ewell*, 160 Ky. 112, 169 S. W. 571. But the grantor of that part of a lot south of the center of a brick wall on the south line of such lot, "said strip of land being 61-2 inches in width, more or less," can not on discovering that the strip south of the center of the brick wall is about one foot wide, have his deed reformed to convey only 61-2 inches: *Frost v. Reagon*, 32 Okla. 849, 124 Pac. 13. Where by consent of both parties the words "more or less" were purposely omitted from a deed of an executrix, the deed can not be reformed on the theory of mistake: *R. O. Campbell Coal Co. v. Baker*, 142 Ga. 434, 83 S. E. 105.

<sup>54</sup> *Darden v. Vanlandingham* (Tex. Civ. App.), 189 S. W. 297. The equitable rule that the deed of a married woman will not be reformed to include land which should have been included therein, is not abrogated by the West Virginia statutes: *Wiseman v. Cresley*, 72 W. Va. 340, 78 S. E. 107.

<sup>55</sup> But a deed will not be reformed as to description when voluntarily and there was no evidence that the parties intended to make any other conveyance than that made: *R. O. Campbell Coal Co. v. Baker*, 142 Ga. 434, 83 S. E. 105. A deed which on its face conveys to a wife life estate can not be reformed so as to give her the fee, in the absence of clear proof of

foregoing principles also apply to instruments concerning personal property.<sup>56</sup>

§ 2376. **Ratification—Delay and acquiescence.**—The right to have contracts reformed because of mistake has been held not lost when claimed as soon as the contracts were sought to be enforced.<sup>57</sup>

§ 2377. **Negligence of complaining party.**—One will not be relieved from unilateral mistakes made by the scrivener or draftsman when there is a negligent failure to read the contract on the part of the party seeking relief and the other party has accepted the agreement in good faith.<sup>58</sup> Equity will not ordinarily reform a contract for one when the mistake was the result of his own heedlessness and inattention or negligence.<sup>59</sup>

mistake of fact: *Haines v. Roydhouse*, 83 N. J. Eq. 675, 93 Atl. 190.

<sup>56</sup> *McLeod Bros. v. Kirkland* (Tex. Civ. App.), 184 S. W. 721 (failure to include debt in mortgage which was to be secured thereby).

<sup>57</sup> *Codd v. Langley*, 75 Wash. 45, 134 Pac. 467. The question as to whether there has been an estoppel or ratification by delay depends very much on whether the defendant has acted in good faith and has not changed his position to his prejudice: *Kinman v. Hill* (Iowa), 156 N. W. 168; *Tazewell Coal & Iron Co. v. Gillespie*, 113 Va. 134, 75 S. E. 757. See also: *Kinman v. Hill* (Iowa); 156 N. W. 168 (lapse of two years). The mere fact that plaintiff has executed the agreement in this case a building contract does not prevent a suit to reform: *Medical Society of South Carolina v. Gilbreth*, 208 Fed. 899. The relief when futile will be denied: *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118.

<sup>58</sup> *Newsome v. Harrell*, 146 Ga. 139, 90 S. E. 855. See also: *Arden v. Boone* (Tex. Civ. App.), 187 S. W. 995. Generally one who is able to read but who signs without reading will not be aided, but there are exceptions to the rule: *Bank of Union v. Redwine*, 171 N. Car. 559, 88 S. E. 878. But see holding that the foregoing principles apply to cancellation more than reformation: *Perkins v. Kirby*

(R. I.), 97 Atl. 884; *Harry v. Hamilton* (Tex. Civ. App.), 154 S. W. 637. Also that it does not apply when the contract fails to express the intention of the parties: *Gilroy v. Strauss Building & Realty Co.*, 157 N. Y. S. 162. See also: *Harris v. Parr* (Tex. Civ. App.), 165 S. W. 42.

<sup>59</sup> *Hearin v. Union Sawmill Co.*, 105 Ark. 455, 151 S. W. 1007 (timber contract); *Spelman v. Delano*, 187 Mo. App. 119, 172 S. W. 1163; *Hyde v. Kirkpatrick*, 78 Ore. 466, 153 Pac. 41; *Hart v. Jopling* (Tex. Civ. App.), 146 S. W. 1075. Where the mistake is mutual negligence of plaintiff in making mistake no defense when not wilful or fraudulent: *Panhandle Lumber Co. v. Rancour*, 24 Idaho 603, 135 Pac. 558. To same effect: *Holden v. Law Union & Rock Ins. Co.*, 63 Ore. 253, 127 Pac. 547 (failure to examine insurance policy). Compare, however, with: *Ætna Life Ins. Co. v. American Zinc, Lead & Smelting Co.*, 169 Mo. App. 550, 154 S. W. 827. The failure of a grantee to discover an error in the description in a deed does not necessarily charge him with laches: *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716. To same effect: *St. Louis, I. M. & S. R. Co. v. McConnell*, 110 Ark. 306, 161 S. W. 496. See also: *Silbon v. Pacific Brewing & Malting Co.*, 72 Wash. 13, 129 Pac. 581.

§ 2378. **Conditions precedent—Demand—Restoration or offer.**—It is not essential in some jurisdictions that plaintiff demand that the mistake be corrected before bringing suit to reform an instrument such as a deed,<sup>60</sup> or note, when there was no knowledge of the mistake until suit was brought to collect the same.<sup>61</sup> In a suit to reform a deed so as to exclude therefrom the right to standing timber possession of the timber need not be proved.<sup>62</sup> Where a deed and mortgage both misdescribe the land conveyed the complainants are not bound as a condition precedent to pay part of the mortgage before bringing suit to reform, but the deed and mortgage may both be reformed at the same time.<sup>63</sup>

§ 2379. **Objections to relief—Laches and negligence—Adequate remedy at law.**—In case an adequate remedy is afforded at law an action in equity to reform the contract will not lie.<sup>64</sup> But it is otherwise when no adequate remedy is furnished at law.<sup>65</sup>

§ 2380. **Persons entitled to reformation.**—One not a party to the instrument but who has been prejudiced by a mistake therein or who stands in privity of relationship is entitled to the equitable relief of reformation.<sup>66</sup> An action may be maintained by a purchaser of property at a mortgage sale to have the description in the mortgage reformed.<sup>67</sup> The action may be maintained by a life tenant in a proper case,<sup>68</sup> or one who through assignment has come in possession of property affected by a contract may sue to have the same reformed.<sup>69</sup> The action may likewise

<sup>60</sup> *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716.

<sup>61</sup> *Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681n.

<sup>62</sup> *Gillen v. Powe*, 219 Fed. 553, 135 C. C. A. 321.

<sup>63</sup> *Rose v. Hoyer* (R. I.), 89 Atl. 242.

<sup>64</sup> *Jahnke v. Seydel* (Iowa), 159 N. W. 986 (damages proper remedy). See also: *Walker v. Garner*, 258 Mo. 494, 167 S. W. 955.

<sup>65</sup> *Garage Equipment Mfg. Co. v. Danielson*, 156 Wis. 90, 144 N. W. 284.

<sup>66</sup> *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636 (action to reform deed to exempt timber); *Bank of Union v.*

*Redwine*, 171 N. Car. 559, 88 S. E. 878 (suit to reform deed).

<sup>67</sup> *Goulding Fertilizer Co. v. Blanchard*, 178 Ala. 298, 59 So. 485.

<sup>68</sup> *Cox v. Interstate Coal Co.*, 157 Ky. 373, 163 S. W. 231.

<sup>69</sup> *Baird v. Erie R. Co.*, 210 N. Y. 225, 104 N. E. 614. Plaintiff having taken the fee in the property of her deceased husband, who had granted a right of way to defendant, was entitled to maintain a bill to correct the description and to quiet title to parts of excess strip which had been sold on land contracts or conveyed by warranty deed: *White v. Grand Rapids & I. R. Co.*, 190 Mich. 1, 155 N. W. 719. The rights of devisees to sue

be maintained by the holder of a first mortgage to correct an error therein.<sup>70</sup>

§ 2381. **Persons against whom relief granted.**<sup>70a</sup>—Equity will reform an instrument in case of mutual mistake between the parties, and third persons can not complain unless they plead and prove that through a good faith transaction they have acquired intervening rights.<sup>71</sup> But, where the rights of third parties have intervened,<sup>72</sup> such as a bona fide purchaser,<sup>73</sup> relief will be denied.<sup>74</sup>

§ 2382. **Reformation as against persons not in being.**—A voluntary deed will not be reformed by equity after the death of the grantor.<sup>75</sup>

§ 2383. **Form of remedy.**—Courts of equity have a jurisdiction not possessed by law courts to reform deeds,<sup>76</sup> and contracts generally.<sup>77</sup> Thus in an action of trespass an error in the

for reformation may be barred by the laches of the owner prior to his death: *Leuer v. Kunz*, 260 Ill. 584, 103 N. E. 550. An employe may have a release contract reformed so as to provide for future employment: *Pierston v. Kingman Milling Co.*, 91 Kans. 775, 139 Pac. 394. One who is executor and also trustee of his father's estate has no interest as trustee to sue to reform a deed by which part of decedent's property was conveyed, in order to escape liability for breach of warranty of title to that part included by mistake: *De Veer v. Pierson*, 222 Mass. 167, 110 N. E. 154.

<sup>70</sup> *Varner-Collins Hardware Co. v. New Milford Security Co. (Okla.)*, 153 Pac. 667.

<sup>70a</sup> [Main section quoted in *Coates v. Smith (Ore.)*, 160 Pac. 517, 521.]

<sup>71</sup> *Blount, Price & Co. v. Payne (Tex. Civ. App.)*, 187 S. W. 990.

<sup>72</sup> *Doherty v. First Nat. Bank of Louisville*, 161 Ky. 202, 170 S. W. 615; *Lenheim v. Smith*, 54 Pa. Super. Ct. 147.

<sup>73</sup> *Robertson v. Smith*, 191 Mich. 660, 158 N. W. 207.

<sup>74</sup> Compare with *Dameron v. Rowland Lumber Co.*, 161 N. Car. 495, 77 S. E. 694.

<sup>75</sup> *Miller v. Beardslee*, 175 Mich. 414, 141 N. W. 566.

<sup>76</sup> *Allen v. Roanoke R. & Lumber Co.*, 171 N. Car. 339, 88 S. E. 492; *Spores v. Maude*, 81 Ore. 11, 158 Pac. 169. Where restrictions are omitted from a deed through accident or mistake, the remedy is by bill to reform the deed, and can not be considered under a bill to enforce the restrictions: *Sargent v. Leonardi*, 223 Mass. 556, 112 N. E. 633. In an eminent domain proceeding it has been held that, if plaintiff set up mutual mistake in his deed, he might join his grantor, and have the issue as to the mistake determined: *Sugg v. Town of Greenville*, 169 N. Car. 606, 86 S. E. 695.

<sup>77</sup> *Blackmon v. Quennelle*, 189 Ala. 630, 66 So. 608; *McIsaac v. McMurray*, 77 N. H. 466, 93 Atl. 115, L. R. A. 1916B, 769n; *Interior Warehouse Co. v. Dunn*, 80 Ore. 528, 157 Pac. 806. Federal courts can neither reform a contract sued on nor recognize as an equitable defense plaintiff's failure to perform a provision of the agreement omitted from the writing in an action at law: *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 219 Fed. 477, 135 C. C. A. 189. A written contract can not be reformed in an action at law: *Capital City Bank v. Hilsen*, 64 Fla. 206, 60 So. 189, Ann. Cas. 1914B, 1211n; *Regelin v. Conran*, 184 Ill. App. 570.



description contained in the deed will not be corrected.<sup>78</sup> But it has been held that although an action on a contract was at law this did not make the petition bad on demurrer when facts are stated which, if proved, would authorize the contract's reformation and enforcement.<sup>79</sup> In some states courts administer legal and equitable rights in one and the same suit and where this is true reformation might be granted in an action at law.<sup>80</sup> It quite frequently happens that reformation and judgment<sup>81</sup> may be had in one and the same suit.<sup>82</sup>

§ 2384. **Jurisdiction of court.**—While an action to reform an instrument is an equitable proceeding, reformation may, as a general rule, be had in any proper proceeding or action in a court having equitable jurisdiction.<sup>1</sup>

§ 2385. **Limitation and laches.**—As a general rule laches will not bar an action to reform an instrument when the party against whom reformation is sought has not changed his position in the meantime.<sup>2</sup> But it has been held that where after discovery of the mistake plaintiff consulted counsel, negotiated with defendant for a settlement and then litigated the matter in a suit at law for two years before bringing an action to reform, the latter suit was barred by the statute of limitations.<sup>3</sup> Also where the mis-

<sup>78</sup> Cilley v. Bacon, 88 Vt. 496, 93 Atl. 261.

<sup>79</sup> Cecil v. Kentucky Livestock Ins. Co., 165 Ky. 211, 176 S. W. 986.

<sup>80</sup> Coats v. Camden Fire Ins. Assn., 149 Wis. 129, 135 N. W. 524.

<sup>81</sup> Jones v. Dappen, 27 Colo. App. 21, 146 Pac. 118; Fidelity Phenix Fire Insurance Co. v. Hilliard, 65 Fla. 443, 62 So. 585; Southern States Fire Ins. Co. v. Vann, 69 Fla. 544, 68 So. 645. Thus, in State Mut. L. Ins. Co. v. Green (Okla.), 166 Pac. 105, L. R. A. 1917F, 663, it was held proper to join the causes of action for reformation and for recovery on the policy, and the proof clearly showing a mistake of fact in the description of the block upon which the insured property stood reformation of the policy and judgment for recovery of the amount due under the policy for total destruction of said property by fire was sustained.

<sup>82</sup> Where a mortgage which has

been foreclosed contains an erroneous description and no deed has been made under the sale, a bill of review may be the basis for proper proceedings to reform the mortgage, where the mortgagee did not know of and is not responsible for the error, or for the delay in discovering it: Adams v. Davis, 63 Fla. 324, 58 So. 837.

<sup>1</sup> Silbon v. Pacific Brewing & Co., 72 Wash. 13, 129 Pac. 581.

<sup>2</sup> Eidlitz v. Manhattan Wrecking & Contracting Co., 164 App. Div. 591, 150 N. Y. S. 307. Reformation of a lease granted when the rights of innocent parties or the lessors have not been prejudiced by delay: Gimbel Bros. v. Tolman, 161 Wis. 382, 154 N. W. 628.

<sup>3</sup> Eidlitz v. Manhattan Wrecking & Contracting Co., 84 Misc. 243, 145 N. Y. S. 889. Compare, however, with: Garage Equipment Mfg. Co. v. Danielson, 156 Wis. 90, 144 N. W. 284.

take might have been discovered by the exercise of due diligence it has been held that a delay of four years would bar an action to reform an insurance policy by the company issuing the same.<sup>4</sup> In suits to reform a deed neither the statute of limitations nor laches will ordinarily bar such an action when the one seeking reformation has been in undisturbed possession all the time,<sup>5</sup> or when the complainant's title has at all times been recognized by the one holding the legal title through a mistake in the deed.<sup>6</sup> Suits to re-

<sup>4</sup> Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co., 116 Md. 422, 82 Atl. 372. Compare also *Boyd Lumber Co. v. Mills*, 146 Ga. 794, 92 S. E. 534, L. R. A. 1918A, 1154, where cancelation and reformation of a deed were both refused to the grantor who had remained silent for two years after he discovered or ought to have discovered the alleged mistake. The following are examples of cases not barred by laches: Where the payor of a note did not know that it contained a stipulation inserted by the scrivener through mistake until an action was brought on the note, he was not guilty of laches for having previously failed to reform the note: *Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681n. Failure to discover a mistake in a policy until after a loss and nearly a year after its issuance held not to estop insured from correcting it and specifically enforcing it: *Cecil v. Kentucky Livestock Ins. Co.*, 165 Ky. 211, 176 S. W. 986. Where a bond was given to secure a railroad construction contract, but it was delivered without being signed by the contractor on account of a mutual mistake of both the contractor and the railroad company and filed away without knowledge of the defect until shortly before suit, the railroad company held not chargeable with laches: *Aetna Indemnity Co. v. Baltimore, S. P. & C. R. Co.*, 117 Md. 523, 84 Atl. 166. Where suit was brought to reform a lease, on the ground that it did not express the agreement of the parties, shortly after defendant began to assert rights under the lease as written, plaintiff was not guilty of such

laches as barred relief: *Gilroy v. Strauss Building & Realty Co.*, 157 N. Y. S. 162.

<sup>5</sup> *Woodlawn Realty & Development Co. v. Hawkins*, 186 Ala. 234, 65 So. 183, *Wykle v. Bartholomew*, 258 Ill. 358, 101 N. E. 597; *Carr v. Burris*, 148 Ky. 232, 146 S. W. 424. The same principle applies to leases: *Gimbel Bros. v. Tolman*, 161 Wis. 382, 154 N. W. 628.

<sup>6</sup> *Zeigler v. Zeigler*, 180 Ala. 246, 60 So. 810 (suit against heirs to establish title). The same principle applies where the grantee has notice of the grantor's claims and the rights of third parties have not intervened: *Young v. Jones*, 72 Wash. 277, 130 Pac. 90. To same effect: *Chapman v. Chapman*, 194 Ala. 518, 70 So. 121; *Rigell v. Gaskins*, 142 Ga. 357, 82 S. E. 1057; *Carlson v. Druse*, 79 Wash. 542, 140 Pac. 570 (defendant in no way prejudiced by delay). See also: *Williams v. American Assn.*, 197 Fed. 500, 118 C. C. A. 1; *Nolen v. Henry*, 190 Ala. 540, 67 So. 500, Ann. Cas. 1917B, 792n; *Carroll v. Ryder*, 34 R. I. 383, 83 Atl. 845 (property in meantime attached by creditors of grantor); *Tazewell Coal & Iron Co. v. Gillespie*, 113 Va. 134, 75 S. E. 757; *Lyle v. Cunningham*, 79 Wash. 420, 140 Pac. 330. See also: *Van Brunt v. Ferguson*, 163 Wis. 540, 158 N. W. 295. In the following cases action held barred: *Louis Werner Sawmill Co. v. Sessoms*, 120 Ark. 105, 179 S. W. 185 (barred by six-year statute); *Leuer v. Kunz*, 260 Ill. 584, 103 N. E. 550 (lapse of twenty years. Inability to understand English at time of exchange no excuse); *Gillespie v. Davis*, 116 Va. 614, 82 S. E. 705 (lapse of 54 years. Mistake appeared on face of deed); *Dillard v.*

form options to purchase lands may be maintained in a proper case after the plaintiff has elected to purchase the land and after the time limit provided in the option has expired.<sup>7</sup> When the right of action on the contract is barred by the statute of limitations a suit to reform and enforce the contract is generally barred by laches, since equity follows the law.<sup>8</sup> The question of whether the action is barred by the statute of limitations may be raised on demurrer in some cases,<sup>9</sup> but this is not true generally.

**§ 2386. Parties to suit.**—Courts of equity will not reform contracts for mutual mistake unless all the parties thereto who have any interests that may be affected by the reformation and all persons who have acquired rights or assumed obligations thereunder are made parties.<sup>10</sup>

**§ 2388. Bill, complaint or petition.**—A petition for reformation of a contract should show in clear and concise language the agreement actually made, the agreement the parties intended to make and the grounds of reformation.<sup>11</sup>

Jefferies, 118 Va. 81, 86 S. E. 844 (lapse of forty years).

<sup>7</sup> Richardson v. Perrin, 137 Ga. 432, 73 S. E. 649.

<sup>8</sup> Erickson v. Insurance Co. of North America, 66 Fla. 154, 63 So. 716 (suit concerning insurance policy). The principle that an action for reformation of a contract will not be barred so long as an action may be brought on the contract is not applicable where the reformation is not merely incidental to the main relief sought, but is essential to the asking of any relief: Bradbury v. Higginson, 167 Cal. 553, 140 Pac. 254.

<sup>9</sup> Cleveland v. Bateman, 21 N. Mex. 675, 158 Pac. 648.

<sup>10</sup> Mangin v. Kellogg (Idaho), 124 Pac. 651 (case reversed to bring in another party); Vial v. Norwich Union Fire Ins. Society, 172 Ill. App. 134; Roussel v. Railways Realty Co., 132 La. 379, 61 So. 409; First Nat. Bank v. Fessler (N. J.), 92 Atl. 914; Brownsville v. Tumlison (Tex. Civ. App.), 179 S. W. 1107 (reformation of interest in business). In case personality is sold under a bill of sale with warranty of title, and is subsequently again sold under the same warranty, the last vendee and his

vendor may join in a suit against the original vendor to reform the original bill of sale so as to include property omitted by mistake: Fambrough v. De Vane, 138 Ga. 47, 74 S. E. 762. Under the Iowa statutes a suit for reformation of plaintiff's assignment of its interest in a lease to defendant did not require the lessor of the parties to be either a party plaintiff or defendant: Buck Auto Carriage & Implement Co. v. Tietge, 174 Iowa 103, 156 N. W. 313. Where a husband sues his wife to reform, for her fraud, deeds executed by a third person to the husband and wife to consummate a conveyance from the husband alone back to them both, the third person, not having had any interest in the property, was not charged with fraud and was not a necessary party: Butler v. Butler, 93 Misc. 258, 157 N. Y. S. 188.

<sup>11</sup> Hughey v. Smith, 65 Ore. 323, 133 Pac. 68. The mistake must be clearly alleged or circumstances from which it can be inferred: Lindenberg v. Rowland, 158 Ky. 760, 166 S. W. 242. A petition to correct the misdescription of land as set out in a deed, which alleges that the grantor agreed to convey by deed of trust two

§ 2389. **Cross-bill, cross-complaint or counter-claim.**—In an action on a written instrument in which two or more persons are defendants one of said defendants may file a cross-action against the other defendant and obtain reformation as against

tracts, that in accordance with the agreement a deed was executed, wherein the land was misdescribed, because the scrivener inserted the wrong description, states, when liberally construed, as required by Rev. Stat. 1909, § 1831, a cause of action based on mutual mistake: *Wolz v. Venard*, 253 Mo. 67, 161 S. W. 760. When the reformation of a written instrument is incidental to the main purpose of the action, no demand to correct the mistake and refusal thereof need be alleged: *Cleveland v. Bateman*, 21 N. Mex. 675, 158 Pac. 648. In the following cases the complaint was held sufficient: *Consumers' Coal & Fuel Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897 (bill to reform mining lease by abatement of purchase-price); *Zeigler v. Zeigler*, 180 Ala. 246, 60 So. 810; *Woodlawn Realty & Development Co. v. Hawkins*, 186 Ala. 234, 65 So. 183; *Stricklin v. Kimbrell*, 193 Ala. 211, 69 So. 14; *Jones v. Johnston*, 193 Ala. 265, 69 So. 427; *Warren v. Crow*, 195 Ala. 568, 71 So. 92 (bill to reform mortgage); *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716; *Lillis v. Silver Creek & Panoche Land & Water Co.*, 21 Cal. App. 234, 131 Pac. 344 (conveyance of water right); *Richardson v. Perrin*, 137 Ga. 432, 73 S. E. 649 (contract for sale of land); *Right v. Gaskin*, 139 Ga. 379, 77 S. E. 390; *Correll v. Greider*, 258 Ill. 479, 101 N. E. 930; *Carr v. Burris*, 148 Ky. 232, 146 S. W. 424; *Boone v. Robinson*, 151 Ky. 715, 152 S. W. 753, Ann. Cas. 1915A, 352n; *Cecil v. Kentucky Livestock Ins. Co.*, 165 Ky. 211, 176 S. W. 986 (action to reform insurance policy); *Eichelberger v. Cooper*, 101 Miss. 253, 57 So. 808; *Thraves v. Greenlees*, 42 Okla. 764, 142 Pac. 1021; *Perkins v. Kirby* (R. I.), 97 Atl. 884; *Hart v. Jopling* (Tex. Civ. App.), 146 S. W. 1075; *Dickey v. Forrester* (Tex. Civ. App.), 148 S. W. 1181; *Carlson v. Druse*, 79 Wash. 542, 140 Pac. 570; *Smith v. McCune* (W. Va.), 88 S. E.

846. A petition which prays for the reformation of a bill of sale and a release so as to make them conform to the contract between the parties and for an accounting on the basis of the instruments as reformed need not offer to surrender the release: *Tudor v. Kennett*, 87 Vt. 99, 88 Atl. 520. In an action to reform and foreclose a chattel mortgage, it is unnecessary for the petition to allege that it was recorded; for as between the parties it was a valid and binding obligation without registration: *Blount, Price & Co. v. Payne* (Tex. Civ. App.), 187 S. W. 990. As to allegations in pleading where mistake made by scrivener, see: *MacDonald v. Crissey*, 215 N. Y. 609, 109 N. E. 609. In the following cases the complaint was held insufficient: *Grieb v. Equitable Life Assur. Society*, 194 Fed. 1021, 114 C. C. A. 658 (bill to reform life insurance policy); *Griel Bros. Co. v. Brooks*, 176 Ala. 577, 58 So. 552 (bill to reform lease and rent notes); *Storhiz v. Bank of England*, 123 Ark. 451, 185 S. W. 784 (action to reform mortgage); *Vial v. Norwich Union Fire Ins. Society*, 172 Ill. App. 134 (reformation sought against the reinsuring company); *Plistil v. Kaspar*, 168 Iowa 333, 150 N. W. 584 (action to reform deed); *Doherty v. American Gas & Electric Co.*, 151 App. Div. 697, 136 N. Y. S. 238 (action to reform option contracts); *Mehlin v. Superior Oil & Gas Co.*, 39 Okla. 565, 136 Pac. 581 (allegations as to what the agreement was held insufficient). See also *Interstate Lumber Co. v. Fife*, 70 Fla. 178, 69 So. 715. In the following case a promissory note was sought to be reformed. It had been indorsed "without recourse." Plaintiff alleged that he was "an uneducated man" and did not know the meaning of the words. This held insufficient: *Baker v. Patton*, 144 Ga. 502, 87 S. E. 659. As to waiver of defects in the complaint, see: *Cleveland v. Bateman*, 21 N. Mex. 675, 158 Pac. 648.

him.<sup>12</sup> Also a defendant may in a proper case, ask reformation as against the plaintiff.<sup>13</sup>

§ 2391. **Demurrer.**—Failure of the petition to allege facts showing that the mistake was mutual may be raised on demurrer.<sup>14</sup> In case the petition asking for reformation of a written instrument sets forth a cause of action interlocutory orders overruling a demurrer and granting an injunction will not be set aside.<sup>15</sup>

§ 2392. **Issue, proof and variance.**—Parol evidence is admissible to show that because of mutual mistake or fraud the instrument sought to be reformed does not express the intention of the parties,<sup>16</sup> but this rule does not deprive the written contract

<sup>12</sup> *Alston v. Pierson* (Tex. Civ. App.), 158 S. W. 1165.

<sup>13</sup> *Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681n. The court may, in a proper case, allow the amendment of defendant's pleading on the trial, so as to ask for reformation: *Fotheringham v. Lockhart*, 30 S. Dak. 394, 138 N. W. 804. In the following case allegations held insufficient: *Citizens' Bank of Adrian v. Southern Securities & Financing Co.*, 143 Ga. 101, 84 S. E. 465.

<sup>14</sup> *Goulding Fertilizer Co. v. Blanchard*, 178 Ala. 298, 59 So. 485.

<sup>15</sup> *City Building & Loan Assn. v. Tatum*, 67 Fla. 485, 65 So. 543.

<sup>16</sup> *Schirmer v. Union Brewing and Malting Co.*, 26 Cal. App. 169, 146 Pac. 194; *Arbaney v. Usel*, 61 Colo. 311, 157 Pac. 204 (suit to reform deed); *Kinman v. Hill* (Iowa), 156 N. W. 168 (reformation of note); *Proctor v. Fife*, 97 Kans. 431, 155 Pac. 931; *McIsaac v. McMurray*, 77 N. H. 466, 93 Atl. 115, L. R. A. 1916B, 769n; *Archer v. McClure*, 166 N. Car. 140, 81 S. E. 1081, Ann. Cas. 1916C, 180n; *Harry v. Hamilton* (Tex. Civ. App.), 154 S. W. 637 (land omitted from deed); *Strickland v. Baugh* (Tex. Civ. App.), 169 S. W. 181. The rule that parol evidence will not be admitted to vary the terms of a written contract does not apply where the action is to correct a mistake of

fact: *Beatty v. Ireland*, 152 App. Div. 588, 137 N. Y. S. 456; *Schlosser v. Nicholson*, 184 Ind. 283, 111 N. E. 13; *Greiner v. Swartz*, 167 Iowa 543, 149 N. W. 598. Compare, however, with *Torrey v. McFadyen*, 165 N. Car. 237, 81 S. E. 296. The intention of the parties is the material issue: *Newton v. American Car Sprinkler Co.*, 88 Vt. 487, 92 Atl. 831. Where there was a shortage in the amount of land sold, evidence that certain parts thereof were more valuable than others was irrelevant and immaterial: *Adams v. White*, 138 Ga. 306, 75 S. E. 321. Also in an action to reform an endowment policy because of mutual mistake in not designating plaintiff as beneficiary at its expiration, evidence that the form of application had caused other mistakes, as to meaning of term "30-year endowment," held not admissible; *Hayes v. Penn Mut. Life Ins. Co.*, 222 Mass. 382, 111 N. E. 168. In an action to correct a contract authorizing defendant to sell plaintiff's land by substituting a higher price, the market value thereof is immaterial except as to plaintiff's good faith: *Turner v. Bray*, 72 Ore. 334, 143 Pac. 1011. In a suit to reform a deed by supplying an omitted part of the description, evidence of the nature and value of improvements put upon the land by the grantee after being put in possession held properly admitted: *Allen v. Purcell*, 141 Ga. 226, 80 S. E. 713.

of evidential force.<sup>17</sup> Abstracts of title may constitute such contemporaneous data as will render them admissible on the question of what real estate was intended to be conveyed.<sup>18</sup> Evidence of previous negotiations<sup>19</sup> and circumstances and conversations leading up to the drawing up of the contract, when material, are admissible.<sup>20</sup> The conduct of the parties after the execution of the contract may also be admissible to show their intention.<sup>21</sup> In suits to reform instruments because of a mistake of fact the question of laches on the part of plaintiff is one of fact and not law,<sup>22</sup> as is also the insertion of words in a written instrument.<sup>23</sup> In case of trial by jury it is for the jury to say whether the evidence is sufficiently clear, strong and convincing to warrant reformation.<sup>24</sup> The pleading and proof must substantially correspond.<sup>25</sup>

**§ 2393. Presumptions and burden of proof.**—When suit is brought to reform a contract a presumption exists that the

<sup>17</sup> *Biser v. Bauer*, 205 Fed. 229, 123 C. C. A. 417.

<sup>18</sup> *Harry v. Hamilton* (Tex. Civ. App.), 154 S. W. 637.

<sup>19</sup> *United States Health & Accident Ins. Co. v. Emerick*, 55 Ind. App. 591, 103 N. E. 435; *Torrey v. McFadyen*, 165 N. Car. 237, 81 S. E. 296; *Melott v. West*, 76 W. Va. 739, 86 S. E. 759.

<sup>20</sup> *Koch v. Bird*, 174 Mich. 594, 140 N. W. 919. What occurred at the signing of the contract may be admissible: *King v. Edward Thompson Co.*, 56 Ind. App. 274, 104 N. E. 106.

<sup>21</sup> *Fischer v. Dent*, 259 Mo. 86, 167 S. W. 977.

<sup>22</sup> *Osincup v. Henthorn*, 89 Kans. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174n, Ann. Cas. 1914C, 1262n.

<sup>23</sup> *Baker v. Pierce*, 197 Ill. App. 158.

<sup>24</sup> *Archer v. McClure*, 166 N. Car. 140, 81 S. E. 1081, Ann. Cas. 1916C, 180n. In an action to reform a lease, the issue of the lessor's infancy may be a question of fact for the jury: *Giles v. Latimer*, 40 Okla. 301, 137 Pac. 113. As to province of court and jury in suits to reform deeds see: *Highsmith v. Page*, 158 N. Car. 226, 73 S. E. 998.

<sup>25</sup> *Interstate Lumber Co. v. Fife*, 70 Fla. 178, 69 So. 715. To reform a mistake in a policy of insurance, the terms of the intended agreement must be shown; and, where it is alleged that the policy was to be the same as

a prior policy in another company, the terms of such prior policy must be shown: *Aetna Life Ins. Co. v. American Zinc, Lead & Smelting Co.*, 169 Mo. App. 550, 154 S. W. 827. It has been held erroneous to instruct the jury, in case they found the sale of land was by the acre at a fixed price per acre, to make any other reduction than one proportionally to the deficiency: *Adams v. White*, 138 Ga. 306, 75 S. E. 321. In an action to reform an endowment policy on ground of mutual mistake in not naming plaintiff as beneficiary at its maturity, his requested charge that the application might be explained by what was said by the parties, properly refused: *Hayes v. Penn Mut. Life Ins. Co.*, 222 Mass. 382, 111 N. E. 168. In a suit to reform a lease because of mutual mistake, an instruction that in substance defendant's counterclaim was "that defendants were only to clear up 15 acres every two years instead of 15 acres every year" was erroneous, because it indicated that defendants were relying on the lease as written: *Harmon v. Pohle*, 55 Ind. App. 439, 103 N. E. 1087. In case there is a finding of facts such finding should cover the material facts in issue, and if it fails to do so will be insufficient: *Auerbach v. Healy* (Cal.), 161 Pac. 1157.

agreement, as executed, correctly expresses the intention of the parties and the burden of proof is upon the party seeking reformation.<sup>26</sup> This principle applies to deeds<sup>27</sup> and insurance policies,<sup>28</sup> as well as other forms of contracts. When the complaint does not allege the time when the mistake was discovered, it will be presumed that the alleged mistake was known by all the parties interested from the time the instrument was made.<sup>29</sup> In suits to correct misdescriptions in deeds, where it appears that the grantor subsequently conveyed the same land by a correct deed to another, the burden is on the plaintiffs to prove that the subsequent purchaser had knowledge of the mutual mistake in the prior deed given before he purchased.<sup>30</sup> The same is true concerning the burden of proof when the plaintiff seeks to prove that the parties intended to make a contract such as he seeks to establish, and that such intent was frustrated by fraud, accident or mutual mistake.<sup>31</sup> Moreover, the plaintiff should show the exact form to which the contract should be brought.<sup>32</sup>

§ 2394. **Weight and sufficiency of evidence.**—To warrant the reformation of a written instrument on the ground of mutual mistake, fraud, or inequitable conduct the evidence supporting the charge must be clear, unequivocal, and decisive.<sup>33</sup> This rule

<sup>26</sup> Ackerlin v. United States, 49 Ct. Cl. 635; Hesson v. Hesson, 121 Md. 626, 89 Atl. 107. In case notice of the mistake is necessary the burden is upon plaintiff to prove notice as where one insurance company has reinsured and a policy taken over by the second company is sought to be reformed: Vial v. Norwich Union Fire Ins. Society, 172 Ill. App. 134. No presumption, however, that plaintiff has examined the record and knows the terms of the record conveyance where he has been acting under a conveyance of water rights as understood by him: Lillis v. Silver Creek & Panoche Land & Water Co., 21 Cal. App. 234, 131 Pac. 344.

<sup>27</sup> Booth v. Cornelius, 189 Ala. 44, 66 So. 630; Gibbs v. Wallace, 58 Colo. 364, 147 Pac. 686; Hopkins v. Neal, 128 Md. 251, 97 Atl. 436; Sayre v. Moir, 68 Ore. 381, 137 Pac. 215; Byrd v. Mayo, 75 Ore. 100, 144 Pac. 574, 145 Pac. 13, 146 Pac. 475; Gillespie v. Davis, 116 Va. 630, 82 S. E. 705.

<sup>28</sup> Hayes v. Penn Mut. Life Ins. Co.,

222 Mass. 382, 111 N. E. 168; Fidelity Phenix Fire Ins. Co. v. Hilliard, 65 Fla. 443, 62 So. 585.

<sup>29</sup> Cleveland v. Bateman, 21 N. Mex. 675, 158 Pac. 648.

<sup>30</sup> Roycroft v. Jordan, 182 Ala. 447, 62 So. 701.

<sup>31</sup> Day v. Dyer, 171 Iowa 437, 152 N. W. 53. To same effect: Harmon v. Pohle, 55 Ind. App. 439, 103 N. E. 1087; First Nat. Bank v. Hartford Fire Ins. Co. of Hartford, Conn., 17 N. Mex. 334, 127 Pac. 1115. Fraud is not presumed: Noble v. Trump, 174 Iowa 320, 156 N. W. 376.

<sup>32</sup> Wright v. Bott (Tex. Civ. App.), 163 S. W. 360. The real intention of the parties must be clearly established: Winston v. City of Pittsfield, 221 Mass. 356, 108 N. E. 1038.

<sup>33</sup> Allegheny Valley Brick Co. v. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189; Holland Blow Stave Co. v. Barclay, 193 Ala. 200, 69 So. 118; Willingham & Bell v. Whitley, 189 Ala. 52, 66 So. 681; St. Louis, I. M. & S. R. Co. v. McConnell, 110

of certainty, in actions for reformation is often invoked and

Ark. 306, 161 S. W. 496 (relief granted on cross-complaint); Leslie v. O'Neil, 108 Ark. 607, 156 S. W. 1017; Ford v. Nunnelley, 112 Ark. 607, 165 S. W. 291; Goodrum v. Merchants' & Planters' Bank of England, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511n; Eureka Stone Co. v. Roach, 120 Ark. 326, 179 S. W. 499; Jones v. Dappen, 27 Colo. App. 21, 146 Pac. 118; Robinson Point Lumber Co. v. Johnson, 63 Fla. 562, 58 So. 841; Interstate Lumber Co. v. Fife, 70 Fla. 178, 69 So. 715; Buck v. Garber, 261 Ill. 378, 103 N. E. 1059; Lines v. Willey, 253 Ill. 440, 97 N. E. 843; Seery v. Catholic Order of Foresters, 176 Ill. App. 307; Tucker v. Glew, 158 Iowa 231, 139 N. W. 565; Good Milking Mach. Co. v. Galloway, 168 Iowa 550, 150 N. W. 710; Exchange Bank v. Schultz, 167 Iowa 136, 149 N. W. 99; Ison v. Sanders, 163 Ky. 605, 174 S. W. 505; McMee v. Henry, 163 Ky. 729, 174 S. W. 746; Brunswick & Topsham Water Dist. v. Inhabitants of Topsham, 109 Maine 334, 84 Atl. 644; Miles v. Shreve, 179 Mich. 671, 146 N. W. 374; Barnum v. White, 128 Minn. 58, 150 N. W. 227, 151 N. W. 147; Robinson v. Kornis, 250 Mo. 663, 157 S. W. 790; Driskill v. Ashley, 259 Mo. 1, 167 S. W. 1026, Ann. Cas. 1916A, 868n; Hallgren v. Becker, 94 Nebr. 415, 143 N. W. 467; McIsaac v. McMurray, 77 N. H. 466, 93 Atl. 115. L. R. A. 1916B, 769n; Birch v. Baker, 81 N. J. Eq. 264, 86 Atl. 932; First Nat. Bank v. Fessler, 84 N. J. Eq. 166, 92 Atl. 914; J. P. Duffy Co. v. Todebush, 173 App. Div. 205, 159 N. Y. S. 299; City of New York v. Matthews, 156 App. Div. 490, 141 N. Y. S. 432; Beatty v. Ireland, 152 App. Div. 588, 137 N. Y. S. 456; Lamm v. Lamm, 163 N. Car. 71, 79 S. E. 290; Richmond Cedar Works v. John L. Roper Lumber Co., 168 N. Car. 391, 84 S. E. 521 (especially when parties to a deed are dead); Roberts v. National Ins. Co., 2 Ohio App. 463, 35 Ohio Cir. Ct. 212; Schafer v. Midland Hotel Co., 41 Okla. 111, 137 Pac. 664; Dockstader v. Gibbs, 34 Okla. 497, 126 Pac. 229; Cleveland v. Rankin, 48 Okla. 99, 149 Pac. 1131; Davidson v. Bailey (Okla.), 155 Pac. 511; Suksdorf v. Spokane, P. & S. R. Co., 72 Ore. 398, 143 Pac. 1104; Lenheim v. Smith, 54 Pa. Super. Ct. 147; Battle v. Claiborne, 133 Tenn. 286, 180 S. W. 584; Curry v. Landes, 116 Va. 843, 83 S. E. 396; Moore v. Parker, 83 Wash. 399, 145 Pac. 440; Bruce v. Grays Harbor Drug Co., 68 Wash. 668, 123 Pac. 1075; Carlson v. Druse, 79 Wash. 542, 140 Pac. 570; Codd v. Langley, 75 Wash. 45, 134 Pac. 467; Northwest Motor Co. v. Braund, 89 Wash. 593, 154 Pac. 1098; Anderson v. Freeman, 88 Wash. 608, 153 Pac. 307; Stevens v. Johnson, 72 W. Va. 434, 78 S. E. 377; Brown & Hill v. McCabe, 72 W. Va. 105, 77 S. E. 538; Jilek v. Zahl, 162 Wis. 157, 155 N. W. 909. Relief will be denied where the evidence is equally balanced: Hesson v. Hesson, 121 Md. 626, 89 Atl. 107. The mere preponderance of conflicting evidence is insufficient: Griffith v. York, 152 Ky. 14, 153 S. W. 31; Gibbs v. Wallace, 58 Colo. 364, 147 Pac. 686; Noble v. Trump, 174 Iowa 320, 156 N. W. 376; Weight v. Bailey, 45 Utah 584, 147 Pac. 899. Compare with: Harmon v. Pohle, 55 Ind. App. 439, 103 N. E. 1087. While some of the foregoing cases lay down the rule that the evidence must prove the right to reformation beyond a reasonable doubt, the following cases hold the contrary: Panhandle Lumber Co. v. Rancour, 24 Idaho 603, 135 Pac. 558; Clark v. Clark, 141 Ga. 437, 81 S. E. 129; Fife v. Cate, 85 Vt. 418, 82 Atl. 741. The evidence required to obtain a reformation will vary depending on the situation and intelligence of the parties: Biser v. Bauer 205 Fed. 229, 123 C. C. A. 417. In the following cases the evidence was held sufficient to warrant reformation: Fidelity Trust Co. v. D. T. McKeithan Lumber Co., 212 Fed. 229 (mortgage); Williams v. Williams, 183 Ala. 585, 62 So. 843 (reformation of deed); Park v. McKee, 24 Colo. App. 11, 131 Pac. 279 (agreement transferring water shares); Adams v. Davis, 67 Fla. 200, 64 So. 853 (mortgage); Adams v. White, 138 Ga. 306, 75 S. E. 321 (bond for title); Correll v. Greider,



applied to a variety of contracts in general,<sup>34</sup> contracts to convey

258 Ill. 479, 101 N. E. 930 (reformation of deed); Wykle v. Bartholomew, 258 Ill. 358, 101 N. E. 597 (reformation of deed); Sharp v. Trustees of Schools, 261 Ill. 44, 103 N. E. 562 (deed); Groom v. Wray, 154 Iowa 734, 135 N. W. 418 (note); Day v. Dyer (Iowa), 152 N. W. 53 (deed); Kinman v. Hill (Iowa), 156 N. W. 168 (mortgage); McGuire v. Davis, 95 Kans. 486, 148 Pac. 755 (deed); Carr v. Burris, 148 Ky. 232, 146 S. W. 424 (deed); Wilson v. Reynolds, 154 Ky. 159, 156 S. W. 1036 (suit to reform deed); National Union Fire Ins. Co. v. Light's Admr., 163 Ky. 169, 173 S. W. 365 (insurance policy); Cook v. Day, 168 Ky. 282, 181 S. W. 1113 (deed); Combs v. Ison, 168 Ky. 728, 182 S. W. 953 (deed); White v. Grand Rapids & I. R. Co. (Mich.), 155 N. W. 719 (deed railroad right of way); Isberg v. Miller, 176 Mich. 677, 142 N. W. 1060 (contract not to re-engage in business); Lindell v. Peters, 129 Minn. 288, 152 N. W. 648, Ann. Cas. 1916E, 1130n (deed); Henley v. Sullivant, 248 Mo. 672, 154 S. W. 706 (suit to reform contract); McIntyre v. Casey (Mo.), 182 S. W. 966 (relief granted on cross-bill); Potter v. Sorensen, 96 Nebr. 698, 148 N. W. 898 (contract for sale of real estate); Gilroy v. Strauss Building & Realty Co., 157 N. Y. S. 162 (lease); MacDonald v. Crissey, 215 N. Y. 609, 109 N. E. 609 (contract for purchase of motor car); Knobloch v. Kracke, 151 App. Div. 10, 135 N. Y. S. 381 (deed); Freres v. Stayton Woolen Mills Co., 65 Ore. 206, 132 Pac. 533 (reformation of mortgage); White v. Proebstel, 65 Ore. 11, 130 Pac. 732 (reformation of deed); Markwart v. Kliever, 75 Ore. 574, 147 Pac. 553 (deed); Bird v. Mayo, 75 Ore. 100, 144 Pac. 574, 145 Pac. 13, 146 Pac. 475 (deed); Harry v. Hamilton (Tex. Civ. App.), 154 S. W. 637 (reformation of deed); Harris v. Parr (Tex. Civ. App.), 165 S. W. 42 (deed); Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co. (Tex. Civ. App.), 167 S. W. 816 (mortgage); Muerling v. Colsen, 79 Wash. 54, 139 Pac. 616 (deed); Young v. Jones, 72 Wash. 277, 130 Pac. 90 (reformation

of deed). In the following cases the evidence held insufficient: Burnaugh v. Walther, 159 Iowa 143, 140 N. W. 412; Miller v. Uhlman, 198 Fed. 233 (sale of hops); Doniphan, K. & S. R. Co. v. Missouri & N. A. R. Co., 104 Ark. 475, 149 S. W. 60 (railroad traffic contract); Hoffman v. Rice-Stix Dry Goods Co., 111 Ark. 207, 163 S. W. 520 (note); American Nat. Ins. Co. v. Schlosberg, 117 Ark. 655, 174 S. W. 1158 (insurance policy); Miller v. Mandel, 259 Ill. 314, 102 N. E. 760; Perry v. Elliott, 261 Ill. 553, 104 N. E. 196 (deed); Reeves v. St. Pierre, 165 Iowa 581, 146 N. W. 742 (lease); Stromberg v. Alexander, 171 Iowa 707, 154 N. W. 414 (contract to exchange lands); Bennett Jellico Coal Co. v. East Jellico Coal Co., 152 Ky. 838, 154 S. W. 922; Howard v. Howard, 157 Ky. 549, 163 S. W. 740 (deed); Rockport Coal Co. v. Carter, 157 Ky. 555, 163 S. W. 734 (mining lease); Gaver v. Gaver, 119 Md. 634, 87 Atl. 396 (no mistake not shared by sureties); Hopkins v. Neal, 128 Md. 251, 97 Atl. 436 (deed); Hayes v. Penn Mut. Life Ins. Co., 222 Mass. 382, 111 N. E. 168 (insurance policy); Robertson v. Smith, 191 Mich. 660, 158 N. W. 207; Crouch v. Thompson, 254 Mo. 477, 162 S. W. 149 (option contract); Aetna Life Ins. Co. v. American Zinc, Lead & Smelting Co., 169 Mo. App. 550, 154 S. W. 827 (reformation of insurance policy); Disbrow v. Disbrow, 146 N. Y. S. 63 (trust deed); Fitzgerald v. Arcade Theater Co., 153 N. Y. S. 618; Dameron v. Rowland Lumber Co., 163 N. Car. 278, 79 S. E. 607 (timber deed); Torrey v. McFadyen, 165 N. Car. 237, 81 S. E. 296; Sayre v. Moir, 68 Ore. 381, 137 Pac. 215 (deed); Jones v. Kelly, 94 S. Car. 349, 78 S. E. 17; Gillespie v. Davis, 116 Va. 630, 82 S. E. 705 (deed); Hertzog v. Riley, 71 W. Va. 651, 77 S. E. 138 (evidence insufficient on ground of mistake, sufficient on ground of alteration); Gavier v. Brechler, 159 Wis. 157, 149 N. W. 740.

<sup>34</sup> Scott v. Spurr, 169 Ky. 575, 184 S. W. 866; Robertson v. Smith, 191 Mich. 660, 158 N. W. 207. In an action to reform a written contract for

land,<sup>35</sup> deeds,<sup>36</sup> in respect to the property conveyed thereby,<sup>37</sup> and covenants, conditions, reservations and restrictions therein,<sup>38</sup> trust deeds,<sup>39</sup> mortgages,<sup>40</sup> leases,<sup>41</sup> insurance policies,<sup>42</sup> and releases.<sup>43</sup>

§ 2395. **Relief awarded.**—In actions to reform written instruments where the court obtains jurisdiction for that purpose it has the power to grant complete relief,<sup>44</sup> and may award damages for the breach of the contract as reformed,<sup>45</sup> or, in a proper case, compel specific performance.<sup>46</sup> In case of an insurance pol-

mistake, denial by defendant that there was any mistake will not defeat the equity: *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636. To same effect: *Melott v. West*, 76 W. Va. 739, 86 S. E. 759.

<sup>35</sup> *Church v. Nash*, 163 Wis. 424, 158 N. W. 89.

<sup>36</sup> *Bajohr v. Bajohr* (Mo.), 184 S. W. 76. The evidence required is more than a bare preponderance, however: *Stephens v. Stephens* (Mo.), 183 S. W. 572.

<sup>37</sup> *Tegarden v. Hurst*, 123 Ark. 354, 185 S. W. 463. Evidence held insufficient: *Stephens v. Stephens* (Mo.), 183 S. W. 572; *Allen v. Roanoke R. & Lumber Co.*, 171 N. Car. 339, 88 S. E. 492.

<sup>38</sup> *Proctor v. Fife*, 97 Kans. 431, 155 Pac. 931.

<sup>39</sup> *Bank of Union v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

<sup>40</sup> *Bradshaw v. Provident Trust Co.*, 81 Ore. 55, 158 Pac. 274.

<sup>41</sup> *Buck Auto Carriage & Implement Co. v. Tietge*, 174 Iowa 103, 156 N. W. 313; *Wagner v. Glick*, 177 Iowa 623, 159 N. W. 233; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Bott v. Campbell*, 82 Ore. 468, 161 Pac. 955; *Perkins v. Kirby* (R. I.), 97 Atl. 884 (mistake may be implied from circumstances proved). Evidence held insufficient: *A. E. Wood & Co. v. Standard Drug Store*, 192 Mich. 453, 158 N. W. 844.

<sup>42</sup> *Springfield Fire & Marine Ins. Co. v. Snowden*, 173 Ky. 664, 191 S. W. 439; *Mahoney v. Minnesota Farmers' Mut. Ins. Co.*, 136 Minn. 34, 161 N. W. 217 (hail insurance); *Ulman v. Equitable Life Ins. Co.*, 161 App. Div. 708, 146 N. Y. S. 696; *Holden v. Law Union & Rock Ins. Co.*, 63 Ore. 253, 127 Pac. 547; *Carl-*

*ton Lumber Co. v. Lumber Ins. Co.*, 81 Ore. 396, 158 Pac. 807, 159 Pac. 969.

<sup>43</sup> *First State Bank v. Jones*, 107 Tex. 623, 183 S. W. 874.

<sup>44</sup> *Jones v. Dappen*, 27 Colo. App. 21, 146 Pac. 118 (reformation of deed); *Twyman v. Baldwin*, 261 Ill. 67, 103 N. E. 605; *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315; *Mays v. Morrell*, 65 Ore. 558, 132 Pac. 714. In a suit to reform a deed a mortgage executed in connection therewith should also be reformed: *Holbrook v. Schofield*, 211 Mass. 234, 98 N. E. 97. In case plaintiff has not received a part of the land he was supposed to receive he may have the deed reformed to include it or recover its value: *Jones v. Albert*, 118 Va. 363, 87 S. E. 564. Compare with: *Ladd v. Bankston*, 121 Ark. 578, 181 S. W. 889.

<sup>45</sup> *Hogg v. Maxwell*, 218 Fed. 356, 134 C. C. A. 164; *Castleman-Blake-more Co. v. Pickrell & Craig Co.*, 163 Ky. 750, 174 S. W. 749.

<sup>46</sup> *Capital City Bank v. Hilson*, 64 Fla. 206, 60 So. 189, Ann. Cas. 1914B, 121In; *Froyd v. Schultz*, 260 Ill. 268, 103 N. E. 220, Ann. Cas. 1914D, 225n; *Lindenberger v. Rowland*, 158 Ky. 760, 166 S. W. 242; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866. But equity can not first reform and then specifically enforce an agreement for the sale of lands: *Davimos v. Green*, 83 N. J. Eq. 596, 92 Atl. 96; *Vogt v. Mullin*, 82 N. J. Eq. 452, 89 Atl. 533. A written agreement for the sale of real estate can not, for the purpose of specific performance, be reformed to include a contemporaneous oral agreement: *Schwartzman v. Creveling*, 85 N. J. Eq. 402, 96 Atl. 896.

icy, it may award reformation and compel payment.<sup>47</sup> Also where a defendant sets up mistake in a written instrument, the court need not actually reform the contract but may grant the defendant relief as though the agreement had been corrected.<sup>48</sup> The court is not required to make the relief granted coextensive with that prayed. A mortgage may be foreclosed without reformation,<sup>49</sup> or a part of a contract enforced,<sup>50</sup> or title quieted without reformation.<sup>51</sup> A defendant can not object because only part of the relief asked for by plaintiff was granted.<sup>52</sup>

<sup>47</sup> *Carroll v. Hartford Fire Ins. Co.*, 28 Idaho 466, 154 Pac. 985; *Vial v. Norwich Union Fire Ins. Society*, 172 Ill. App. 134; *National Union Fire Ins. Co. v. Light's Admr.*, 163 Ky. 169, 173 S. W. 365; *French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. Dak. 426, 151 N. W. 7, L. R. A. 1915D, 766; *Holden v. Law Union & Rock Ins. Co.*, 63 Ore. 253, 127 Pac. 547.

<sup>48</sup> *Ætna Life Ins. Co. v. American Zinc, Lead & Smelting Co.*, 169 Mo. App. 550, 154 S. W. 827.

<sup>49</sup> *Fry v. Jenkins*, 173 Ill. App. 486. Although a mortgage, because of mistake, did not correctly describe

the premises, the mortgage description can not, after foreclosure and sheriff's sale, be reformed in an action merely to reform the sheriff's deed: *Stearns v. McHugh*, 35 S. Dak. 185, 151 N. W. 888.

<sup>50</sup> *Nellis v. Western Life Indemnity Co.*, 207 N. Y. 320, 100 N. E. 1119.

<sup>51</sup> *Lochridge v. Johnson*, 108 Ark. 147, 157 S. W. 405. Relief by injunction may be granted even though reformation is denied: *Fife v. Cate*, 85 Vt. 418, 82 Atl. 741.

<sup>52</sup> *Crawford v. Headlee (Mo.)*, 191 S. W. 55.

## CHAPTER LIII

### RESCISSION AND CANCELLATION

§ 2410. **Nature and scope of remedy.**—The equitable remedy of rescission is not one enforceable as a matter of right, and a court should not award it unless some such element as actual fraud, accident, mistake or insolvency appears.<sup>1</sup> A court of equity may declare a rescission of a contract of conveyance in order to prevent a manifest wrong.<sup>2</sup> A fraudulent transaction must be affirmed or rescinded as a whole by the defrauded party.<sup>3</sup> A contract may also be rescinded by agreement,<sup>4</sup> and this may be done by parol.<sup>5</sup>

§ 2412. **Grounds for remedy in general.**—A valid and binding contract can not, as a general rule, be rescinded by either party without the assent, express or implied, of the other party,<sup>6</sup> and to entitle a party to have rescission some substantial reason must be shown.<sup>7</sup> That a contract evinces an improvident bar-

<sup>1</sup> *McMillan v. American Suburban Corp.*, 136 Tenn. 53, 188 S. W. 615, L. R. A. 1917B, 401n. A purchaser of land on the installment plan, with bond from vendor to execute deed on completion of payments, which bond contained a guaranty that the vendor would lay water mains, went into possession and the vendor executed a deed but without any provision of guaranty, held purchaser could not have rescission of contract where vendor failed to lay water mains: *Shafer v. Shafer* (Mo.), 190 S. W. 323.

<sup>2</sup> The failure to perform a contract for support made in consideration of conveyance of lands will be rescinded by a court of equity although the promise is not a condition subsequent and the breach is only partial: *O'Ferrall v. O'Ferrall*, 276 Ill. 132, 114 N. E. 561; *Huston v. Goemann*, 99 Kans. 438, 162 Pac. 271.

<sup>3</sup> *Jones v. Bay Cities Electric Co.*, 22 Cal. App. 81, 133 Pac. 492; *Gordon-Tiger Mining & Reduction Co. v. Brown*, 56 Colo. 301, 138 Pac. 51;

*Girouard v. Jasper*, 219 Mass. 318, 106 N. E. 849; *Expansion Realty Co. v. Geren*, 185 Mo. App. 440, 170 S. W. 928; *Miller v. Missouri State Life Ins. Co.*, 194 Mo. App. 265, 186 S. W. 762; *Collison v. Ream*, 95 Nebr. 29, 144 N. W. 1050; *Guild v. More*, 32 N. Dak. 432, 155 N. W. 44.

<sup>4</sup> *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 So. 871; *Messer Real Estate & Ins. Co. v. Ruff*, 185 Ala. 236, 64 So. 51; *White Pine Lumber Co. v. Manufacturers' Lumber Co.*, 191 Mich. 390, 158 N. W. 124.

<sup>5</sup> *Tompkins v. Davidow*, 27 Cal. App. 327, 149 Pac. 788; *Murray v. Boyd*, 165 Ky. 625, 177 S. W. 468.

<sup>6</sup> *Pardoe v. Jones*, 161 Iowa 426, 143 N. W. 405; *Blake v. Osmundson* (Iowa), 159 N. W. 766; *Listman Mill Co. v. Dufresne*, 111 Maine 104, 88 Atl. 354. Contra: *American-Hawaiian Eng. & Constr. Co. v. Butler*, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44n (building contract).

<sup>7</sup> *Tanforan v. Tanforan*, 173 Cal. 270, 159 Pac. 709; *Blake v. Osmundson* (Iowa), 159 N. W. 766; *Simmons*

gain,<sup>8</sup> is uncertain,<sup>9</sup> or shows a failure of an illegal consideration,<sup>10</sup> is not ground for rescission. As a general rule, rescission can not be had where the contract is fully executed,<sup>11</sup> or where the defects in an instrument do not appear on its face.<sup>12</sup> A forfeiture of a contract for a breach of condition is not rescission.<sup>13</sup>

§ 2413. **Misrepresentation and fraud as ground.**—Fraud or misrepresentation of a fact inducing another to enter into a contract is ground for rescission.<sup>14</sup>

§ 2414. **Remedy given for expressions of opinion.**—An expression of mere opinion is not sufficient ground for setting a contract aside although it be false. Thus an expression of opinion as to the condition of a business is not ground to set aside a contract of sale.<sup>15</sup>

§ 2415. **Illegality as ground for remedy.**—Contracts fraudulently procured,<sup>16</sup> or against public policy,<sup>17</sup> may be rescinded before they are fully performed.

§ 2416. **Inadequate consideration as ground for rescission.**—As a general rule partial failure of consideration is not a ground for rescission of a contract, but it is held where both parties can be placed in statu quo, the party not in default, having restored the consideration received, may enforce rescission.<sup>18</sup>

§ 2417. **Remedy given for mistake.**—Rescission for mistake only involves the abandonment of a contract which the

v. Shafer, 98 Kans. 725, 160 Pac. 199; Turner & Frazer v. Frazier, 157 Ky. 388, 163 S. W. 245; Gould v. McCormick, 75 Wash. 61, 134 Pac. 676, 47 L. R. A. (N. S.) 765, Ann. Cas. 1915A, 710n.

<sup>8</sup> Capital Security Co. v. Holland, 60 So. 495, 6 Ala. App. 197; Federal Life Ins. Co. v. Griffin, 173 Ill. App. 5; Bowker v. Torrey, 211 Mass. 282, 97 N. E. 770; Society of Independent Doukhobors v. Hecker, 83 Ore. 65, 162 Pac. 851.

<sup>9</sup> Hawthorne v. Jenkins, 182 Ala. 255, 62 So. 505, Ann. Cas. 1915D, 707n.

<sup>10</sup> Garzot v. O'Neill, 237 Fed. 73, 150 C. C. A. 275.

<sup>11</sup> Sewell v. Walkley (Ala.), 73 So. 422.

<sup>12</sup> Smith v. Roney, 182 Ala. 540, 62 So. 753; Whitney v. Considine In-

vesting Co., 176 App. Div. 157, 162 N. Y. S. 507; Campbell v. Alsop's Admr., 116 Va. 39, 81 S. E. 31.

<sup>13</sup> Stennick v. J. K. Lumber Co. (Ore.), 161 Pac. 97.

<sup>14</sup> Van Denburg v. Scott, 78 Misc. 281, 138 N. Y. S. 149; Fields v. Brown, 160 N. Car. 295, 76 S. E. 8. The right to rescind a contract for nonperformance depends upon whether the defendant's failure to perform was a breach of a substantial part of the contract: Elgin v. Snyder, 60 Ore. 297, 118 Pac. 280.

<sup>15</sup> Eureka Dairy Co. v. McSween, 37 App. D. C. 1.

<sup>16</sup> Edward Thompson Co. v. Schroeder, 131 Minn. 125, 154 N. W. 792.

<sup>17</sup> Tallman v. Lewis, 124 Ark. 6, 186 S. W. 296.

<sup>18</sup> Williams v. Butler, 58 Ind. App. 47, 105 N. E. 387.

parties did not intend to make, and one can not, ordinarily, have a contract rescinded for a mistake on his part only.<sup>19</sup>

§ 2421. **Remedy given for nonperformance.**—As a general rule a rescission of a contract will not be permitted where the breach is slight or casual.<sup>20</sup>

§ 2422. **Remedy where specific performance denied.**—Where specific performance is denied upon ground of mutual mistake rescission may generally be granted.<sup>21</sup>

§ 2424. **Inadequacy of legal remedy.**—Where a complaint shows the plaintiff has no adequate or complete remedy at law, relief in equity will be given.<sup>22</sup>

§ 2427. **Inadequacy of legal remedy with respect to other grounds.**—A suit to rescind a contract may be maintained although there has been a prior breach by one or both parties.<sup>23</sup>

§ 2428. **When a remedy at law exists.**—A contract may be rescinded in a proper case for fraud or mistake as to matter affecting the thing contracted for, although the injured party may have a concurrent legal remedy.<sup>24</sup>

§ 2429. **Estoppel where contract or deed ratified.**—Where one having knowledge of the facts unequivocally does an act which implies an intention to abide by a contract, he can not afterward disaffirm and sue for rescission.<sup>25</sup>

§ 2430. **Acts amounting to ratification.**—A failure to rescind before the other party has changed his position is evidence

<sup>19</sup> Frazier v. State Bank of Decatur, 101 Ark. 135, 141 S. W. 941.

<sup>20</sup> Fore River Shipbuilding Co. v. Southern Pac. Co., 219 Fed. 387, 135 C. C. A. 129; Oscar Barnett Foundry Co. v. Crowe, 219 Fed. 450, 135 C. C. A. 162; Burpee v. Guggenheim, 226 Fed. 214; Hoggson Bros. v. First Nat. Bank, 231 Fed. 869, 146 C. C. A. 65; Giberson v. Fink, 28 Cal. App. 25, 151 Pac. 371; Mettler v. Vance, 158 Pac. 1044, 30 Cal. App. 499; Stearns-Roger Mfg. Co. v. Jackson Lake Reservoir & Irrigation Co., 61 Colo. 403, 158 Pac. 137; Karbach v. Grant, 131 Minn. 269, 154 N. W. 1071; Fossum v. Requa, 218 N. Y. 339, 113 N. E. 330; Morris v. Brown (Tex. Civ.

App.), 173 S. W. 265; Grove v. Keeling (Tex. Civ. App.), 176 S. W. 822; Ingebrigt v. Seattle Taxicab & Transfer Co., 78 Wash. 433, 139 Pac. 188.

<sup>21</sup> McCrea v. Hinkson, 65 Ore. 132, 131 Pac. 1025.

<sup>22</sup> Peerless Coal Co. v. Lamar, 180 Ala. 307, 60 So. 837.

<sup>23</sup> Oscar Barnett Foundry Co. v. Crowe, 219 Fed. 450, 135 C. C. A. 162; Crowe v. Oscar Barnett Foundry Co., 213 Fed. 864. See also Kamps & Sacksteder Drug Co. v. United Drug Co., 164 Wis. 412, 160 N. W. 271.

<sup>24</sup> Wilson v. McConnell, 72 W. Va. 81, 77 S. E. 540.

<sup>25</sup> City Light, Power, Ice & Storage

of an election to stand on the contract.<sup>26</sup> Likewise, where on discovering fraud the injured party does not offer to return what he has received his failure will be treated as an election to affirm.<sup>27</sup>

§ 2431. **Effect of laches.**<sup>27a</sup>—One who would repudiate a formal written contract as not containing the agreements of the parties must act promptly and under circumstances consistent with good faith.<sup>28</sup> It is generally held that an action, to avoid laches, must be brought within a reasonable time.<sup>29</sup> What is a reasonable time depends on the circumstances of the particular case.<sup>30</sup> The rule is the same in actions to cancel an instrument as required where a rescission is sought.<sup>31</sup>

§ 2434. **Placing defendant in statu quo.**—As a general rule the return of the consideration, or placing in statu quo, is a condition precedent to an action for rescission.<sup>32</sup> It is only where the clearest and strongest equity demands such relief that a court of equity will rescind a contract where the parties can not be placed in statu quo.<sup>33</sup>

§ 2435. **Return of consideration received.**—Where one seeks the rescission of a contract on the ground of fraud he must return or tender back the benefits received within a reasonable time after discovering the fraud.<sup>34</sup> Such rule, however, does not apply where the plaintiff is entitled to retain the consideration

Co. v. St. Mary's Mach. Co., 170 Mo. App. 224, 156 S. W. 83.

<sup>26</sup> Reed v. Benzine-ated Soap Co., 81 N. J. Eq. 182, 86 Atl. 263.

<sup>27</sup> Putney v. Schmidt, 16 N. Mex. 400, 120 Pac. 720.

<sup>27a</sup> [Main section quoted in Myler v. Fidelity Mut. Life Ins. Co. (Okla.), 167 Pac. 601, 608.]

<sup>28</sup> Van Sickle v. Harmeyer, 172 Ill. App. 218; Finlayson v. Cuyuga Coal & Coke Co., 173 Ky. 763, 191 S. W. 486; Angel v. Columbia Canal Co., 69 Wash. 550, 125 Pac. 766; Thompson v. Rhodehamel, 71 Wash. 24, 127 Pac. 572; Faucett v. Northern Clay Co., 93 Wash. 239, 160 Pac. 643.

<sup>29</sup> Watson Fireproof Window Co. v. Henry Weis Cornice Co., 181 Mo. App. 318, 168 S. W. 905.

<sup>30</sup> Donian v. Fox, 170 Ill. App. 41.

<sup>31</sup> Barkley v. Hibernia Sav. & Loan Soc., 21 Cal. App. 456, 132 Pac. 467.

<sup>32</sup> Sheridan State Bank v. Rowell, 212 Fed. 529; Betts v. Ward, 196 Ala.

248, 72 So. 110; Madson v. Clark, 165 Ill. App. 228; Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701, 64 So. 684; Shea v. Manhattan Life Ins. Co., 224 Mass. 112, 112 N. E. 631; Shea v. Manhattan Life Ins. Co., 224 Mass. 112, 112 N. E. 631; Horne v. John A. Hertel Co., 184 Mo. App. 725, 171 S. W. 598; Evans v. Brooks, 34 Okla. 55, 124 Pac. 599; Jones v. McGinn, 70 Ore. 236, 140 Pac. 994; Clapp v. Gilt Edge Consol. Mines Co., 33 S. Dak. 123, 144 N. W. 721; Brady v. Oliver, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.) 60n, Ann. Cas. 1913C, 376n.

<sup>33</sup> United States v. Norris, 222 Fed. 14, 137 C. C. A. 552; Abner M. Harper v. Newburgh, 159 App. Div. 695, 145 N. Y. S. 59.

<sup>34</sup> Consumers' Coal & Fuel Co. v. Yarbrough, 194 Ala. 482, 69 So. 897; Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61; Hedges v. Pioneer Iron

in any event,<sup>35</sup> where the property has been destroyed or is worthless,<sup>36</sup> or where it is impossible.<sup>37</sup> And where through the fault of the wrongdoer a party is unable to restore the property in the condition in which it was received, it will be sufficient that he restore so far as he is able.<sup>38</sup>

§ 2436. **When restoration must be made.**—As a general rule in order to rescind a contract the property received thereunder must be returned before suit, but where the consideration is a mere promise, as a check or note, it may be returned afterward.<sup>39</sup> And where restitution is rendered impossible by the misconduct of the other party, it is not a condition precedent to a right of rescission.<sup>40</sup> The rule applies to contracts partly executory only.<sup>41</sup>

§ 2438. **Restoration in case of illegal contract.**—A court of equity will not require a return or tender of the consideration in case of actual fraud in getting a signature to a writing of a different character from that represented so that there was in reality no such contract and no fruits received from it, as a condition precedent to the filing of a bill to rescind.<sup>42</sup>

§ 2441. **Bona fide purchasers—Relief against.**—Equity will not give relief by cancelation against a bona fide purchaser, for value and without knowledge or notice of the ground for cancelation.<sup>43</sup>

Works, 166 App. Div. 208, 151 N. Y. S. 495; *Moore v. Kelly* (Okla.), 157 Pac. 81; *Whitney v. Bissell*, 75 Ore. 28, 146 Pac. 141, L. R. A. 1915D, 257.

<sup>35</sup> *Collier v. Collier*, 137 Ga. 658, 74 S. E. 275; *Robinson v. Robinson*, 153 Ky. 828, 156 S. W. 903. See also *Taylor v. Colley*, 138 Ga. 41, 74 S. E. 694.

<sup>36</sup> *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897; *Roth v. Baum*, 153 N. Y. S. 185; *Shawnee Life Ins. Co. v. Taylor* (Okla.), 160 Pac. 622; *Jones v. McGinn*, 70 Ore. 236, 140 Pac. 994.

<sup>37</sup> *Hafer v. Cole*, 176 Ala. 242, 57 So. 757.

<sup>38</sup> *Clark v. Wells*, 127 Minn. 353, 149 N. W. 547, L. R. A. 1916F, 476n. Where a party seeks to rescind a contract he is required to make and keep a tender good and must show that he is able and willing to deliver

the property: *Kimble v. Gillard*, 177 Mich. 250, 143 N. W. 79.

<sup>39</sup> *Owen v. Button*, 210 Mass. 219, 96 N. E. 333.

<sup>40</sup> *Consumers' Coal & Fuel Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897.

<sup>41</sup> *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244, Ann. Cas. 1914B, 859n.

<sup>42</sup> The son of an aged woman induced her to sign a conveyance, fraudulently representing it to be another document, and for which she received no consideration. Held, she was bound as a condition to setting the deed aside to return to the son all sums expended by him in her behalf: *Burt v. Burt*, 145 Ga. 865, 90 S. E. 73.

<sup>43</sup> *Cain v. Ragsdale*, 146 Ga. 372, 91 S. E. 119; *Hill v. Horse Creek Coal Land Co.*, 70 W. Va. 221, 73 S. E. 718.



§ 2442. **Parties to suit—In general.**—A contract legally made can not as a rule be rescinded by one party.<sup>44</sup> As a general rule all persons interested in the subject-matter and who will be affected by the decree are necessary parties to a suit for rescission or cancelation.<sup>45</sup> But one who acts as a mere conduit of title in the transfer of real estate is not a necessary party.<sup>46</sup>

§ 2450. **Allegations of bill or complaint—Pleading facts.**—A complaint seeking judicial annulment of a contract should allege the facts upon which the plaintiff relies,<sup>47</sup> although there are holdings to the effect that it is sufficient where the facts are alleged from which fraud, undue influence, or want of consideration may be inferred.<sup>48</sup>

§ 2453. **Plea or answer.**—In order for an assignee to show that he is a bona fide holder such fact must be pleaded.<sup>49</sup>

§ 2454. **Counterclaim or cross-bill.**—It has been held that a cross-bill setting up an equitable lien for loans to pay incumbrances and make improvements is proper in a suit for rescission or cancellation.<sup>50</sup> But a cross-bill based on a breach of warranty in a deed is not proper in an action to cancel the deed.<sup>51</sup>

§ 2456. **Variance.**—A party must prove his action as alleged or fail in his proof.<sup>52</sup>

§ 2457. **Burden of proof in general.**—In an action to cancel a note in the hand of an assignee upon the ground of fraud of the maker, and that the assignee was not an innocent holder, the burden of showing good faith was held to be upon the assignee.<sup>53</sup>

<sup>44</sup> Blake v. Osmundson (Iowa), 159 N. W. 766.

<sup>45</sup> Huntington Park Imp. Co. v. Park Land Co., 165 Cal. 429, 132 Pac. 760; Weigand v. Rutscke, 253 Ill. 260, 97 N. E. 641; Ducas v. Ducas, 150 App. Div. 397, 135 N. Y. S. 35.

<sup>46</sup> Conlon v. Marsh, 97 Misc. 506, 161 N. Y. S. 819.

<sup>47</sup> Sanchez v. Sanchez (N. Mex.), 159 Pac. 669; M. Kangerga & Bro. v. Willard (Tex. Civ. App.), 191 S. W. 195.

<sup>48</sup> Denney v. Reber (Ind. App.), 114 N. E. 424; Brown v. Slaton, 172 Ky. 787, 189 S. W. 1130.

<sup>49</sup> Bonelli v. Burton, 61 Ore. 429, 123 Pac. 37.

<sup>50</sup> Lewis v. Davis (Ala.), 73 So. 419.

<sup>51</sup> McKenzie v. Call, 176 Mich. 198, 142 N. W. 370.

<sup>52</sup> Where in a suit to rescind a contract for the purchase of land a failure of title was pleaded, proof of a breach of warranty or quantity, although ground for rescission, was a variance: Fox v. Robinson, 18 Cal. App. 585, 123 Pac. 813.

<sup>53</sup> Lundean v. Hamilton (Iowa), 159 N. W. 163.

§ 2459. **Sufficiency of proof.**—In order to justify a court of equity in decreeing rescission of a contract upon the ground that it was procured by fraud, the evidence must be clear, unequivocal, and convincing.<sup>54</sup> It is held, however, that where a party fails to perform a written contract for support in consideration of a conveyance of lands, a court of equity will infer a fraudulent intent in the first instance.<sup>55</sup>

§ 2460. **Relief granted in general.**—Equity having once acquired jurisdiction in a suit for rescission, will retain it to settle the equities between the parties, and may grant both equitable and legal relief, providing such relief is prayed and the pleadings are sufficient. Thus the court in a suit for rescission may decree a lien on property,<sup>56</sup> give judgment for damages,<sup>57</sup> or issue writ of sequestration for rents and give complete relief.<sup>58</sup> But in a suit to cancel two mortgages it was held that the court did not have power to foreclose one of the mortgages found valid.<sup>59</sup>

§ 2461. **Cancellation, rescission, or reconveyance.**—A court of equity may decree a reconveyance by quitclaim deed where liens have intervened.<sup>60</sup>

§ 2462. **Alternative, additional or incidental relief.**—Where one performs services under a contract induced by his fraud a court of equity will not allow him remuneration for services actually performed, in an action to set aside the contract.<sup>61</sup>

<sup>54</sup> Goodno v. Hotchkiss, 237 Fed. 686; Fletcher v. Moriarty, 62 Fla. 482, 486, 56 So. 437; Culton v. Asher, 149 Ky. 659, 149 S. W. 946; Faucett v. Northern Clay Co., 93 Wash. 239, 160 Pac. 643. But see Green v. Security Mut. Life Ins. Co., 159 Mo. App. 277, 140 S. W. 325. Evidence held sufficient: Faucett v. Hamilton, 93 Wash. 239, 160 Pac. 643; Lundeau v. Hamilton (Iowa), 159 N. W. 163; Gafford v. Davis (Okla.), 159 Pac. 490. Evidence held insufficient: Faucett v. Northern Clay Co., 93 Wash. 239, 160 Pac. 643; Lundeau v. Hamilton (Iowa), 159 N. W. 163; Brogan v. Porter, 145 Ky. 587, 140 S. W. 1007; Parkyn v. Ford (Mich.), 160 N. W. 531.

<sup>55</sup> O'Ferrall v. O'Ferrall, 276 Ill. 132, 114 N. E. 561.

<sup>56</sup> A grantee fulfilled his agreement to support his grantor during the

grantee's life, but his widow refused to remain with grantor, held, judgment refusing cancellation, but making care of grantor a charge on the land, is proper: Simmons v. Shafer, 98 Kans. 725, 160 Pac. 199.

<sup>57</sup> Miller v. Mateer, 172 N. Car. 401, 90 S. E. 435.

<sup>58</sup> O'Ferrall v. O'Ferrall, 276 Ill. 132, 114 N. E. 561; Delaney v. McNeil & Higgins Co., 195 Ill. App. 524; Merritt v. Merritt, 169 Mich. 164, 134 N. W. 1105; McGehee v. Weeks, 112 Miss. 483, 73 So. 287; Hagelstine v. Blaschke (Tex. Civ. App.), 149 S. W. 718.

<sup>59</sup> Osborn v. Detroit Kraut Co., 193 Mich. 664, 160 N. W. 442.

<sup>60</sup> Biewer v. Mueller, 254 Ill. 315, 98 N. E. 548.

<sup>61</sup> Adrians v. Will, 37 App. D. C. 59.

## CHAPTER LIV

### INJUNCTION

§ 2482. **Prohibitory and mandatory injunctions.**—The writ of mandamus commands that a thing be done; the writ of injunction restrains the commission of an act. Mandamus is a civil proceeding; injunction is solely an equitable remedy.<sup>1</sup> A party who seeks an injunction against a threatened invasion of his legal rights must make out a case which commends itself to the conscience of the chancellor.<sup>2</sup> A bill without equity is insufficient to support an injunction of any character under any circumstances.<sup>3</sup>

§ 2484. **Right requiring protection.**<sup>4</sup>

§ 2487. **Injury already sustained.**—It is not the function of an injunction to correct past injuries.<sup>5</sup>

§ 2490. **Inadequacy of legal remedy.**<sup>6</sup>

§ 2491. **Damages at law adequate.**<sup>7</sup>

§ 2492. **Insolvency of defendant as ground for remedy.**—Generally the solvency or insolvency of the defendant is unimportant where an injunction is sought for impossibility of measuring injury in money, or where the legal remedy is inadequate.<sup>8</sup>

<sup>1</sup> *Clingen v. Harrison*, 195 Ill. App. 301. Where an injunction was obtained by one of two joint renters of a safe deposit box after the other's death, "restraining" the deposit company from denying plaintiff's free access to the box, it was held a mandatory injunction: *Moller v. Lincoln Safe Deposit Co.*, 174 App. Div. 458, 161 N. Y. S. 171.

<sup>2</sup> *Ardmore v. Appollos* (Okla.), 162 Pac. 211.

<sup>3</sup> *Pierson v. Duncan* (Ala.), 73 So. 406.

<sup>4</sup> *Tidwell v. H. H. Hitt Lumber Co.* (Ala.), 73 So. 486.

<sup>5</sup> *Correll v. Kroth* (Okla.), 162 Pac. 215; *State v. Superior Court of*

*Lewis County*, 93 Wash. 429, 161 Pac. 68.

<sup>6</sup> *Auerbach v. Northland Rubber Co.*, 161 N. Y. S. 396 (contract for personal services); *Board of Comrs. of Muskogee County v. Dudding* (Okla.), 160 Pac. 109.

<sup>7</sup> *Campbell v. Irvine Toll Bridge Co.*, 173 Ky. 313, 190 S. W. 1098 (action to compel defendant to accept plaintiff as lessee).

<sup>8</sup> *Campbell v. Irvine Toll Bridge Co.*, 173 Ky. 313, 190 S. W. 1098. Plaintiff was granted an injunction against an insolvent defendant, who contracted to purchase tobacco for it, from selling and delivering the to-

Thus the mere fact that defendant is solvent and able to respond fully in damages does not necessarily prevent the issuing of an injunction preventing him from cutting trees.<sup>9</sup>

§ 2493. **Remedy as ground for prevention of multiplicity of suits.**<sup>10</sup>

§ 2498. **Restraining commencement and prosecution of civil action.**—Equity will not enjoin the prosecution of a pending legal action on the ground that an accord and satisfaction was completed after issue was joined; this being available as a defense in the action.<sup>11</sup> But a plaintiff may, in a proper case, sue to enjoin suit on a note and to require redelivery thereof.<sup>12</sup> And in an action to compel the execution of a lease and for a temporary injunction, where a lease signed by plaintiff was in accordance with a written authorization of defendant to her agents, an injunction pendente lite to prevent summary proceedings should be granted.<sup>13</sup> Also where prayed and it appears that at the time the bill for an accounting is filed an action is pending at law involving the matters in regard to which the accounting is sought, an interlocutory order restraining the further prosecution of the action at law is proper.<sup>14</sup> But equity will refuse to enjoin a vendor from bringing his action in detinue against the buyer for a chattel sold with the reservation of title for the reason that the vendor has broken his contract, entitling the purchaser to damages.<sup>15</sup>

§ 2500. **Injunction—Foreign suits.**—A citizen of a state may be enjoined from bringing an action, against another citizen of that state or a nonresident corporation lawfully doing business

in loco to third parties, thus rendering plaintiff unable to perform his contracts: *H. Friedberg, Inc., v. McClary*, 173 Ky. 579, 191 S. W. 300, L. R. A. 1917C, 777n.

<sup>9</sup> *Tidwell v. H. H. Hitt Lumber Co.* (Ala.), 73 So. 486. But see *Penix v. Pumphrey*, 125 Ark. 332, 188 S. W. 816.

<sup>10</sup> *Tidwell v. H. H. Hitt Lumber Co.* (Ala.), 73 So. 486 (multiplicity of suits for separate trespasses).

<sup>11</sup> *Savage v. Edgar*, 86 N. J. Eq. 205, 98 Atl. 407 (in the above case

plaintiff replied that the accord and satisfaction was obtained by fraud. Held that this issue could be tried in the same action and that relief by injunction was unnecessary).

<sup>12</sup> *Gallagher v. Lembeck & Co. Brewing Co.*, 86 N. J. Eq. 188, 98 Atl. 461.

<sup>13</sup> *Roskam-Scott Co. v. Thomas*, 175 App. Div. 84, 161 N. Y. S. 776.

<sup>14</sup> *Mayr v. Nelson Chesman & Co.*, 195 Ill. App. 587.

<sup>15</sup> *Charleston Hardware Co. v. Warner Elevator Mfg. Co.* (W. Va.), 90 S. E. 674.

therein, in a foreign jurisdiction in order to evade the laws of his own state.<sup>16</sup>

**§ 2508. Injunction to restrain threatened violation of contract.**—Injunction will not be granted to prevent the breach of a contract, where it appears defendant is endeavoring in good faith to observe the contract, and the breach consisted in erroneously opening a relatively small number of letters.<sup>17</sup>

**§ 2510. Injunction to restrain breach of covenant where breach criminal.**<sup>18</sup>

**§ 2511. Injunction to restrain interference with contracts by third persons.**—Where a labor union and certain employers agree that, so long as it was able to do it, the union should have all the employer's work, a rival union's exertion of pressure upon employers to break the contract was an invasion of the contracting union's right, which would be enjoined.<sup>19</sup>

**§ 2517. Injunction to restrain violation of trade secret.**—A complaint which charges that defendant, formerly employed by plaintiff, since his discharge has used the information acquired solely by virtue of his employment to ruin plaintiff's business, states a cause of action.<sup>20</sup> But one who sells a laundry route and is then employed by the purchaser to solicit on such route has the right, on leaving such employ, to work for a rival laundry or for himself and to take as customers persons voluntarily offering him their trade.<sup>21</sup>

**§ 2526. Injunction to adjudicate titles.**—One who has no title or possession can not restrain trespass on land.<sup>22</sup>

<sup>16</sup> Fisher v. Pacific Mut. Life Ins. Co., 112 Miss. 30, 72 So. 846. Where a resident of New Jersey acquired an official domicile in New York by becoming an assignee for the benefit of creditors in the latter state he could not be enjoined by a New Jersey court from prosecuting in New York courts a claim against a New Jersey corporation; such suit being in his official and not individual capacity. Nor will injunction issue on the theory that the defendant will not get justice in New York: Federal Trust Co. v. Conklin (N. J. Ch.), 99 Atl. 109.

<sup>17</sup> Kilmer v. Dr. Kilmer & Co., 175 App. Div. 670, 162 N. Y. S. 617.

<sup>18</sup> Equity has power to enjoin acts threatening irreparable injury to property rights and his power can not be divested because such acts may violate the criminal law: State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk, 269 Mo. 389, 190 S. W. 877.

<sup>19</sup> Tracey v. Osborne (Mass.), 114 N. E. 959.

<sup>20</sup> Goldschmidt v. Sachs, 162 N. Y. S. 323.

<sup>21</sup> New Method Laundry Co. v. MacCann (Cal.), 161 Pac. 990.

<sup>22</sup> Travis v. Bruce, 172 Ky. 390, 189 S. W. 939; Lincoln Co. v. Curtis, 134 Minn. 473, 159 N. W. 129; Postal Telegraph-Cable Co. v. Nolan

§ 2527. **Necessity of prior adjudication of title.**—Where, in a suit to remove a cloud on the title and enjoin cutting of timber, plaintiff's title was clear as a matter of law, equity has jurisdiction to enjoin the trespass and remove the cloud on the title.<sup>23</sup>

§ 2528. **Injunction to enforce restrictive covenants in conveyances.**<sup>23a</sup>

§ 2529. **Restrictive covenants illustrated.**<sup>24</sup>

§ 2545. **Protection of corporate franchise by injunction.**—It is held that a private citizen can not restrain the act of a corporation within the powers of its franchise, although the rights of such citizen may be injured thereby.<sup>25</sup>

§ 2563. **Mandatory injunction to compel performance of duties by public service corporations.**—Where a water company adopted a contract entered into by its promoters to furnish water to the city and complied with it for many years, and then claimed that it was illegal, and threatened to cut off the public supply, the city was entitled to an injunction to restrain the cutting off of the water.<sup>26</sup>

§ 2570. **Injunction against public corporations and officers.**—A court of equity will not undertake to control the discretionary powers of a municipal or quasi municipal officer.<sup>27</sup>

§ 2573. **Injunction to restrain appropriation of public funds for unauthorized purpose.**—A public official may restrain the payment of his salary to his predecessor in office.<sup>28</sup>

§ 2574. **Injunction to restrain enforcement of ordinance**

(Mont.), 162 Pac. 169; *Burnett v. Sapulpa Refining Co.* (Okla.), 159 Pac. 360. And a decree, in a suit to recover title, by which title and possession of land was vested and ordered in plaintiff bank, gave the bank constructive possession of land and justified granting of an injunction restraining defendants from trespassing on premises and harvesting growing crops: *Schaefer v. First Nat. Bank, Bay City* (Tex. Cix. App.), 189 S. W. 556.

<sup>23</sup> *Halstead v. Aliff* (W. Va.), 89 S. E. 721.

<sup>23a</sup> [Main section cited in *Ross v. Sanderson* (Okla.), 162 Pac. 709, L. R. A. 1917C, 879, 882.]

<sup>24</sup> *Doran v. Graham*, 195 Ill. App. 65 (erection of flat prevented).

<sup>25</sup> *Alexander v. Wilkes-Barre An-*

*thracite Coal Co.*, 254 Pa. 1, 98 Atl. 794, L. R. A. 1917B, 310n (construing P. L. 1360).

<sup>26</sup> *Belfast v. Belfast Water Co.*, 115 Maine 234, 98 Atl. 738; *Jacob Dold Packing Co. v. Kings County Refrigerating Co.*, 176 App. Div. 407, 162 N. Y. S. 1035 (refrigeration company enjoined from summarily discontinuing service).

<sup>27</sup> *Marteeny v. Louth*, 197 Ill. App. 106. In Kentucky it is held that mandatory injunction is the only available and proper remedy for requiring the county clerk to make ready for a municipal primary election; as mandamus is inadequate: *Scott v. Singleton*, 171 Ky. 117, 188 S. W. 302.

<sup>28</sup> *Lampe v. Newport*, 173 Ky. 177, 190 S. W. 678.

**which breaches a contract.**—Equity will not enjoin enforcement of an ordinance in the absence of allegations showing invasion or destruction of property right, franchise or civil right, or other specific ground for jurisdiction of equity.<sup>29</sup> Whether an ordinance calling for the vacation of a street extension, which provided that it should be subject to a landowner's agreement for the use of the street, released or destroyed the rights of the parties thereunder, is a legal question for determination in a court of law and could not be determined on an application for a preliminary injunction restraining the passage of the ordinance. A court of equity will not enjoin the passage of an ordinance within the scope of the powers of the municipality.<sup>30</sup> But equity will restrain by injunction a proceeding under an invalid ordinance, which, if permitted to continue, will destroy property rights and inflict irreparable injury.<sup>31</sup>

§ 2578. **Injunction to try title to public office.**—The question of which of two candidates was, in fact, nominated can not be tried by injunction.<sup>32</sup>

§ 2584. **Jurisdiction of courts in general.**—In Kentucky, jurisdiction to grant a mandatory injunction is conferred on and confined to the circuit judge of the district, and, in his absence, a judge of similar jurisdiction.<sup>33</sup>

§ 2587. **Jurisdiction of inferior courts.**—In Oklahoma, a county judge, in the absence of the district judge from the county, may issue an injunction where the district judge would have been authorized to issue same.<sup>34</sup>

§ 2589. **Venue.**—Where a suit was brought by the mayor and council of a city to restrain the secretary of state and state auditor from tabulating returns and promulgating results of an

<sup>29</sup> *City of Savannah v. Granger*, 145 Ga. 578, 89 S. E. 690.

<sup>30</sup> *Harrison Land Co. v. Crucible Steel Co.*, 86 N. J. Eq. 249, 98 Atl. 1085.

<sup>31</sup> *Yee Gee v. San Francisco*, 235 Fed. 757 (even though the ordinance is enforced by criminal prosecution); *New York Life Ins. Co. v. Comanche* (Okla.), 162 Pac. 466. An interlocutory injunction may be granted where it is alleged that the ordinance is unreasonable: *Waycross v. Georgia*

*Inv. Co.*, 146 Ga. 2, 90 S. E. 281.

<sup>32</sup> *In re Anderson*, 164 Wis. 1, 159 N. W. 559. Otherwise where plaintiff was entitled to run as the nominee and the party executive committee was about to nominate another candidate in violation of the state statute: *Gilmore v. Waples* (Tex.), 188 S. W. 1037.

<sup>33</sup> *Scott v. Singleton*, 171 Ky. 117, 188 S. W. 302.

<sup>34</sup> *Pearson v. Glen Lumber Co.* (Okla.), 160 Pac. 48.

election seeking to substitute a new charter for the city, it was proper to bring such suit at the seat of state government, and not in the parish where the election took place.<sup>35</sup>

**§ 2590. Time to sue—In general.**<sup>36</sup>

**§ 2592. Plaintiffs or complainants.**—The commissioners of a sewer improvement, whose sewer has not been accepted by the city, may enjoin one constructing a system of sewers for private gain, from connecting with the improvement district sewer until reasonable compensation is made for such connection.<sup>37</sup> Likewise a company, although it does not have an exclusive franchise to sell electricity in a certain territory, is entitled to sue to enjoin another company, chartered to supply another territory, from disposing of current to a company competing with the plaintiff in territory which it occupied.<sup>38</sup>

**§ 2593. Persons who must be made defendants.**—Members of a labor union, composed of individuals all of whom are ultimately liable for acts of the officers of the union, are bound by an injunction, though only the officers are served, under the New York practice.<sup>39</sup>

**§ 2595. Bill, complaint or petition.**—Relief by injunction in ex parte proceedings must be based on allegations in the bill, showing the urgency for the issuance of the order, and the exigencies of each case must be considered.<sup>40</sup> And even if it is conceded that a court of equity has jurisdiction to restrain the re-

<sup>35</sup> *Gretna v. Bailey*, 140 La. 363, 72 So. 996. In Georgia, proceedings to condemn land for a tramroad has been held a "pending proceeding" which could be enjoined by the superior court of the county where the proceedings were pending: *Hutchinson v. Copeland*, 146 Ga. 357, 91 S. E. 206.

<sup>36</sup> A petition by the receiver of a bank to enjoin a creditor from prosecuting actions to obtain an inequitable advantage over other creditors is not prematurely brought, when it appears that at the time the bill was filed there existed the necessity of enforcing the liabilities of stockholders, and where it further appeared that it would be impracticable to enforce such liability prior to the time

when the creditor, unless restrained, will be able to prosecute his suits to judgment: *People v. La Salle St. Trust &c. Bank*, 195 Ill. App. 336. Prematurity in bringing a suit to enjoin does not go to the jurisdiction of the court before which it is brought: *Gretna v. Bailey*, 140 La. 363, 72 So. 996.

<sup>37</sup> *Peay v. Kinsworthy*, 126 Ark. 323, 190 S. W. 565.

<sup>38</sup> *Citizens' Electric Illuminating Co. v. Lackawanna & Wyoming Valley Power Co.*, 255 Pa. 145, 99 Atl. 402.

<sup>39</sup> *Neal v. Hutcheson*, 160 N. Y. S. 1007.

<sup>40</sup> *Whitmer v. William Whitmer & Sons* (Del. Ch.), 98 Atl. 940.



removal of a city official, a bill therefor is insufficient which does not show that the office held by complainant was duly established by ordinance, the nature and extent of complainant's right to hold office, and the nature of the authority by which it is sought to remove him.<sup>41</sup> The verification of a petition for an injunction in some jurisdictions at least should state positively that the grounds therefor alleged therein are true and not be made on information and belief.<sup>42</sup>

§ 2598. **Demurrer.**—When no demurrer has been filed defendant has the right to challenge a bill for an injunction in matters of substance only.<sup>43</sup> Misjoinder of causes of action is not ground for refusing a temporary injunction, defendant not having made complaint thereof by answer or demurrer, but having answered only by denial of the material allegations.<sup>44</sup>

§ 2601. **Evidence.**—A valid agreement in restraint of trade must be established by clear and satisfactory proof before an injunction will be issued against its breach.<sup>45</sup> But in a suit to enjoin the erection of flat buildings contrary to the restrictions imposed upon a grantee of land, a finding by the chancellor that the structures to be erected were flats or apartments was held justified by the evidence, although the plans were designed to conceal the true character of the structure to be erected.<sup>46</sup>

§ 2602. **Dismissal.**—The dismissal of the petition terminates the case, and operates as a dissolution of the injunction granted.<sup>47</sup>

<sup>41</sup> *Michels v. McCarty*, 196 Ill. App. 493. The denial of an injunction upheld where the petition did not allege an irreparable injury nor that the remedy by way of damages was inadequate: *Crutcher v. Johnstone* (Okla.), 162 Pac. 201. An allegation that plaintiff's term of office as "city fire marshal" and "chief of police" has not expired is a mere conclusion of law: *Michels v. McCarty*, 196 Ill. App. 493. A complaint by a shipbroker that defendant broker, with knowledge of defendant steamship company, offered to divide the commission for procuring a purchaser for a vessel of defendant steamship company, and that, after he had effected the sale, another defendant claimed a one-half interest in the commission, thus reducing plaintiff's share from

one-half to one-quarter, and asking for an injunction to restrain payment of the commission, states a cause of action: *Spielberg v. Canada S. S. Lines, Limited*, 98 Misc. 304, 162 N. Y. S. 610.

<sup>42</sup> *American Nat. Bank of Ft. Worth v. Strong* (Tex. Civ. App.), 188 S. W. 1014; *Graves v. M. Griffin O'Neil & Sons* (Tex. Civ. App.), 189 S. W. 778.

<sup>43</sup> *Doran v. Graham*, 195 Ill. App. 65.

<sup>44</sup> *Brown v. Mitchell-Lewis Motor Co.*, 174 App. Div. 420, 161 N. Y. S. 162.

<sup>45</sup> *Plamondon v. Lindsey*, 100 Nebr. 318, 160 N. W. 85.

<sup>46</sup> *Doran v. Graham*, 195 Ill. App. 65.

<sup>47</sup> *Potter v. Yonts*, 172 Ky. 130, 188

§ 2604. **Object and nature of preliminary injunction.**—The granting of a preliminary injunction is addressed to the sound discretion of the court,<sup>48</sup> and unless it is made to appear on appeal that such discretion was abused the trial court's order denying the injunction will be upheld.<sup>49</sup> An injunction pendente lite is a mere ancillary writ the purpose of which is to preserve the status in quo pending final hearing.<sup>50</sup> Mandatory injunctions are granted pendente lite only in certain rare cases where affirmative action by the defendant is essential to preserve the status quo until trial and judgment.<sup>51</sup>

§ 2605. **When preliminary injunction denied.**—The refusal of an interlocutory injunction is not an abuse of discretion where the evidence is conflicting.<sup>52</sup> A temporary injunction should not be granted merely because apprehension exists that injury will be done.<sup>53</sup> The balance of convenience or hardship may be a factor of controlling importance in cases where a substantial doubt exists at the time of granting or refusing a preliminary injunction.<sup>54</sup>

§ 2607. **Bond in proceeding for preliminary injunction.**—In some states an injunction is void unless an undertaking is given in compliance with the statute.<sup>55</sup> But it has been held that

S. W. 1059. No error was committed by the court in dismissing a bill after a hearing upon dissolving a preliminary injunction, where the parties treated the cause as if submitted on bill, answer, and proof: *Lea v. Louisville & N. R. Co.*, 135 Tenn. 560, 188 S. W. 215.

<sup>48</sup> *Temple v. Gordon*, 31 Cal. App. 127, 159 Pac. 983.

<sup>49</sup> *Postal Telegraph-Cable Co. v. Nolan*, 53 Mont. 129, 162 Pac. 169.

<sup>50</sup> *Hillmer Co. v. Behr*, 196 Ill. App. 363; *Postal Telegraph-Cable Co. v. Nolan*, 53 Mont. 129, 162 Pac. 169. In Delaware an ex parte injunctive order is termed a "restraining order," to distinguish it from a preliminary injunction, which is issued only on a hearing: *Whitmer v. William Whitmer & Sons* (Del. Ch.), 98 Atl. 940.

<sup>51</sup> *Moller v. Lincoln Safe Deposit Co.*, 174 App. Div. 458, 161 N. Y. S. 171.

<sup>52</sup> *Brown v. Berrien County Bank*, 146 Ga. 361, 91 S. E. 121; *Dorminey*

*v. Mathis*, 146 Ga. 16, 90 S. E. 379. In a suit to reform or cancel a contract for support of a wife, the granting of preliminary injunction against suit for breach of contract is error where no urgent necessity for injunction or probability of irreparable injury is shown: *Schlemm v. Whittle*, 86 N. J. Eq. 415, 99 Atl. 206.

<sup>53</sup> *Bunelt v. Sapulpa Refining Co.*, (Okla.), 159 Pac. 360.

<sup>54</sup> *Chew v. First Presbyterian Church*, 237 Fed. 219; *Wehrman v. Moore*, 177 Iowa 542, 159 N. W. 218.

<sup>55</sup> *MacVatters v. Stockslager*, 29 Idaho 803, 162 Pac. 671. A bond given for a temporary restraining order, running to "defendants" instead of parties injured, the term "defendants" held to include all parties against whom injunctive relief is asked and obtained to their direct and immediate or necessary and natural injury: *Boyd v. Lambert* (Okla.), 160 Pac. 586.

where a court which has taken jurisdiction of the entire affairs of an insolvent banking corporation restrains a creditor from receiving an undue advantage over remaining creditors, no bond is necessary.<sup>56</sup>

§ 2608. **Restraining order pending hearing.**—On application for interlocutory injunction, the court can not make final finding of fact, but passes on the evidence only in so far as it shows the right to a temporary injunction.<sup>57</sup>

§ 2610. **Dissolving restraining order.**—A motion to vacate a temporary order for want of equity has the same effect as a demurrer to the bill, in so far as the injunction is concerned.<sup>58</sup> And an order which denies, after hearing, a motion to dissolve an injunction granted ex parte and continuing the injunction, is res judicata on the question of the sufficiency of the complaint.<sup>59</sup> An injunction pendente lite will not be dissolved before trial of an action to enforce building restrictions, where a reasonable doubt exists as to defendant's right to such dissolution, and where plaintiff's papers make out a prima facie case, and sufficient security is provided against loss pending trial.<sup>60</sup>

<sup>56</sup> *People v. La Salle St. Trust & C. Bank*, 195 Ill. App. 336..

<sup>57</sup> *Andrews v. Stulb & Vorhaner*, 145 Ga. 826, 90 S. E. 59; *Waycross v. Waycross Savings & Trust Co.*, 146 Ga. 68, 90 S. E. 382. A temporary injunction may be granted in suit involving conflicting claims to waters of a creek for placer mining: *Buena Vista Gold Mines Co. v. Boise Basin Improvement Co.*, 29 Idaho 789, 162 Pac. 330. Plaintiff who supplied towels and soap to factories and employs therein, was not entitled to an injunction pendente lite against former employes, engaged in same business, on the ground that the competition was unfair, because it involved the use of knowledge of plaintiff's customers, or because in violation of Penal Law, § 553, subd. 6: *New York Towel Supply Co. v. Lally*, 162 N. Y. S. 247.

<sup>58</sup> *Lawrenceville v. Central Illinois Public Service Co.*, 197 Ill. App. 59.

<sup>59</sup> *Cullen v. Walsh*, 97 Misc. 177, 161 N. Y. S. 123. Where restraining order is issued ex parte before the filing of an answer, upon filing of his

answer, or at any time, defendant has the right to move to have the restraining order dissolved: *Whitmer v. William Whitmer & Sons (Del. Ch.)*, 98 Atl. 940.

<sup>60</sup> *Lewis v. Gordon*, 160 N. Y. S. 842. See also: *Lehmann v. Shimeall*, 195 Ill. App. 511. An injunction, granted on a bill to restrain prosecution of an action at law until discovery can be had, should not be dissolved until defendant has had a reasonable time to answer the interrogatories, and plaintiff a reasonable time to compel answers: *Eskridge v. Thomas (W. Va.)*, 91 S. E. 7. It is proper to dissolve a temporary injunction restraining defendant from prosecuting an action at law where it appears that such action was based on sufficient grounds: *Nathan v. Brown*, 197 Ill. App. 533. No error can be committed in dissolving a temporary injunction issued at the beginning of a suit, for plaintiff, in the absence of reversible error in the final judgment which was against plaintiff: *Thorne v. Dashiell (Tex. Civ. App.)*, 189 S. W. 986.

§ 2613. **Damage on modification or dissolution of restraining order.**—Traveling expenses to another state and a portion of the attorney's fee for services in that state, both arising out of the injunction, have been held allowable as injunction bond damages.<sup>61</sup> In Illinois it is error for a court to hear evidence and assess damages on the vacation of an injunction without the filing of a suggestion of damages.<sup>62</sup>

§ 2615. **Writ, order or decree.**—The decree should not go further than required by the issues and the evidence. Thus, in an injunction against a driver, who sold a laundry route to plaintiff and solicited work for him, on leaving plaintiff, "from soliciting laundry work from" plaintiff's customers, it was improper to insert the words "but not from receiving" before the words "laundry work," etc., since defendant's right to receive work unsolicited was not in issue.<sup>63</sup> And a decree which enjoins the collection of a purchase-money note given under a contract to pay the note in full if a pending suit against grantor terminated favorably to him, but one-half to be paid in any event, was erroneous. The injunction should provide for the payment of the one-half and enjoin enforcement of claim for the balance until further order of the court.<sup>64</sup>

§ 2617. **Disobeying order, consequences.**—In proceedings for contempt in violating a restraining order, the court will not investigate the merits of the case in which the injunction was issued.<sup>65</sup> But disobedience of a void injunction can not be punished

<sup>61</sup> Weed v. Hunt, 90 Vt. 418, 98 Atl. 922. A reasonable attorney's fee for services rendered on motion to dissolve has been held a proper item of damage: Hillmer Co. v. Behr, 196 Ill. App. 363.

<sup>62</sup> Majewski v. Pozdol, 195 Ill. App. 400. It is proper to allow an item found correct as injunction bond damages, although not claimed by the defendant in his specifications: Weed v. Hunt, 90 Vt. 418, 98 Atl. 922. Where there is no proof or finding of the nonexistence of the emergency alleged as ground for a temporary restraining order, defendant in an injunction proceeding could not recover on the emergency bond by merely showing dismissal of injunction suit by plaintiff therein: William

E. Sweet & Co. v. Ford (Colo.), 161 Pac. 144.

<sup>63</sup> New Method Laundry Co. v. MacCann (Cal.), 161 Pac. 990.

<sup>64</sup> Weekly v. Taylor, 119 Va. 856, 89 S. E. 858. The injunction may issue against only part of the defendants: Richardson v. Lumpkin, 146 Ga. 15, 90 S. E. 379.

<sup>65</sup> Smith v. Smith, 146 Ga. 83, 90 S. E. 711. An injunction order signed by a justice of the Supreme Court was in effect an order of the court, although in form only a judge's order, wilful disobedience of which was punishable as criminal contempt. Also an injunction order, when so drawn, covers not only parties, but attorneys, agents or employees: People ex rel. Empire Leasing Co. v.

as contempt of court.<sup>66</sup> Also, where an injunction has been granted restraining the doing of certain things, it has been held that the party restrained is in no danger of punishment for contempt, if subsequently he does the acts restrained with the consent of the party obtaining the injunction, although the injunction may be thereby technically violated.<sup>67</sup>

Mecca Realty Co., 174 App. Div. 384,  
161 N. Y. S. 241.

<sup>66</sup> MacWalters v. Stockslager, 29  
Idaho 803, 162 Pac. 671.

<sup>67</sup> Sholl Bros. v. Peoria &c. R. Co.,  
196 Ill. App. 306.

## CHAPTER LV

### LAPSE OF TIME—STATUTES OF LIMITATIONS

§ 2642. **Element of Delay.**<sup>1</sup>—While a person desiring to rescind a contract must act promptly,<sup>1a</sup> lapse of time does not alone determine whether a rescission has been made with reasonable promptness. The circumstances of each case control.<sup>2</sup>

§ 2644. **Delay through ignorance of facts.**—One who has dealt in good faith has the right to assume that the other party has also dealt in good faith and is not required to act until he is put on notice or discovers the fraud in case fraud has been practiced upon him.<sup>3</sup> After being put on notice he is entitled to a reasonable time in which to investigate the facts<sup>4</sup> and rescind.<sup>5</sup> After the fraud is discovered the contract must be promptly and unequivocally rescinded.<sup>6</sup>

§ 2645. **Delay caused by poverty, nonresidence, etc.**—One who has a right to rescind a contract by reason of the breach by

<sup>1</sup> [Main section cited in *Poole v. Camden* (W. Va.), 92 S. E. 454, 455.]

<sup>1a</sup> *Whitney v. Bissell*, 75 Ore. 28, 146 Pac. 141, L. R. A. 1915D, 257.

<sup>2</sup> *Gunderson v. Brey*, 210 Fed. 401; *Garstang v. Skinner*, 165 Cal. 721, 134 Pac. 329; *Rohr v. Shaffer* (Iowa), 160 N. W. 279. Unless the delay in rescinding a contract is so great that reasonable minds would not differ, the question of what is reasonable time is for the jury in case the suit is one tried by jury: *Dawson v. Flinton*, 195 Mo. App. 75, 190 S. W. 972. See also: *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61, L. R. A. 1915A, 109n; *Smith v. Rhode Island Co.* (R. I.), 98 Atl. 1. When the facts are undisputed the question is for the court: *Robinson v. Listonburg Coal Mining Co.*, 58 Pa. Super. Ct. 136. It is too late to ask for a rescission of a contract when two suits have been maintained <sup>4</sup>hereon by the party seeking to rescind and recovery was had in one: *Forsythe v. Norfolk & W. R. Co.*, 88 Ohio 514, 103 N. E. 758.

<sup>3</sup> *Rohr v. Shaffer* (Iowa), 160 N. W. 279.

<sup>4</sup> Notice of facts which would put a man of ordinary prudence and intelligence on inquiry is equivalent to knowledge of all facts that a reasonably diligent inquiry would disclose: *Garstang v. Skinner*, 165 Cal. 721, 134 Pac. 329; *Dawson v. Flinton*, 195 Mo. App. 75, 190 S. W. 972. He must also return whatever he has received under the contract: *Gayle v. Pennington*, 185 Ala. 53, 64 So. 572.

<sup>5</sup> *Watson Fireproof Window Co. v. Henry Weis Cornice Co.*, 181 Mo. App. 318, 168 S. W. 905.

<sup>6</sup> *Ripley v. Jackson Zinc & Lead Co.*, 221 Fed. 209, 136 C. C. A. 619; *Reiniger v. Piercy* (W. Va.), 86 S. E. 926. A delay of two years after discovery of the fraud has been held to amount to laches: *Davidson v. Gould* (Mo. App.), 187 S. W. 591. By undue delay the right to rescind is lost and suit can only be maintained for damages for the deceit: *Central Life Ins. Co. v. Taylor*, 164 Ky. 844, 176 S. W. 373.

the other party must exercise such right within a reasonable time.<sup>7</sup>

**§ 2650. Element of prejudice.**—The fact that no prejudice results from the delay, while not controlling, is a matter to be considered in determining whether the rescission was made in a reasonable time.<sup>8</sup> If the delay has been long enough to result in prejudice to the other party the right to rescind will be lost.<sup>9</sup>

**§ 2656. Construction of statutes.**—Statutes of limitations are necessarily of statutory origin and differ accordingly in the various jurisdictions. In order to determine the particular statute applicable reference must be had to the particular jurisdiction and, to the nature of the action in which it is to be invoked.<sup>10</sup> Such statutes are construed, like any other statutes, in accordance with the apparent intent of the legislature ascertained from the

<sup>7</sup> *In re Warner's Estate*, 168 Cal. 771, 145 Pac. 504 (accepting payments under contract after breach).

<sup>8</sup> *Stotts v. Fairfield*, 163 Iowa 726, 145 N. W. 61, L. R. A. 1915A, 109n.

<sup>9</sup> *Brown v. Young*, 62 Ind. App. 696, 110 N. E. 562.

<sup>10</sup> *Moloney v. Cressler*, 236 Fed. 636, 149 C. C. A. 632 (written contracts); *McDonough v. Commercial State Bank* (Ala. App.), 73 So. 754 (common counts); *John A. Roebling's Sons Co. v. Southern Power Co.*, 145 Ga. 761, 89 S. E. 1075 (holding the statute applicable to written contracts applies in an action on an implied warranty); *Slay v. George*, 145 Ga. 771, 89 S. E. 830; *Curtis v. College Park Lumber Co.*, 145 Ga. 601, 89 S. E. 680 (account); *McPhaul v. Curry*, 146 Ga. 305, 91 S. E. 89 (contribution between partners); *Seaboard Air Line R. v. Luke*, 19 Ga. App. 100, 90 S. E. 1041; *New Albany Nat. Bank v. Brown* (Ind. App.), 114 N. E. 486; *Gates v. Colfax Northern R. Co.*, 177 Iowa 690, 159 N. W. 456; *Jett v. Jett*, 171 Ky. 548, 188 S. W. 669; *Central State Hospital v. Foley*, 171 Ky. 616, 188 S. W. 752, L. R. A. 1917B, 107n (liabilities created by statute); *Sim v. Citizens' Bank of Carrsville*, 173 Ky. 799, 191 S. W. 489 (note); *Kincade v. Peck*, 193 Mich. 207, 159 N. W. 480 (oral con-

tract); *Mineral Land Inv. Co. v. Bishop Iron Co.*, 134 Minn. 412, 159 N. W. 966, L. R. A. 1917D, 900n (recovery of real property); *Liebing v. Mutual Life Ins. Co.*, 269 Mo. 509, 191 S. W. 250 (life insurance); *Otier v. Neiman*, 96 Misc. 481, 160 N. Y. S. 610 (fraud and duress); *Burhans v. New York*, 163 N. Y. S. 140 (claim for loss of employment); *Hunter v. West*, 172 N. Car. 160, 90 S. E. 130 (partition); *Shelton v. State* (Okla.), 162 Pac. 224 (recovery of money); *Carnegie Realty Co. v. Carolina, C. & O. R. Co.*, 136 Tenn. 300, 189 S. W. 371 (breach of covenant); *Olsen v. Greele* (Tex. Civ. App.), 190 S. W. 240 (forged deed); *McCavick v. McBride* (Tex. Civ. App.), 189 S. W. 795 (accommodation surety); *Barbian v. Grant* (Tex. Civ. App.), 190 S. W. 789; *Quanah, A. & P. R. Co. v. Collett* (Tex. Civ. App.), 190 S. W. 1128 (appropriation of land); *State ex rel. Whitten v. Spokane*, 92 Wash. 667, 159 Pac. 805; *Golden Eagle Mining Co. v. Imperator-Quilp Co.*, 93 Wash. 692, 161 Pac. 848, L. R. A. 1917C, 113n; *Lone Pine-Surprise Consol. Mining Co. v. Insurgent Gold Mining Co.*, 93 Wash. 700, 161 Pac. 850 (trespass); *Fish v. Collins*, 164 Wis. 457, 160 N. W. 163 (special proceeding).

usual meaning of the terms used.<sup>11</sup> They are not, however, to be extended by construction but are to be reasonably and fairly construed.<sup>12</sup> Thus a suit against a physician for alleged unskillful treatment is not ejusdem generis with actions on "contracts express or implied."<sup>13</sup>

§ 2657. **Evasion of limitations by form of action.**—It is the nature of the action and not its form that determines what statute is to be applied.<sup>14</sup> In other words, there are many instances in which there is a right to an election of remedies, or more than one remedy, so that one may be resorted to even though the other is barred.<sup>15</sup> So where an action is brought against a physician for alleged unskillful treatment and the complaint proceeds in contract, then that statute and not the statute applicable to tort actions will be applied;<sup>16</sup> but it is held that an action for tort can not be changed to an action in assumpsit by amendment so as to render a different statute applicable,<sup>17</sup> and where the pleading does not clearly show that the suit is in tort it will be construed as an action on contract rather than in tort.<sup>18</sup>

§ 2658. **When limitations commence to run.**—It is the general rule that limitations do not begin to run until the cause of action accrues,<sup>19</sup> and, where no right of action could accrue until the death of a party, limitations run from the death.<sup>20</sup> So, where one performs services for a decedent during his lifetime upon an express agreement to pay therefor by will, limitations run from the death of the decedent.<sup>21</sup> In case of fraud, the running of the statute dates from its discovery, or from the time it should have

<sup>11</sup> Wren v. Dixon (Nev.), 161 Pac. 722.

<sup>12</sup> Fish v. Collins, 164 Wis. 457, 160 N. W. 163.

<sup>13</sup> Keirsey v. McNeemer, 197 Ill. App. 173. See also: Keirsey v. McNeemer, 197 Ill. App. 173.

<sup>14</sup> Keirsey v. McNeemer, 197 Ill. App. 173. See also: Penobscot Fish Co. v. Western Union Telegraph Co., 91 Conn. 35, 98 Atl. 341.

<sup>15</sup> Frankfort Land Co. v. Hughett, 137 Tenn. 32, 191 S. W. 530.

<sup>16</sup> Keirsey v. McNeemer, 197 Ill. App. 173.

<sup>17</sup> Handtofski v. Chicago Consol. Trac. Co., 274 Ill. 282, 113 N. E. 620.

<sup>18</sup> Matthys v. Donelson (Iowa), 160 N. W. 944.

<sup>19</sup> State v. Logan, 195 Mo. App. 171, 190 S. W. 75; Johnson v. Peterson, 100 Nebr. 255, 159 N. W. 414; Denning v. Powers, 96 Misc. 252, 160 N. Y. S. 636.

<sup>20</sup> Nichols v. Caldwell, 275 Ill. 520, 114 N. E. 278; Gibson v. Iowa Legion of Honor (Iowa), 159 N. W. 639. In an action by contingent beneficiaries for the breach of an agreement to have a claim made a lien against an estate the running of the statute of limitations dates from the death of the life tenant: Brown v. Ford (Va.), 91 S. E. 145.

<sup>21</sup> Henderson v. Davis (Tex. Civ. App.), 191 S. W. 358.



been discovered in the exercise of ordinary care.<sup>22</sup> In case a party complains that the fraud was concealed there must be a showing of diligence in order to toll the running of the statute.<sup>23</sup> One can not take advantage of his own wrong to put the statute in motion.<sup>24</sup> If a contract of employment is conditional, limitations do not commence to run until the condition is fulfilled.<sup>25</sup> Likewise, as a general rule, in contracts for the payment of money limitations do not begin to run until the time fixed for payment.<sup>26</sup> But limitations against the collection of warrants issued by the officers of a municipality do not begin to run until such municipality has provided funds for their payment.<sup>27</sup> In an action on implied contract for the recovery of usurious interest limitations begin from the time it was paid, but the mere assignment of an usurious contract does not set the statute in motion.<sup>28</sup> Ordinarily in an action to establish a constructive trust limitations begin to run upon the discovery of the facts upon which such trust is founded.<sup>29</sup>

**§ 2659. When cause of action accrues—In general.**—A right of action accrues whenever the right to maintain a suit for a breach of duty or wrong is given and arises.<sup>30</sup> In a suit on an official bond the action does not accrue until the damage occurs and where a recorder entered a satisfaction of a trust deed without a surrender of the note secured, limitations are put in operation

<sup>22</sup> *United States v. Albright*, 234 Fed. 202; *Bayley v. Coy*, 195 Ill. App. 433; *Pickens v. Campbell*, 98 Kans. 518, 159 Pac. 21; *Callegari v. Sartori*, 174 App. Div. 102, 160 N. Y. S. 931; *Garland v. Arrowood*, 172 N. Car. 591, 90 S. E. 766; *Hoy v. Burk*, 92 Wash. 536, 159 Pac. 701.

<sup>23</sup> *Bayley v. Coy*, 195 Ill. App. 433.

<sup>24</sup> It has been held where the right to rescind a contract of conditional sale was with the seller the buyers who had failed to perform on their part could not take advantage of their own wrong to start the running of the statute of limitations: *Standard Dry Kiln Co. v. Ellington*, 172 N. Car. 481, 90 S. E. 564.

<sup>25</sup> Where an attorney was to wait for compensation until the proceeds of the litigation were received the limitation begins with the end of the litigation: *Ryan v. Bullion*, 100 Nebr. 705, 161 N. W. 167.

<sup>26</sup> *Leonard v. Kendall* (Tex. Civ. App.), 190 S. W. 786.

<sup>27</sup> *Sulphur v. State* (Okla.), 162 Pac. 744.

<sup>28</sup> *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A, 762.

<sup>29</sup> *Briggs v. McBride* (Tex. Civ. App.), 190 S. W. 1123.

<sup>30</sup> *Bayley v. Coy*, 195 Ill. App. 433; *People v. May*, 276 Ill. 332, 114 N. E. 685; *Lamkin v. Lamkin*, 177 Iowa 583, 159 N. W. 436; *Drainage Dist. No. 1 v. Bates County*, 269 Mo. 78, 189 S. W. 1176; *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. S. 681; *Indian Land & Trust Co. v. Owen* (Okla.), 162 Pac. 818. A cause of action reclaiming usurious interest arises when the interest has been paid: *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A, 762; *Baker v. Lynchburg Nat. Bank* (Va.), 91 S. E. 157.

upon plaintiff's acquisition of interest,<sup>31</sup> and where one deposits securities with another to be returned if no money is advanced upon them and the enterprise is abandoned without any advancement a cause of action accrues from the abandonment.<sup>32</sup> Likewise, where the payment of purchase-money is conditioned on the resale of land an action therefor does not accrue until the resale.<sup>33</sup>

**§ 2660. Demand, contingency and condition precedent.**—Where a demand is necessary before a cause of action can arise it is clear that the action does not accrue until such demand is made or waived.<sup>34</sup>

**§ 2661. Continuing and severable contracts.**—So long as the obligation of a contract continues the statute of limitations is not a bar; but this is not true of the damages occasioned by the failure to perform the contract,<sup>35</sup> and where a contract requires the payment of a certain amount at fixed periods limitations run from the time each payment becomes payable.<sup>36</sup> But where payment for services is not to be made until the services are ended and the employé is discharged limitations begin from the time of the discharge.<sup>37</sup> Likewise a contract requiring the payment of money in instalments at fixed periods, limitations will run on the various instalments from the time each becomes severally due.<sup>38</sup> In case of an account one may not so join his actions as to constitute an open account to which the statute is not applicable,<sup>39</sup> or by tacking transactions avoid the statute.<sup>40</sup> The statute of limitations has no application to mutual accounts.<sup>41</sup> It is held that a mutual account within the meaning of the statute of limitations must include reciprocal demands, and a claim for goods furnished without credits is not a mutual account.<sup>42</sup>

<sup>31</sup> Bayley v. Coy, 195 Ill. App. 433.

<sup>32</sup> Smith v. Staten Island Land Co., 175 App. Div. 588, 162 N. Y. S. 681.

<sup>33</sup> Hay v. Casey, 30 Cal. App. 570, 159 Pac. 726, 728.

<sup>34</sup> Mayhew v. Felton's Estate, 90 Vt. 370, 98 Atl. 900.

<sup>35</sup> Where a railroad company covenanted to erect and maintain a passenger station in a certain locality the running of the statute does not date from the initial breach, but the action is a continuing one and the statute is not a bar except as to damages: Carnegie Realty Co. v. Carolina, C. & O. R. Co., 136 Tenn. 300, 189 S. W. 371.

<sup>36</sup> Warren v. Glasgow & Western Exploration Co., Ltd. (Nev.), 160 Pac. 793; Lans v. Bristow (Tex. Civ. App.), 188 S. W. 970.

<sup>37</sup> Martin v. Camp, 219 N. Y. 170, 114 N. E. 46.

<sup>38</sup> National Exch. Bank v. Smith (Ind. App.), 114 N. E. 881.

<sup>39</sup> Shellberg v. Kuhn, 35 N. Dak. 448, 160 N. W. 504.

<sup>40</sup> Hills v. Hoquiam, 94 Wash. 63, 161 Pac. 1049.

<sup>41</sup> Mustin v. Millen Grocery Co., 18 Ga. App. 601, 89 S. E. 1091.

<sup>42</sup> Hills v. Hoquiam, 94 Wash. 63, 161 Pac. 1049. An unauthorized credit placed to an account does not

§ 2667. **Ignorance and fraud.**—It is held that the concealment of fraud will suspend the running of the statute of limitations against a suit founded thereon regardless of whether it is actively concealed or not,<sup>43</sup> but lack of knowledge alone will not defeat the running of the statute.<sup>44</sup> Actual knowledge of a fraud or wrong is not essential to set the statute running,<sup>45</sup> it being sufficient if the plaintiff has such knowledge as would lead a man of ordinary prudence to make investigation.<sup>46</sup> It is held, however, that for concealment to suspend the running of the statute it must be such that the plaintiff was misled or deceived thereby.<sup>47</sup> In an action for money paid under duress limitations begin to run from the time of discovery,<sup>48</sup> but it is also held that the statute does not begin to run until the injured party is emancipated from such influence.<sup>49</sup>

§ 2668. **Running of statute—Effect of death.**—Although the limitations on a judgment may be suspended by virtue of the statute as against the property of a deceased person it is not interrupted unless an entry is made on the record.<sup>50</sup>

§ 2669. **Meaning of “absence”—“Outside of state.”**—Nonresidence of a principal will defeat the running of the statute against a suit by his sureties upon a judgment satisfied by them.<sup>51</sup> It is also held that where the maker of a note executed in Pennsylvania shortly after the maturity of the note moved to Missouri the six-years statute did not bar the action.<sup>52</sup>

§ 2670. **Effect of new promise and part payment.**—It is generally held that an express acknowledgment of a debt as due or an express promise to pay it will have the effect of stopping the

remove the bar of limitations as an open account: *Kennedy v. Drake*, 225 Mass. 303, 114 N. E. 310.

<sup>43</sup> *Exploration Co., Limited, v. United States*, 235 Fed. 110, 148 C. C. A. 604.

<sup>44</sup> *Irvin v. Bentley*, 18 Ga. App. 662, 90 S. E. 359; *Reuff-Griffin Decorating Co. v. Wilkes*, 173 Ky. 566, 191 S. W. 443.

<sup>45</sup> *Van Wechel v. Van Wechel* (Iowa), 159 N. W. 1039.

<sup>46</sup> *Sanderlin v. Cross*, 172 N. Car. 234, 90 S. E. 213; *Grubb v. House*, 93 Wash. 200, 160 Pac. 421.

<sup>47</sup> *Schrock v. Duncan* (Mo. App.), 189 S. W. 610.

<sup>48</sup> *Jett v. Jett*, 171 Ky. 548, 188 S. W. 669.

<sup>49</sup> *Bither v. Packard*, 115 Maine 306, 98 Atl. 929.

<sup>50</sup> *Delle v. Boss*, 164 Wis. 392, 160 N. W. 179.

<sup>51</sup> *Cooper v. Jewett*, 233 Fed. 618, 147 C. C. A. 426.

<sup>52</sup> *Daniels v. Gallagher* (Mo. App.), 189 S. W. 644. See also as to the meaning of “residence” in Pennsylvania statute and as to the question being one of fact. *Hunter v. Bremer*, 256 Pa. 257, 100 Atl. 809, Ann. Cas. 1918A, 152.

running of the statute of limitations,<sup>53</sup> but in order that a new promise have that effect it must be unconditional and unqualified.<sup>54</sup> Although a debt may be barred by the statute of limitations it is not extinguished,<sup>55</sup> and an intentional part payment is an acknowledgment such as will revive the liability.<sup>56</sup> Under such rule the indorsement of credit on a note of a payment made by the obligor with his consent will operate to interrupt the running of the statute of limitations.<sup>57</sup> But, general payments on an account will not have the effect of defeating limitations against certain items already barred.<sup>58</sup>

§ 2671. **Concluding observations—Commencement of action—Limitations against sovereignty.**—Limitations do not run against a judgment in favor of the United States, notwithstanding the statute fixing the duration of the lien of judgments of the federal courts.<sup>59</sup>

§ 2672. **Pleading statute as defense.**—The defense of the statute may be made by plea or, in a proper case, by demurrer.<sup>60</sup> It is generally held that the statute must be specially pleaded to be available,<sup>61</sup> but where a demand set up by the defendant is barred it has been held that the plaintiff is entitled to the

<sup>53</sup> *Philp v. Hicks*, 112 Miss. 581, 73 So. 610.

<sup>54</sup> So a letter written by the obligor that he would pay if possible or that he might be able to do something is not sufficient: *Gill v. Gibson*, 225 Mass. 226, 114 N. E. 198; *MacDiarmid v. Steele*, 176 App. Div. 313, 162 N. Y. S. 263. See also: *Jett v. Jett*, 171 Ky. 548, 188 S. W. 669; *In re Maniatakis (Pa.)*, 101 Atl. 920, L. R. A. 1918A 900, and other recent cases reviewed in note.

<sup>55</sup> *Lane v. Newton*, 145 Ga. 810, 89 S. E. 1083.

<sup>56</sup> *Canal Bank & Trust Co. v. Bank of Ascension*, 140 La. 465, 73 So. 269; *Haslam v. Perry*, 115 Maine 295, 98 Atl. 812; *Kennedy v. Drake*, 225 Mass. 303, 114 N. E. 310; *Rositzke v. Meyer*, 176 App. Div. 193, 162 N. Y. S. 613. See also *In re Maniatakis (Pa.)*, 101 Atl. 920, L. R. A. 1918A, 900.

<sup>57</sup> *Wright v. Wayland (Mo. App.)*, 188 S. W. 928. A holder of several notes may, upon receipt of payment from the maker, credit such payment

on all such notes and thus defeat the statute of limitation: *Wright v. Wayland (Mo. App.)*, 188 S. W. 928.

<sup>58</sup> *Kennedy v. Drake*, 225 Mass. 303, 114 N. E. 310.

<sup>59</sup> *United States v. Minor*, 235 Fed. 101, 148 C. C. A. 595.

<sup>60</sup> *Sudduth v. Central of Georgia R. Co. (Ala.)*, 73 So. 28; *Curtis v. College Park Lumber Co.*, 145 Ga. 601, 89 S. E. 680; *Smith v. Central of Georgia R. Co.*, 146 Ga. 59, 90 S. E. 474; *Smith v. Central of Georgia R. Co.*, 146 Ga. 59, 90 S. E. 474; *Drainage Dist. No. 1 v. Bates County*, 269 Mo. 78, 189 S. W. 1176; *Steinbruegge v. Prudential Ins. Co. (Mo. App.)*, 190 S. W. 1018; *Shawnee Life Ins. Co. v. Taylor (Okla.)*, 160 Pac. 622; *O'Donnell v. Parker*, 48 Utah 578, 160 Pac. 1192.

<sup>61</sup> *Todd v. Chicago City R. Co.*, 197 Ill. App. 544; *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A 762; *Murphy v. Taylor*, 63 Pa. Super. Ct. 85; *In re Brandon's Estate*, 164 Wis. 387, 160 N. W. 177.

benefit of the statute without pleading it.<sup>62</sup> In pleading the statute of limitations the facts should be stated,<sup>63</sup> and where a cause of action would be barred but for an exception to the operation of the statute the pleader must show that he comes within the exception.<sup>64</sup> An amendment of a pleading will not be permitted where the effect would be to revive a cause of action already barred.<sup>65</sup> The statute of limitations must relate to the principal action sued on and can not be invoked against a mere defense.<sup>66</sup> The plea of the statute of limitations ordinarily involves a mixed question of law and fact.<sup>67</sup> The burden of proof is upon the plaintiff to show that his cause of action was brought within time.<sup>68</sup> It is held that an indorsement of the payee on a note showing a partial payment is not sufficient evidence in itself to remove the bar of limitations.<sup>69</sup>

<sup>62</sup> Kincade v. Peck, 193 Mich. 207, 159 N. W. 480.

<sup>63</sup> Citizens' Nat. Bank v. Gaston County Farmers' Union Warehouse Co., 172 N. Car. 602, 90 S. E. 698.

<sup>64</sup> Steinbruegge v. Prudential Ins. Co. (Mo. App.), 190 S. W. 1018. See also: People v. May, 276 Ill. 332, 114 N. E. 685.

<sup>65</sup> Hunt v. Glassell, 30 Cal. App. 676, 159 Pac. 227; Malmstrom v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.), 188 S. W. 453; Silver Valley Horse Co. v. C. V. Evans & Co. (Tex. Civ. App.), 190 S. W. 794. But see: Moloney v. Cressler, 236 Fed. 636, 149 C. C. A. 632.

<sup>66</sup> Caples v. Morgan, 81 Ore. 692, 160 Pac. 1154, L. R. A. 1917B, 760.

<sup>67</sup> Myers v. Muskegon Improvement Co., 193 Mich. 697, 160 N. W. 456; Bonslett v. New York Life Ins. Co. (Mo.), 190 S. W. 870; Fowler v. Murdock, 172 N. Car. 349, 90 S. E. 301; Garland v. Arrowood, 172 N. Car. 591, 90 S. E. 766; Seureau v.

Frazer (Tex. Civ. App.), 189 S. W. 1003.

<sup>68</sup> Forbes v. Plummer (Ala.), 73 So. 451; Tillery v. Whiteville Lumber Co., 172 N. Car. 296, 90 S. E. 196; Garland v. Arrowood, 172 N. Car. 591, 90 S. E. 766; Street v. Shadix (Ala.), 73 So. 73; Roberts v. Pacific Telephone & C. Co., 93 Wash. 274, 160 Pac. 965, L. R. A. 1917B, 354n; Van Wechel v. Van Wechel (Iowa), 159 N. W. 1039; Sanderlin v. Cross, 172 N. Car. 234, 90 S. E. 213.

<sup>69</sup> MacDiarmid v. Steele, 176 App. Div. 313, 162 N. Y. S. 263. For other instances involving the sufficiency of the evidence to sustain partial payment see: Reuff-Griffin Decorating Co. v. Wilkes, 173 Ky. 566, 191 S. W. 443; Haslam v. Perry, 115 Maine 295, 98 Atl. 812; Myers v. Muskegon Improvement Co., 193 Mich. 697, 160 N. W. 456; Wester v. Wester's Estate (Mo. App.), 189 S. W. 608.

## CHAPTER LVI

### REMEDIES FOR INTERFERENCE BY THIRD PERSONS

§ 2685. **Generally.**—That a right of action exists in favor of the party injured for the malicious and wrongful interference by third persons with contract rights is well settled both in England and in this country.<sup>1</sup> Strangers to a contract owe to the parties the duty not to wrongfully interfere with its performance and a violation of this duty is a tort.<sup>2</sup>

§ 2686. **Inducing breach of contract by servant.**—Where one intentionally induces a servant or master to break a valid contract he is liable to the other in damages.<sup>3</sup>

§ 2688. **Inducing breach of contracts of employment generally.**—It is, in general, the right of every person, singly and in combination with others, to contract or refuse to contract with whom he chooses.<sup>4</sup> A wrongful interference with the performance of a contract to the injury of another is an actionable tort.<sup>5</sup>

§ 2689. **Inducing breach of contracts other than employment.**—The principle of liability to respond in damages for causing the breach of a contract is not confined to contracts of employment.<sup>6</sup> But lawful conduct or interference by a stranger

<sup>1</sup> Lewis v. Bloede, 202 Fed. 7.

<sup>2</sup> Faunce v. Searles, 122 Minn. 343, 142 N. W. 816; Twitchell v. Nelson, 126 Minn. 423, 148 N. W. 451.

<sup>3</sup> Sutton v. Workmeister, 164 Ill. App. 105; Chambers v. Probst, 145 Ky. 381, 140 S. W. 572, 36 L. R. A. (N. S.) 1207; McClure v. McClintock, 150 Ky. 265, 150 S. W. 332, 42 L. R. A. (N. S.) 388n; Hanson v. Innis, 211 Mass. 301, 97 N. E. 756; Cornellier v. Haverhill Shoe Mfrs. Assn., 221 Mass. 554, 109 N. E. 643, L. R. A. 1916C, 218n; Faunce v. Searles, 122 Minn. 343, 142 N. W. 816; De Jong v. B. G. Behrman Co., 148 App. Div. 37, 131 N. Y. S. 1083; Warschauser v. Brooklyn Furniture Co., 159 App. Div. 81, 144 N. Y. S. 257.

<sup>4</sup> Empire Theater Co. v. Cloke, 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E, 383.

<sup>5</sup> Faunce v. Searles, 122 Minn. 343, 142 N. W. 816; Twitchell v. Nelson, 126 Minn. 423, 148 N. W. 451, 601.

<sup>6</sup> Rawlings v. Sheppard, 10 Ga. App. 350, 73 S. E. 523 (landlord and tenant); Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 81 Atl. 927, Ann. Cas. 1915A, 702n (sale contract); Peerless Pattern Co. v. Pictorial Review Co., 147 App. Div. 715, 132 N. Y. S. 37 (sale contract); Day v. Hunnicutt (Tex. Civ. App.), 160 S. W. 134 (building contract); Bowen v. Speer (Tex. Civ. App.), 166 S. W. 1183 (sale of land).

is no excuse for not performing a contract otherwise enforceable.<sup>7</sup> And it has been held that where employes merely urge customers and business associates of their employer to stop dealing with him and there is no unlawful purpose they violate no legal right.<sup>8</sup>

§ 2690. **Wrongfully preventing performance of contract.**—A party may be liable for preventing performance of a contract as well as inducing the breach. Thus for interference with a contract for erection of a building prevented by the threats of a third person, damages are recoverable.<sup>9</sup> So also where a party wrongfully interferes with the contract of others and prevents one from carrying out the contract thereby resulting in a loss to the other he is liable for damages.<sup>10</sup>

§ 2691. **Interference with the formation of future contracts.**—Upon the ground of unjustifiable interference with one's business a wrongful and malicious interference with the making of a contract is actionable. In all actions, however, for a wrongful interference with the making of a contract the plaintiff must not only show that there was a malicious interference but he must go further and show that he would but for the interference of the defendant, have entered into the contract.<sup>11</sup> It is held an interference with the purchase of a lot which plaintiff contemplated buying, but for which he had never negotiated with the owner, will not create a cause of action.<sup>12</sup> In an action of malicious interference with the contract rights of others the wrongdoer will not be heard to say that the contract interfered with was invalid and not enforceable.<sup>13</sup>

§ 2692. **Malice as an element of the right of action.**—The case of *Angle v. Chicago, etc., R. Co.*,<sup>14</sup> is the leading American case to announce the doctrine laid down in *Lumley v. Gye*,<sup>15</sup> and while there is apparent conflict in the authorities such doctrine seems to be sustained both by weight of authority and by the bet-

<sup>7</sup> *Roberts & Stanley v. American, etc., Lbr. Co.*, 76 W. Va. 290, 85 S. E. 535. <sup>197</sup> Fed. 221; *Sutton v. Workmeister*, 164 Ill. App. 105.

<sup>8</sup> *Auburn Draying Co. v. Wardell*, 178 App. Div. 270, 165 N. Y. S. 469. <sup>11</sup> *Lewis v. Bloede*, 202 Fed. 7, 120 C. C. A. 335.

<sup>9</sup> *Day v. Hunnicutt* (Tex. Civ. App.), 160 S. W. 134. <sup>12</sup> *Debnam v. Simonson*, 124 Md. 354, 92 Atl. 782.

<sup>10</sup> *Mealey v. Bemidji Lbr. Co.*, 118 Minn. 427, 136 N. W. 1090. See also *Aluminum Castings Co. v. Local No. 84 of International Molders' Union*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. ed. 55. <sup>13</sup> *Lewis v. Bloede*, 202 Fed. 7, 120 C. C. A. 335.

<sup>14</sup> 151 U. S. 1, 14 Sup. Ct. 240, 38 L. ed. 55. <sup>15</sup> 2 El. & Bl. 216.

ter reason.<sup>16</sup> The term "malicious" in the sense here used does not mean a personal ill will, but merely a wrongful purpose to injure, or to gain some advantage at the expense of another,<sup>17</sup> an unreasonable and wrongful act done intentionally, without any just cause or excuse.<sup>18</sup>

**§ 2693. Contract terminable at will of one party.**—The fact that a contract is from day to day,<sup>19</sup> or is terminable at will of either party,<sup>20</sup> will not relieve defendant from liability.

**§ 2694. Unlawfulness of interference as dependent upon means used.**—The means used may determine the unlawfulness of interference. A test of unlawfulness includes all acts contrary to public policy, whether unreasonable or unlawful.<sup>21</sup> In the preservation of the rights of others and of the public welfare the law recognizes, as where concerted action by combinations is concerned, certain bounds beyond which they may not be permitted to go. One of the bounds thus fixed is "that the harm inflicted be reasonably referable to the alleged object of lawful gain or advantage; that the means employed be adopted in good faith for the attainment of that object; and that their employment be not prompted by personal ill will, desire to injure, or express malice of any sort," to which it must be added, the means employed should be of themselves not unlawful.<sup>22</sup> Solicitation not amounting to coercion does not amount to unlawful interference with contract.<sup>23</sup> It is not unlawful for the members of a labor union to take action for the betterment of their conditions as working men so long as the means used are such as the law approves.<sup>24</sup> They are not permitted, however, under the

<sup>16</sup> *Schonwald v. Ragains*, 32 Okla. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854.

<sup>17</sup> *Lewis v. Bloede*, 202 Fed. 7, 120 C. C. A. 335.

<sup>18</sup> *Schonwald v. Ragains*, 32 Okla. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854 (collecting numerous definitions).

<sup>19</sup> *McCarter v. Baltimore Chamber of Commerce*, 126 Md. 131, 94 Atl. 541.

<sup>20</sup> *Lopes v. Connolly*, 210 Mass. 487, 97 N. E. 80, 38 L. R. A. (N. S.) 986n; *Warschauser v. Brooklyn Furniture Co.*, 159 App. Div. 81, 144 N. Y. S. 257.

<sup>21</sup> *Connors v. Connolly*, 86 Conn.

641, 86 Atl. 600, 45 L. R. A. (N. S.) 564n.

<sup>22</sup> *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564n.

<sup>23</sup> *Mitchell v. Hitchman Coal & Coke Co.*, 214 Fed. 685.

<sup>24</sup> *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564n. Resort to violence, coercion or intimidation by labor unions to advance the interests of members who are in employment of third persons are without right: *Hitchman Coal & Coke Co. v. Mitchell*, 202 Fed. 512. Where employes merely urge customers and business associates of



guise of bettering their conditions to intentionally injure the employer or employé as their primary object.<sup>25</sup>

§ 2695. **Interference by combination or conspiracy.**—Employees have the right, if they so desire, to cease work,<sup>26</sup> and they may combine for the purpose of regulating their own conduct with relation to legitimate competition, although others may be indirectly affected thereby.<sup>27</sup> But while they have the right to quit the service of their employer, singly or in association with others, and even to picket or patrol the premises of the employer, and to peaceably induce other workmen to stay away or to persuade remaining employés to join in a strike, they have no right to intimidate those who desire to enter or to remain in the service of the employer,<sup>28</sup> or to interfere with the access of the employer and other employees to his place of business.<sup>29</sup> Members of labor unions may by agreement among themselves refuse to work for an employer with whom they have differences;<sup>30</sup> but to injure others in order to compel them to coerce the plaintiff is an unjustifiable interference with plaintiff's business.<sup>31</sup> It is held that a person to advance his own interests may take such steps as circumstances may require, and so long as he does not act maliciously toward or unnecessarily interfere with the rights of his neighbor he is not chargeable with actionable wrong, regardless of the result of his conduct.<sup>32</sup> A combination to bring about a breach of contract is an unlawful conspiracy at common law.<sup>33</sup> A conspiracy may also exist where employés act in concert to bring about a boycott and an unlawful interference with trade,<sup>34</sup> or there may be a conspiracy between workmen to de-

their employer to cease dealing with him, and there is no unlawful or malicious purpose, they do not violate any legal right: *Auburn Draying Co. v. Wardell*, 178 App. Div. 270, 165 N. Y. S. 469.

<sup>25</sup> *Tunstall v. Stearns Coal Co.*, 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453. See also *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801, L. R. A. 1917F 755n.

<sup>26</sup> *Alaska S. S. Co. v. International Longshoremen's Assn.*, 236 Fed. 964.

<sup>27</sup> *Alaska S. S. Co. v. International Longshoremen's Assn.*, 236 Fed. 964.

<sup>28</sup> *Aluminum Castings Co. v. Local No. 84 of International Molders'*

*Union*, 197 Fed. 221; *Sutton v. Workmeister*, 164 Ill. App. 105.

<sup>29</sup> *Alaska S. S. Co. v. International Longshoremen's Assn.*, 236 Fed. 964.

<sup>30</sup> *George J. Grant Const. Co. v. St. Paul Bldg. Trades Council*, 136 Minn. 167, 161 N. W. 520, 1055.

<sup>31</sup> *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, 105 N. E. 885.

<sup>32</sup> *George J. Grant Const. Co. v. St. Paul Bldg. Trades Council*, 136 Minn. 167, 161 N. W. 520, 1055.

<sup>33</sup> *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, 105 N. E. 885.

<sup>34</sup> *Justin Seubert, Inc., v. Reiff*, 98 Misc. 402, 164 N. Y. S. 522.

prive a fellow workman of work by force, threats or intimidations, although it is not a crime by statute.<sup>35</sup> It is recognized that there is a sound distinction between what an individual may lawfully do and that which a combination of individuals may do,<sup>36</sup> although there are holdings to the contrary.<sup>37</sup>

§ 2697. **Strikes.**—A labor strike to have a foreman discharged because some of the employes under him have a dislike for him is not justifiable in law.<sup>38</sup> The law recognizes the right of organized labor to strike for higher wages, shorter hours and improved shop conditions, although not the right to compel a closed shop, but the legality to a great degree depends upon the purpose and the means used and the question whether any particular strike is unlawful is a question of law.<sup>39</sup> And while the strikers have the right to use peaceable means to induce other workmen to join in the strike and may picket or patrol the premises of the employer, they have no right to coerce such other employes to refuse to enter or remain in the service of the employer, or to prevent access to his place of business.<sup>40</sup>

§ 2698. **Boycotts.**—Generally speaking, a boycott may be lawful or unlawful dependent upon the purpose and extent to which it is carried. So where persons have differences with a dealer and agree not to patronize him, the unlawful element of combination to injure is merged in the stronger element of self-interest; but when they go further and attempt to destroy his

<sup>35</sup> *Bausbach v. Reiff*, 244 Pa. 559, 91 Atl. 224, L. R. A. 1915D, 785, Ann. Cas. 1915C, 421n.

<sup>36</sup> *Bausbach v. Reiff*, 244 Pa. 559, 91 Atl. 224, L. R. A. 1915D, 785, Ann. Cas. 1915C, 421n.

<sup>37</sup> It is held that every person has the right singly and in combination with others to deal or refuse to deal with whom he chooses; to reach his decision in that, as in all other matters, upon or without good reason; to regard unfriendly all those who with or without justification refuse to co-operate or sympathize; that these rights do not depend upon the character, numbers or influence of those who seek to exercise them; nor upon the occasion of their exercise; nor on the consequences which may follow their legitimate use: *Empire*

*Theater Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E, 383.

<sup>38</sup> *De Minico v. Craig*, 207 Mass. 593, 94 N. E. 317, 42 L. R. A. (N. S.) 1048n. See also *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756.

<sup>39</sup> *Cornellier v. Haverhill Shoe Mfg. Assn.*, 221 Mass. 554, 109 N. E. 643, L. R. A. 1916C, 218n. See also *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801, L. R. A. 1917F, 757; *White Mountain Freezer Co. v. Murphy* (N. H.), 101 Atl. 357. But compare *Cohn C. Roth Elec. Co. v. Bricklayers & Masons & Plasterers' Local Union* (Conn.), 101 Atl. 659.

<sup>40</sup> *Aluminum Castings Co. v. Local No. 84*, 197 Fed. 221; *Alaska S. S. Co. v. International Longshoremen's Assn.*, 236 Fed. 964.

trade generally, their self-benefit becomes more remote and comparatively less, while the element of injury to another becomes primary, dominant, and therefore characterizing.<sup>41</sup> So long as there is an apparent promotion of direct self-interest a combination or boycott is not unlawful or wrongful, but where there is no pervading and characterizing promotion of direct self-interest, and an injury to the plaintiff is the primary and immediately controlling element, an action will lie.<sup>42</sup> Where employes act in concert to bring about a boycott and interference with trade they are generally liable in damages.<sup>43</sup> But it is recognized that labor unions are permitted to publish and carry out a peaceful boycott against any person or unfriendly enterprise.<sup>44</sup> A warning that a boycott has been established is not a threat converting the boycott into an unlawful conspiracy.<sup>45</sup> But the prevention of the employment of an expelled member of a trade union as an example for the purpose of discipline is a boycott and the party injured may recover damages.<sup>46</sup>

§ 2699. **Blacklists.**—A combination to blacklist is the counter weapon to a combination to boycott and similar legal objections apply when it is directed against individuals with whom those combining have no trade disputes, or when the concerted action is employed to coerce the individual members by implied threats or otherwise to withhold employment from those whom ordinarily they would employ.<sup>47</sup> It was formerly held by the Supreme Court of Massachusetts<sup>48</sup> that injunction would not lie for making use of a blacklist, upon the ground that the rights alleged to be violated were personal rights, and that there were no precedents in equity for issuing an injunction against the grievance complained of. In a subsequent case the court overruled its former holding,<sup>49</sup> and held that in the light of the more recent de-

<sup>41</sup> *Tunstall v. Stearns Coal Co.*, 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453n.

<sup>42</sup> *Tunstall v. Stearns Coal Co.*, 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453n.

<sup>43</sup> *Justin Seubert v. Reiff*, 98 Misc. 402, 164 N. Y. S. 522.

<sup>44</sup> *Empire Theater Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E, 383.

<sup>45</sup> *Empire Theater Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E, 383.

<sup>46</sup> *Shinksq v. Tracey*, 226 Mass. 21,

114 N. E. 957, L. R. A. 1917C, 1053n. See also *Harvey v. Chapman*, 226 Mass. 191, 115 N. E. 304, L. R. A. 1917E, 389 (injunction).

<sup>47</sup> *Cornellier v. Haverhill Shoe Mfrs. Assn.*, 221 Mass. 554, 109 N. E. 643, L. R. A. 1916C, 218n; *New Eng. Cement Gun Co. v. McGivern*, 218 Mass. 198, 105 N. E. 885.

<sup>48</sup> *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342n, 34 Am. St. 294.

<sup>49</sup> *Cornellier v. Haverhill Shoe Mfrs. Assn.*, 211 Mass. 554, 109 N. E. 643, L. R. A. 1916C, 218n.

cisions, which recognized that the right to labor and to its protection from unlawful interference is a constitutional as well as a common-law right, that there was no reason why it should not be fully protected under the broad powers of equity.<sup>50</sup> A party, however, can not recover damages for blacklist where he is also in the wrong.<sup>51</sup>

**§ 2700. Injunctive relief.**—An unlawful interference with the rights of an employer by the members of a labor union may be enjoined.<sup>52</sup> Likewise it is held that injunction is the proper remedy for the protection of a business threatened by destruction through acts of striking employes,<sup>53</sup> and strikers may be enjoined from maintaining a boycott against their employer and his products.<sup>54</sup>

**§ 2701. Measure of damages.**—A servant is entitled to past and future damages for wrongfully procuring his discharge.<sup>55</sup>

**§ 2703. Justification—Interference for which there is no remedy.**—An interference with contractual relations recognized by law is a violation of a legal right without justification.<sup>56</sup> Where an individual without lawful justification interferes intentionally with an employe's right to the benefit of a contract he is liable in an action for damages.<sup>57</sup> Competition in business does not justify unfair competition or misrepresentation tending to induce another to break his contract.<sup>58</sup> It is no longer questioned that organized labor may strike for higher wages, shorter hours, and improved shop conditions,<sup>59</sup> but it is held that a strike

<sup>50</sup> *Shinsky v. Tracey*, 226 Mass. 21, 114 N. E. 957, L. R. A. 1917C, 1053n.

<sup>51</sup> *Cornellier v. Haverhill Shoe Mfrs. Assn.*, 211 Mass. 554, 109 N. E. 643.

<sup>52</sup> *Aluminum Castings Co. v. Local No. 84*, 197 Fed. 221; *Tunstall v. Stearns Coal Co.*, 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453n; *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801, L. R. A. 1917F, 755.

<sup>53</sup> *Commercial Bindery & Printers' Co. v. Tacoma Typographical Union No. 170*, 85 Wash. 234, 147 Pac. 1143.

<sup>54</sup> *A. Fink & Son v. Butchers' Union No. 422*, 84 N. J. Eq. 638, 95

Atl. 182. See also L. R. A. 1917E, 389, 392n.

<sup>55</sup> *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756.

<sup>56</sup> *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702n.

<sup>57</sup> *Cornellier v. Haverhill Shoe Mfrs. Assn.*, 221 Mass. 554, 109 N. E. 643, L. R. A. 1916C, 218n.

<sup>58</sup> *Sperry & Hutchinson Co. v. Pommer*, 199 Fed. 309. See also *Schonwald v. Ragains*, 32 Okla. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854.

<sup>59</sup> *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036, 37 L. R. A. (N. S.) 179n, Ann. Cas. 1912C, 1299n.

brought for the purpose only of compelling a closed shop is not justifiable on the principles of competition and is unlawful.<sup>60</sup> The burden of establishing justification is upon the defendant.<sup>61</sup>

<sup>60</sup> Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162; Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316, 35 L. R. A. (N. S.) 787n.

<sup>61</sup> Connors v. Connolly, 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564n.

## CHAPTER LVII

### IMPAIRMENT OF OBLIGATION OF CONTRACTS

§ 2715. **Provisions and effect of article 1, section 10, of Constitution of United States—In general.**—Article 1, section 10 of the Constitution of the United States places no limitation upon the power of congress to impair the obligations of contract, but to the principle that legislatures can not abridge such obligations there are no modifications.<sup>1</sup> The word “contract” in the sense used in article 1, section 10, of the federal constitution, means an express and not an implied contract.<sup>2</sup> The protection of the constitutional prohibition against the impairment of the obligation of contracts does not extend to mere political rights or privileges.<sup>3</sup>

§ 2717. **Laws affected by this constitutional provision.**—The clause of the federal constitution forbidding any state to pass any law impairing the obligation of contracts applies to city ordinances enacted under authority of the state.<sup>4</sup> Such clause, however, has no application to acts of congress dealing with interstate matters.<sup>5</sup> Neither is it applicable to legislation which is within the police power.<sup>6</sup> Treaties between Indians and state are contracts.<sup>7</sup>

§ 2719. **Effect of change of judicial decision.**—It has been held that the restrictions upon the power of the legislature apply in a proper case with equal force upon the courts,<sup>8</sup> and that the doctrine of impairment of contract may be invoked where contracts are made pursuant to law as interpreted by judicial de-

<sup>1</sup> Anderson v. Baker, 175 Ill. App. 254.

<sup>2</sup> Detroit United R. Co. v. City of Detroit, 229 U. S. 39, 33 S. Ct. 697, 57 L. ed. 1056.

<sup>3</sup> Moore v. Pittsburgh, 254 Pa. 185, 98 Atl. 1037 (annexation).

<sup>4</sup> Cumberland Tel. &c. Co. v. Memphis, 198 Fed. 955; Puget Sound Trac. Light &c. Power Co. v. Reynolds, 223 Fed. 371.

<sup>5</sup> W. M. Carter Planing Mill Co. v. New Orleans &c. R. Co., 112 Miss. 148, 72 So. 884.

<sup>6</sup> Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574.

<sup>7</sup> George v. Pierce, 85 Misc. 105, 148 N. Y. S. 230.

<sup>8</sup> Gale v. Guffey, 248 Pa. 523, 94 Atl. 238.

cisions.<sup>9</sup> Rules of property established through many decisions can not be changed by the courts without impairing rights acquired under them.<sup>10</sup>

§ 2720. **What is the obligation of a contract.**—The “obligation of a contract” is its binding force considered in accordance with the standards of law in existence when it is made.<sup>11</sup>

§ 2721. **Impairment of obligation of contracts—Illustrative cases.**—A subsequent law, which tends to diminish the duty or impair the rights settled by contract is an impairment of its obligation and when it amounts to a denial or obstruction to the rights accruing by contract although professing to act only on the remedy is obnoxious to the prohibition of the federal constitution.<sup>12</sup> A statute releasing a county treasurer and his bondsmen from liability for money lost does not violate article 1, section 10, of the federal constitution prohibiting the impairment of the obligation of contract.<sup>13</sup> It is held that a grant to a railroad company of the use of a street, when accepted, is a contract and entitled to the protection of the constitutional guaranty.<sup>14</sup> But consequent expense and difficulty is not an impairment of a railroad franchise.<sup>15</sup> And where public funds are diverted from one use to another it is not an impairment of a contract with a citizen.<sup>16</sup> A colonial grant to the trustees of a town and ratified by legislative action is a contract and can not be impaired.<sup>17</sup> On the same principle the legislature can not fix the compensation of trust officers where the contract is left open for judicial determination.<sup>18</sup> A contract between an employé and the relief department of a railway company is also entitled to protection.<sup>19</sup> Treaties have also been held to come under the protection of the contract

<sup>9</sup> *Ruf v. Mueller*, 49 Ind. App. 7, 96 N. E. 612.

<sup>10</sup> *Matthews v. Sylvester*, 34 Ohio Cir. Ct. 1.

<sup>11</sup> *National Union v. Sherry*, 180 Ala. 627, 61 So. 944; *Humphrey v. Board of Comrs.*, 93 Kans. 413, 144 Pac. 197.

<sup>12</sup> *National Union v. Sherry*, 180 Ala. 627, 61 So. 944.

<sup>13</sup> *Miller v. Henry*, 62 Ore. 4, 124 Pac. 197, 41 L. R. A. (N. S.) 97n.

<sup>14</sup> *Grand Trunk Western R. Co. v. South Bend*, 227 U. S. 544, 33 S. Ct. 303, 57 L. ed. —, 44 L. R. A. (N.

S.) 405; *Portland R., Light & Power Co. v. Portland*, 201 Fed. 119.

<sup>15</sup> *Kaw Valley Drainage District v. Kansas City Terminal R. Co.*, 87 Kans. 272, 123 Pac. 991.

<sup>16</sup> *Miller v. Henry*, 62 Ore. 4, 124 Pac. 197, 41 L. R. A. (N. S.) 97n.

<sup>17</sup> *People v. Hand*, 135 N. Y. S. 192.

<sup>18</sup> *Miami Valley Gas & Fuel Co. v. Mills*, 157 App. Div. 542, 142 N. Y. S. 862.

<sup>19</sup> *Baltimore &c. R. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545.

clause.<sup>20</sup> Where a franchise is accepted by a telephone company it can not be repealed or forfeited by ordinance.<sup>21</sup> It is held, however, that a statute giving materialmen and laborers as well as the owner the benefit of a contractor's bond does not impair the obligation of contract.<sup>22</sup>

§ 2722. **Priority between contract and statute.**—Where the grant of a franchise by a municipality to a telephone company fixing the rates to be charged was made prior to the passage of a public utility law and before the state attempted to regulate rates the state is not barred from increasing the rate.<sup>23</sup>

§ 2723. **Laws affecting contracts of the state with individuals.**—A statute abrogating a contract between the state and a contractor for the construction of a capitol building on state grounds is not an impairment of contract.<sup>24</sup> A license to sell intoxicating liquor,<sup>25</sup> to operate a motor vehicle,<sup>26</sup> or to operate a moving picture show,<sup>27</sup> is held not to be a contract. Thus a state may pass a prohibition law although it applies to existing licensed dealers without impairing the obligation of contract.<sup>28</sup> A charter granted by the state to an individual authorizing the construction and maintenance of a dam across a navigable river without reserving the right of repeal and accepted, is held to be a contract, and may not be repealed at the pleasure of the legislature.<sup>29</sup>

§ 2724. **Laws affecting contracts of municipalities with individuals.**—Because of its being a state agency a municipality can not make a contract with a public utility company which may not be amended.<sup>30</sup> But it is held that a city can not by resolution compel a telephone company to remove its poles and wires from the street where they were placed under a franchise granted

<sup>20</sup> *George v. Pierce*, 85 Misc. 105, 148 N. Y. S. 230.

<sup>21</sup> *Louisville v. Cumberland Tel. & Co.*, 224 U. S. 649, 32 S. Ct. 572, 56 L. ed. 934.

<sup>22</sup> *American Indemnity Co. v. Burrows Hdw. Co.* (Tex. Civ. App.), 191 S. W. 574.

<sup>23</sup> *Woodburn v. Public Service Commission*, 82 Ore. 114, 161 Pac. 391, L. R. A. 1917C, 98, Ann. Cas. 1917E, 996.

<sup>24</sup> *Caldwell v. Donaghey*, 108 Ark. 60, 156 S. W. 839, 45 L. R. A. (N. S.) 721n, Ann. Cas. 1915B, 133n.

<sup>25</sup> *People v. Kaelber*, 253 Ill. 552, 97 N. E. 1068.

<sup>26</sup> *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080.

<sup>27</sup> *Dreyfus v. Montgomery*, 4 Ala. App. 270, 58 So. 730.

<sup>28</sup> *Gherna v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94n.

<sup>29</sup> *State v. Bancroft*, 148 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526.

<sup>30</sup> *Kenosha v. Kenosha Home Tel. Co.*, 149 Wis. 338, 135 N. W. 848.



by ordinance.<sup>31</sup> Where an ordinance is relied upon as constituting an impairment of a contract it must be shown to have been enacted pursuant to legislative sanction.<sup>32</sup> It has been held that a street railway company may be compelled by ordinance to construct a new line without impairing any contract rights.<sup>33</sup>

§ 2725. **Subsequent and prior contracts.**—A law prohibiting the publication of liquor advertisements in the state is not invalid as impairing contract rights, although the publishers had contracts for the publication of such advertisements.<sup>34</sup> But statutes creating labor liens must apply to future contracts.<sup>35</sup>

§ 2726. **Statutes validating or invalidating contracts.**—A statute which attempts to validate a void contract made by a married woman is unconstitutional as impairing the obligation of the contract.<sup>36</sup> Validating statutes curing defectively executed and acknowledged deeds and mortgages but protecting the rights of third persons acquired in good faith are not unconstitutional.<sup>37</sup> Likewise an act whereby unenforceable contracts of an unregistered foreign corporation are made enforceable does not impair the obligation of contract.<sup>38</sup>

§ 2727. **Police power.**—Laws and ordinances passed in the exercise of the police power are not subject to the objection that they impair the obligation of contracts.<sup>39</sup> The police power can not be bargained away and all franchises and grants to public utility corporations are made and accepted subordinate to such

<sup>31</sup> *Saginaw Power Co. v. Saginaw*, 193 Fed. 1008.

<sup>32</sup> *San Francisco v. United Railroads of San Francisco*, 190 Fed. 507, 111 C. C. A. 339.

<sup>33</sup> *State v. St. Paul City R. Co.*, 117 Minn. 316, 135 N. W. 976, Ann. Cas. 1913D, 139n.

<sup>34</sup> *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501.

<sup>35</sup> *Oceanic Gold Mining Co. v. Steinfield*, 16 Ariz. 571, 147 Pac. 717.

<sup>36</sup> *Stephens v. Hicks*, 156 N. Car. 239, 72 S. E. 313, 36 L. R. A. (N. S.) 354n, Ann. Cas. 1913A, 272n.

<sup>37</sup> *Eden St. Permanent Bldg. Assn. v. Lusby*, 116 Md. 173, 81 Atl. 284.

<sup>38</sup> *Pittsburgh Const. Co. v. West Side Belt R. Co.*, 232 Pa. 578, 81 Atl. 884.

<sup>39</sup> *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501 (anti-advertising liquor law), *Colorado & S. R. Co. v. Ft. Collins*, 52 Colo. 281, 121 Pac. 747, Ann. Cas. 1913D, 646n; *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816 v. *Georgia Public Service Corp.*, 142 Ga. 84, 83 S. E. 946; *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916C, 282n; *Pittsburg &c. R. Co. v. Chappell*, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; *Commonwealth v. Boston &c. R. Co.*, 212 Mass. 82, 98 N. E. 1075 (corporate charter); *Marymont v. Nevada State Banking Bd.*, 33 Nev. 333, 111 Pac. 295, 32 L. R. A. (N. S.)

power.<sup>40</sup> But the right to regulate and control banking business under the police power does not warrant imposing a personal liability on the stockholders different from that provided by law when the bank was organized and the stock purchased.<sup>41</sup>

§ 2728. **Invalid contracts not protected.**—An invalid or unenforceable contract is not protected by the contract clause of the federal constitution. Thus contracts void as contrary to statute and public policy are not within the protection clause.<sup>42</sup> And where a public utility company abandoned a right to lay electrical conductors under the city streets, a revocation by the city of such permission did not impair a contract obligation. It is held these principles are also applicable to change in remedy.<sup>43</sup>

§ 2730. **Partial impairment of contracts.**—Where the provisions of a contract are dependent and not severable an impairment of a part renders the whole invalid.<sup>44</sup>

§ 2731. **Change or withdrawal of remedy.**—Remedies which are in existence when a contract is made constitute a part of the contract and a change or repeal of a remedy which substantially diminishes the value of the contract or seriously obstructs its enforcement is unconstitutional as impairing the obligation of contracts.<sup>45</sup> The legislature has the power to create new remedies to enforce existing rights,<sup>46</sup> and to suspend the remedies given for a definite and reasonable time; but it can not suspend

477, Ann. Cas. 1914A, 162n; *State v. Seattle* (Wash.), 132 Pac. 45 (workmen's compensation law).

<sup>40</sup> *In re Relief Electric Light, Heat & Power Co.*, 63 Pa. Super. Ct. 1.

<sup>41</sup> *Yoncalla State Bank v. Gemmill*, 134 Minn. 334, 159 N. W. 798, L. R. A. 1917A, 1223.

<sup>42</sup> *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325.

<sup>43</sup> *Reynolds v. Lee*, 180 Ala. 76, 60 So. 101; *New York Electric Lines Co. v. Gaynor*, 218 N. Y. 417, 113 N. E. 519.

<sup>44</sup> *Baltimore & C. R. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545.

<sup>45</sup> *Johnson v. Libby*, 111 Maine 204, 88 Atl. 647; *Lyon & Matthews Co. v. Civ. App.*, 142 S. W. 29. See also *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831n. It is held, however, that the right of an employe to sue in the future for a pos-

sible tort is no part of his contract of service and therefore the workmen's compensation law is not invalid as to employes working under contracts of employment extending beyond the time of the act becoming effective: *Borgins v. Folk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 33 S. Ct. 17, 57 L. ed. —; *Pittsburg Steel Co. v. Baltimore Equitable Soc.*, 226 U. S. 455, 33 S. Ct. 167, 57 L. ed. 297; *Schwertner v. Provident Mut. Bldg. Loan Assn.*, 17 Ariz. 93, 148 Pac. 910; *Muller v. McCann* (Okla.), 151 Pac. 621; *In re Assessment of Local Improvement*, etc., 84 Wash. 565, 147 Pac. 199.

<sup>46</sup> *Public Service Commission v. New York R. Co.*, 77 Misc. 487, 136 N. Y. S. 720.

the application of remedies fixed by the parties in their contract.<sup>47</sup> In other words, parties may adjust or modify the legal remedies for themselves and make them an express substantive part of their contract so that as to that particular contract they can not be changed by the legislature.<sup>48</sup> But the rule as to remedies being left unimpaired can be invoked only in favor of valid contracts.<sup>49</sup>

**§ 2732. Change or withdrawal of remedy—Illustrative cases.**—A shareholder in a trust company can not complain where the legislature changed the remedy by which previously imposed double liability might be enforced.<sup>50</sup> The rights of a contractor in the construction of a sewer under special assessment laws can not be impaired; but subsequent laws which merely change the method of procedure by which property owners might contest the assessment are not an impairment of his contract rights.<sup>51</sup> It is held that a statute requiring all mortgages, notwithstanding any provision contained therein, to be foreclosed by action in a court of competent jurisdiction is remedial and not invalid as to existing contracts.<sup>52</sup> Workmen's compensation acts, and laws requiring the protection of machinery, abolishing assumption of risk and co-servant rule and changing the rule of contributory negligence, although applied to parties bearing contract relations, can not be said to impair the obligation of contracts.<sup>53</sup> The liability of property to be taken in execution can not be said to become a part of a contract of purchase in such sense that the legislature may not subsequently change it.<sup>54</sup>

**§ 2734. Impairment of franchises of public utility companies.**—As a general rule a franchise granted by the state, or by a city under legislative authority, to a public utility com-

<sup>47</sup> *Galey v. Guffey*, 248 Pa. 523, 94 Atl. 238.

<sup>48</sup> *Galey v. Guffey*, 248 Pa. 523, 94 Atl. 238.

<sup>49</sup> *Reynolds v. Lee*, 180 Ala. 76, 60 So. 101. See also *Muller v. McCann* 50 Okla. 621, 151 Pac. 621.

<sup>50</sup> *Johnson v. Libby*, 111 Maine 204, 88 Atl. 647.

<sup>51</sup> *In re Assessment of Local Improvement*, 84 Wash. 565, 147 Pac. 199.

<sup>52</sup> *Schwertner v. Provident Mut. Bldg. Loan Assn.*, 17 Ariz. 93, 148 Pac. 910.

<sup>53</sup> *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489. See also *New York Cent. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, L. R. A. 1917D, 1n, Ann. Cas. 1917D, 629n; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa 245, 154 N. W. 1037, L. R. A. 1917D, 15n; *Troth v. Millville Bottle Works* (N. J.), 98 Atl. 435.

<sup>54</sup> *Lyon & Matthews Co. v. Modern Order of Praetorians* (Tex. Civ. App.), 142 S. W. 29.

pany and accepted by it constitutes a contract<sup>55</sup> which, in the absence of reserved power, can not be impaired by subsequent user so that a revocation of the grant may be made.<sup>56</sup> And it has been held that a franchise granted without any surrender or waiver of either party's rights is not a contract such as can not be changed.<sup>57</sup> It is held, also, that a license tax on a public service company,<sup>58</sup> an order of a commission fixing a telephone rate higher than that fixed by the franchise,<sup>59</sup> an ordinance requiring a street railway company to construct a new line,<sup>60</sup> or an ordinance renewing a water company's franchise and providing that the city shall reimburse the company for expense in changing its mains and pipes on change of grade,<sup>61</sup> does not impair such grant. So the contract clause of the federal constitution is not a protection from the police power of the state, and when a corporation secures a franchise for the purpose of carrying on a corporate business within a city it is accepted subject to the police power.<sup>62</sup>

**§ 2735. Protection of exclusive grants to water companies.**—Where a municipal corporation has granted a water company an irrevocable easement to lay water pipes in a street

<sup>55</sup> *Detroit v. Detroit United R. Co.*, 173 Mich. 314, 139 N. W. 56. Where a natural gas company was granted a franchise to distribute gas in a city so long as it was available, and it was shown that the gas was failing and that a pressure could not be kept up at all times without unwarranted expenditure of money, an ordinance passed by the city requiring a prescribed pressure at all times was an impairment of the contract: *Boise Hot & Cold Water Co. v. Boise City*, 230 U. S. 84, 33 S. Ct. 997, 57 L. ed. 1400; *Saginaw Power Co. v. Saginaw*, 193 Fed. 1008; *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500. A law requiring secretary to governor to be carried free, is unconstitutional when applied to railroads operating under special charters previously granted and containing no such provision: *Pennsylvania R. Co. v. Herrmann*, 89 N. J. L. 582, 99 Atl. 404. An ordinance which provides that no more than five cents shall be charged by the company, is a contract giving the right to charge a five-cent rate,

and such rate can not be reduced without consent of company: *Atlantic Coast Elec. R. Co. v. Board of Public Utility Comrs.*, 89 N. J. L. 407, 99 Atl. 395; *Kings County Lighting Co. v. New York*, 176 App. Div. 175, 162 N. Y. S. 581.

<sup>56</sup> *New York Elec. Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 35 S. Ct. 72, 59 L. ed. —, Ann. Cas. 1915A, 906n.

<sup>57</sup> *South Covington &c. R. Co. v. Covington*, 146 Ky. 592, 143 S. W. 28.

<sup>58</sup> *Los Angeles Gas & Elec. Corp. v. Los Angeles*, 163 Cal. 621, 126 Pac. 594.

<sup>59</sup> *Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S. E. 508.

<sup>60</sup> *State v. St. Paul City R. Co.*, 117 Minn. 316, 135 N. W. 976, Ann. Cas. 1913D, 139n.

<sup>61</sup> *Bismark Water Supply Co. v. Bismark*, 23 N. Dak. 352, 137 N. W. 34.

<sup>62</sup> *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916E, 282n (limiting number of plants).

it can not subsequently pass an ordinance requiring a monthly rental for the use of the street.<sup>63</sup>

§ 2736. **Impairment by making franchise subject to right of eminent domain.**—The exercise of the power of eminent domain by or under the authority of the state is not open to the objection that it impairs the obligation of a contract.<sup>64</sup> Thus the condemnation of the property of a railroad company for the extension of a street across its right of way does not impair any contract right.<sup>65</sup> And a contract itself may be the subject of condemnation. So it has been held that a contract between a water company and a city to furnish water is "property" which may be condemned as an incident to taking the property for public use, and such proceeding does not impair the contract but appropriates it as property.<sup>66</sup>

§ 2737. **Impairment of franchise by rate regulation.**—Where a street railway company in the extension of its system acquired certain suburban lines with all their franchises, a statute requiring reduced rates in such annexed territory without regard to the franchise of such suburban companies is unconstitutional.<sup>67</sup> A city can not grant a franchise that will deprive the legislature of its reserved power over rates. So where a city makes a contract with a street railway company fixing a maximum charge this is not binding on the state and the fixing of new rates by the state does not impair the obligations of the contract.<sup>68</sup> So the city may change the rates for gas and electricity where such right is reserved in the franchise.<sup>69</sup>

§ 2738. **Impairment of franchises by rate regulation—Water rates.**—Where water rates for a fixed term have been

<sup>63</sup> *Boise Hot & Cold Water Co. v. Boise City*, 230 U. S. 84, 33 S. Ct. 997, 57 L. ed. 1400.

<sup>64</sup> *Cincinnati v. Louisville & C. R. Co.*, 223 U. S. 390, 32 S. Ct. 267, 56 L. ed. 481; *Cox v. Revelle*, 125 Md. 579, 94 Atl. 203, L. R. A. 1915E, 443n; *Wood v. Millville*, 89 N. J. L. 646, 98 Atl. 267; *Contributors of Pennsylvania Hospital v. Philadelphia*, 254 Pa. 392, 98 Atl. 1077; *Emery v. Chicago & C. R. Co.*, 35 S. Dak. 583, 153 N. W. 655.

<sup>65</sup> *Emery v. Chicago & C. R. Co.*, 35 S. Dak. 583, 153 N. W. 655.

<sup>66</sup> *Wood v. Millville*, 89 N. J. L. 646, 98 Atl. 267.

<sup>67</sup> *Detroit United R. Co. v. People*, 242 U. S. 238, 37 S. Ct. 87, 61 L. ed. —. But see *Atlantic Coast Elec. R. Co. v. Board of Public Utility Comrs.*, 89 N. J. L. 407, 99 Atl. 395.

<sup>68</sup> *Duluth St. R. Co. v. Railroad Commission of Wisconsin*, 161 Wis. 245, 152 N. W. 887. See also *State v. Superior Court of King County*, 67 Wash. 37, 120 Pac. 861, L. R. A. (N. S.) 1915C, 287n, Ann. Cas. 1913D, 78n.

<sup>69</sup> *Portland R. Light & Power Co. v. Portland*, 200 Fed. 890.

agreed upon by contract the municipality is without power to change them.<sup>70</sup> But the construction of a charter of a water company in the light of the law existing at the time it was given does not impair it.<sup>71</sup> Neither is the regulation of water rates under the police power of the state an impairment of the obligation of contracts, although prior contracts are affected.<sup>72</sup> And an ordinance fixing water rates for a definite period is not impaired by appointment of commissioners under a statute subsequently enacted.<sup>73</sup>

**§ 2739. Impairment of rights of stockholders under reserved power of amendment.**—A statute which fails to maintain a distinction between borrowing and nonborrowing members of a building and loan association in accordance with their contract is invalid as an impairment of their contract.<sup>74</sup> Where a state reserves the right to alter, amend or repeal the laws under which a corporation was organized, such power may be exercised not only to alter the contract as it exists between the state and the corporate entity, but as well to alter the contract existing between the corporation and its stockholders, and the stockholders inter sese.<sup>75</sup> The reserved power to alter or amend the charter of a corporation that will place a liability upon its stockholders beyond the amount of the stock subscribed and unpaid can not be created by implication or doubtful construction of a general power.<sup>76</sup>

<sup>70</sup> *Wichita Water Co. v. Wichita*, 234 Fed. 415 (under statute).

<sup>71</sup> *Consumers' Co. v. Hatch*, 224 U. S. 148, 32 S. Ct. 465, 56 L. ed. 703.

<sup>72</sup> *Yeatman v. Towers*, 126 Md. 513, 95 Atl. 158.

<sup>73</sup> *Pocatello v. Murray*, 21 Idaho 180, 120 Pac. 812.

<sup>74</sup> *Simons v. Kosciusko Bldg. L. & Sav. Assn.*, 180 Ind. 335, 103 N. E. 2.

<sup>75</sup> Where authority was denied the corporation to dispose of all the corporate property when it was organized such power may be conferred by subsequent legislation, and the charter will be treated as having read into it "this corporation shall not without the unanimous consent of its stockholders dispose of all the corporate property until such time as the

Legislature may authorize it: *Somerville v. St. Louis Min. & Mill Co.*, 46 Mont. 268, 127 Pac. 464, L. R. A. 1915B, 811n.

<sup>76</sup> Where the law under which a state bank was organized reserved no right to amend its charter and fixed the liability of its stockholders to the unpaid par value of their stock, a subsequent amendment imposing a double liability as affecting prior stockholders is invalid: *Yoncalla State Bank v. Gemmill*, 134 Minn. 334, 159 N. W. 798, L. R. A. 1917A, 1223. See as to alteration of stockholders' liability as impairment of contractual obligations, note L. R. A. 1915 B, 797. See also *Norris Safe & Lock Co. v. Weaver*, 81 Ore. 670, 160 Pac. 807.

§ 2740. **Impairment by imposition of personal liability on stockholders for corporate debts.**—Where a contractual liability as between a stockholder and creditors of an insolvent corporation has been created and is in full force the legislature can not deprive them of all remedy for the enforcement of their contract.<sup>77</sup> But a stockholder can not complain because the legislature changed the remedy by which double liability, previously imposed, might be enforced.<sup>78</sup>

§ 2742. **Impairment of contracts by laws affecting foreign corporations.**<sup>79</sup>—A foreign corporation by complying with the laws of a state and making investments under the privilege granted has a contract right which is protected from impairment under the federal constitution;<sup>80</sup> but it is held that a license or permission is not a contract.<sup>81</sup> And there is no implied contract between a state and a corporation admitted to do business in the state that the legislature shall never pass any act which in any manner affects the business of such corporation.<sup>82</sup> A statute prescribing the conditions under which foreign corporations may do business in another state and requiring them to appoint an agent to accept process is not contractual but governmental in character and may be amended.<sup>83</sup>

§ 2743. **Impairment by change in statutes of limitation.**—The enactment of a statute limiting the time for bringing an action on pre-existing contracts, so long as the time is not unreasonable does not impair the obligations of contract.<sup>84</sup>

<sup>77</sup> *Irvine v. Elliott*, 203 Fed. 82.

<sup>78</sup> *Johnson v. Libby*, 111 Maine 204, 88 Atl. 647, Ann. Cas. 1916C, 681n.

<sup>79</sup> An act whereby unenforceable contracts of an unregistered foreign corporation are made enforceable is not violative of constitution prohibition: *Pittsburg Const. Co. v. West Side Belt R. Co.*, 232 Pa. 578, 81 Atl. 884.

<sup>80</sup> *Hagerla v. Mississippi River Power Co.*, 202 Fed. 776 (eminent domain). Where a mortgage taken by a foreign corporation which was not licensed to do business in the state, was once validated it can not afterwards be invalidated: *Bennington*

*County Savings Bank v. Lowry*, 160 Wis. 659, 152 N. W. 463.

<sup>81</sup> *State v. American Surety Co.*, 91 Nebr. 22, 135 N. W. 365, Ann. Cas. 1913B, 973n.

<sup>82</sup> *State v. Missouri Pac. R. Co.*, 242 Mo. 339, 147 S. W. 118.

<sup>83</sup> *Brown-Ketcham Iron Wks. v. George B. Swift Co.*, 53 Ind. App. 630, 100 N. E. 584.

<sup>84</sup> *Irvine v. Elliott*, 203 Fed. 82; *Zuega v. Nebraska Mtg. Co.*, 92 Kans. 272, 140 Pac. 855, 52 L. R. A. (N. S.) 877n, Ann. Cas. 1916B, 865n (quieting title); *Heath v. Hazelip*, 159 Ky. 555, 167 S. W. 905 (but not to remove a bar); *Chickasha v. O'Brien (Okla.)*, 159 Pac. 282.

§ 2744. **Statutes affecting sales and conveyances.**—The fee-simple title to land can not be impaired by any act of the legislature subsequent to the making of the deed upon which it rests.<sup>85</sup> But it is held that the vacation of a street opened and dedicated by the commonwealth abutting which the commonwealth had sold lots does not impair such contracts.<sup>86</sup>

§ 2745. **Impairment by change in lien laws.**—A statute fixing the time when the right under a vendor's lien is barred and providing rules for the making and construction of contracts for extension of debt does not violate the obligations of contracts.<sup>87</sup>

§ 2747. **Statutes affecting judgments.**—Where a judgment is upon contract it is within the protection of the contract clause of the federal constitution, otherwise the right would be without an effective remedy.<sup>88</sup> The exclusion from evidence of a foreign judgment in an action on an insurance policy between different parties does not impair the obligations of contracts.<sup>89</sup> Likewise, a statute preventing entry of judgment without notice in suits on a bond or mortgage does not impair such contracts.<sup>90</sup>

§ 2749. **Impairment of marriage contract.**—The constitutional prohibition as to impairment of contract does not apply to marriage contracts and the right of the legislature to enact laws on the subject of divorce is not restrained thereby.<sup>91</sup>

§ 2752. **Impairment by changes in redemption laws.**—A rule of property right such as the statutory right of redemption can not be impaired by subsequent legislation.<sup>92</sup> The amendment of redemption laws so as to affect the substantial rights of the holder of a tax certificate, or to change the time of redemption impairs the obligation of contracts executed prior to such enactments.<sup>93</sup> But dispensing with notice of the expiration of the time of redemption from a tax sale is not an impairment of the obliga-

<sup>85</sup> Puget Mill Co. v. State, 93 Wash. 128, 160 Pac. 310.

<sup>86</sup> Eichenlaub v. Erie, 254 Pa. 70, 98 Atl. 857.

<sup>87</sup> Laredo v. Salinas (Tex. Civ. App.), 191 S. W. 190.

<sup>88</sup> Douglas v. Loftus, 85 Kans. 720, 119 Pac. 74. L. R. A. 1915B, 797n, Ann. Cas. 1913A, 378n.

<sup>89</sup> Ibs v. Hartford Life Ins. Co., 121

Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798n.

<sup>90</sup> Pennsylvania Co. v. Marcus, 89 N. J. L. 633, 99 Atl. 405.

<sup>91</sup> Worthington v. Dist. Court &c., 37 Nev. 212, 142 Pac. 230, L. R. A. 1916A, 696n, Ann. Cas. 1916E, 1097n.

<sup>92</sup> Turk v. Mayberry, 32 Okla. 66, 121 Pac. 665.

<sup>93</sup> Clark-Ray-Johnson Co. v. Williford, 62 Fla. 453, 56 So. 938.



tion of contract between the holder of the certificate and the state.<sup>94</sup> The test for determining whether or not statutes subsequent to the execution are 'obnoxious as impairing the obligation of the mortgage is whether or not the statute as to redemption cuts off any existing right of the mortgagee, or places an additional burden on the mortgagor.'<sup>95</sup>

**§ 2753. Impairment by change of exemption or home-stead laws.**—It is held that exemption laws may not be changed so as to deprive a judgment creditor of a right which he formerly possessed.<sup>96</sup> Laws affecting the liability of property to be taken in execution do not become a part of the contract and may be subsequently repealed, but an exemption law does become a part of the contract and if it would materially impair the contract it can not be repealed.<sup>97</sup>

**§ 2754. Impairment by change of law as to notice.**—A law dispensing with notice of the expiration of the time of redemption from a tax sale is held not to impair the obligation of contract between the holder of the certificate and the state.<sup>98</sup>

**§ 2755. Impairment of contracts by tax laws generally.**—There is no contract right existing between the state and its citizens to prevent the state from changing its tax laws. Thus it is held a law fixing a tax or bonus rate payable by a corporation on increase of capital stock,<sup>99</sup> a statute requiring an acting trustee to pay and deduct income tax from the income collected,<sup>1</sup> a law imposing a tax on the holders of securities of specially chartered railroads,<sup>2</sup> inheritance tax laws,<sup>3</sup> or the apportionment of taxes collected between a city and county,<sup>4</sup> may be changed without impairing the obligation of contract. A charter of a drainage district is not a contract with its members and the law may change

<sup>94</sup> Byers v. Minnesota & Co. Loan Co., 118 Minn. 226, 131 N. W. 880.

<sup>95</sup> Cowley v. Shields, 180 Ala. 48, 60 So. 267.

<sup>96</sup> Crain v. Magee, 132 La. 312, 61 So. 385.

<sup>97</sup> Lyon & Matthews Co. v. Modern Order of Practorians (Tex. Civ. App.), 142 S. W. 29 (exemption decreased).

<sup>98</sup> Byers v. Minnesota & Co. Loan Co., 118 Minn. 266, 136 N. W. 880.

<sup>99</sup> Commonwealth v. Independence Trust Co., 233 Pa. 92, 81 Atl. 928.

<sup>1</sup> State v. Widule, 164 Wis. 56, 159 N. W. 630.

<sup>2</sup> Detroit & Co. R. Co. v. Fuller, 205 Fed. 86.

<sup>3</sup> State v. Probate Court &c., 128 Minn. 371, 150 N. W. 1094, L. R. A. 1916A, 901.

<sup>4</sup> Sanderson v. Texarkana, 103 Ark. 529, 146 S. W. 105.

the method of taxation.<sup>5</sup> Funds acquired by a county in the exercise of its governmental functions are not entitled to be protected against legislative diversion.<sup>6</sup> But a law which deprives a municipal corporation of the means of paying valid debts contracted by it, impairs the obligation of contract as to the holders of its bonds.<sup>7</sup> It is held that the holders of bonds issued by the state and purchased with the understanding that they were non-taxable are protected from impairment.<sup>8</sup>

**§ 2756. Impairment by statute allowing debtor to pay taxes of creditor and deduct same from debts.**—A contract between a bank and its depositors is not impaired by a law placing a tax on interest-bearing deposits which the bank may pay and charge to depositor.<sup>9</sup>

**§ 2757. Impairment by withdrawal of exemption from taxation.**—A general law exempting educational institutions from the payment of taxes is not a contract which can not be repealed.<sup>10</sup>

**§ 2759. Impairment of tax sale contracts.**—Where redemption laws are so amended as to affect the substantial rights of the holder of a tax certificate by change of the time of redemption they are invalid.<sup>11</sup>

**§ 2761. Impairment of public land contracts.**—The amendment of a law relating to jurisdiction of land contest cases is held not to impair the obligation of contract.<sup>12</sup>

**§ 2762. Impairment by amendment of charters of municipal corporations.**—A colonial grant to the trustees of a town and accepted by them is a contract and entitled to the protection of the federal constitution.<sup>13</sup> There may be reservations of

<sup>5</sup> Houck v. Little River Drainage Dist., 248 Mo. 373, 154 S. W. 739.

<sup>6</sup> State v. Cummings, 130 Tenn. 566, 172 S. W. 290, L. R. A. 1915D, 274n.

<sup>7</sup> Swain v. Fritchman, 21 Idaho 783, 125 Pac. 319.

<sup>8</sup> In re assessment First Nat. Bank (Okla.), 160 Pac. 469. See also In re Assessment of First Nat. Bank (Okla.), 160 Pac. 469 (public building bonds).

<sup>9</sup> Clement Nat. Bank v. Vermont,

231 U. S. 120, 34 S. Ct. 31, 58 L. ed. 147.

<sup>10</sup> Seton Hall College v. South Orange, 242 U. S. 100, 37 S. Ct. 54, 61 L. ed. 170.

<sup>11</sup> Clark-Ray-Johnson Co. v. Williford, 62 Fla. 453, 56 So. 938. See also Byers v. Minnesota & Co. Loan Co., 118 Minn. 266, 136 N. W. 880.

<sup>12</sup> Craycroft v. Superior Court &c., 18 Cal. App. 781, 124 Pac. 1042.

<sup>13</sup> People v. Hand, 158 App. Div. 510, 135 N. Y. S. 192, 143 N. Y. S. 1138.

power to alter or amend a municipal charter in which case the constitutional prohibition does not apply.<sup>14</sup> It is held, however, that a reserved power to amend does not justify the imposition of an alien duty not regulative in its character, or subservient to any public interest,<sup>15</sup> or give the power to destroy contract rights.<sup>16</sup> Such contractual obligations, however, will not prevent the valid exercise of the police power.<sup>17</sup>

§ 2763. **Impairment of municipal obligations.**—The issuance of bonds by a municipality to fund outstanding warrants does not contravene the contract obligations with warrant holders.<sup>18</sup> And where a city embracing the territory of a prior dissolved city is prevented by statute from levying a tax to pay a judgment against the latter, such statute impairs a contract with the dissolved city.<sup>19</sup> Remedies given by bonding ordinances for the enforcement of contracts also fall within the constitutional prohibition.<sup>20</sup> A statute which makes a public corporation liable for failure to exact a statutory bond from a building contractor is not invalid as impairing the right of contract.<sup>21</sup>

§ 2765. **Statutes relating to insolvency.**—The Rhode Island insolvency act does not impair contract obligations made after its passage.<sup>22</sup>

§ 2767. **Impairment of contracts by imposition of penalties.**—The enactment or repeal of statutes which impose penalties on the failure to perform contract obligations promptly is not an impairment of the obligation of existing contracts.<sup>23</sup>

<sup>14</sup> Commonwealth v. Boston & C. R. Co., 212 Mass. 82, 98 N. E. 1075.

<sup>15</sup> Delaware & C. R. Co. v. Board of Public Utilities Comrs., 85 N. J. L. 28, 88 Atl. 849.

<sup>16</sup> Owensboro v. Cumberland Tel. & C. Co., 230 U. S. 58, 33 S. Ct. 988, 57 L. ed. 1389. See as to increasing liabilities of stockholders note in L. R. A. 1917A, 1223.

<sup>17</sup> Commonwealth v. Boston & C. R. Co., 212 Mass. 82, 98 N. E. 1075.

<sup>18</sup> Post Printing & Publ. Co. v. Shafroth, 53 Colo. 129, 124 Pac. 176.

<sup>19</sup> Young v. Colorado (Tex. Civ. App.), 174 S. W. 986.

<sup>20</sup> Swain v. Fritchman, 21 Idaho 783, 125 Pac. 319.

<sup>21</sup> Handelan v. Smee School Dist., 38 S. Dak. 29, 159 N. W. 888.

<sup>22</sup> Lace v. Smith, 34 R. I. 1, 82 Atl. 268, Ann. Cas. 1913E, 945n.

<sup>23</sup> Barber v. Hartford Life Ins. Co., 269 Mo. 21, 187 S. W. 867. See also note in L. R. A. 1917B, 926-930. A statute which makes the directors of corporation failing to file annual report individually liable to its creditors and subject to a fine, is penal in its nature and may be repealed without impairing the obligation of contracts: Credit Men's Adjustment Co. v. Vickery (Colo.), 161 Pac. 297. A subsequent enactment authorizing an additional recovery from an insurance company where its refusal to settle is not in good faith is not invalid: Fraternal Mystic Circle v. Snyder, 227 U. S. 497, 33 S. Ct. 292, 57 L. ed. 611.

§ 2771. **Statutes relating to insurance.**—A statute providing a penalty for the wrongful refusal of an insurance company to pay its losses does not impair the obligation of contracts.<sup>24</sup> But a law prohibiting the liability imposed on railroad companies for damages caused by fire passing by assignment or subrogation to any insurance company issuing a policy on the property,<sup>25</sup> or a statute which creates a state insurance fund for the benefit of the injured and dependents of killed employees,<sup>26</sup> impairs the obligation of contracts when applied to existing contracts. Likewise the effect of representations in the procurement of insurance is a contract right not to be impaired by subsequent legislation.<sup>27</sup>

§ 2772. **Change in method of payment of wages.**—The constitutional prohibition against impairment of contract is not violated by a law requiring corporations to pay their employes semi-monthly.<sup>28</sup>

§ 2773. **Statutes affecting defenses and parties.**—A person has no property or vested interest in any rule of the common law and it is settled that the right to limit or abolish common-law defenses does not impair the obligation of contracts.<sup>29</sup>

§ 2774. **Statutes relating to pleadings and changes in law of evidence.**—The power to change rules of evidence applicable to existing contracts is recognized generally.<sup>30</sup>

<sup>24</sup> *Fraternal Mystic Circle v. Snyder*, 227 U. S. 497, 33 S. Ct. 292, 57 L. ed. 611; *Barber v. Hartford Life Ins. Co.*, 269 Mo. 21, 187 S. W. 867.

<sup>25</sup> *British Am. Assur. Co. v. Colorado &c. R. Co.*, 52 Colo. 589, 125 Pac. 508, 1135, 41 L. R. A. (N. S.) 1202n.

<sup>26</sup> *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694.

<sup>27</sup> *National Union v. Sherry*, 180 Ala. 627, 61 So. 944.

<sup>28</sup> *State v. Missouri Pac. R. Co.*, 242 Mo. 339, 147 S. W. 118. And a statute may constitutionally require corporations to give clearance letters

to employes. *Cheek v. Prudential Ins. Co. (Mo.)*, 192 S. W. 387, L. R. A. 1918A, 166.

<sup>29</sup> *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451.

<sup>30</sup> *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451. A statute imposing on carriers the burden of specifically alleging facts to show the validity of a contract limiting liability is not in conflict with article 1, section x of the federal constitution: *Cleveland &c. R. Co. v. Blind*, 182 Ind. 398, 105 N. E. 483. See also *State Board of Education v. Remick*, 160 N. Car. 562, 76 S. E. 627 (tax deed).

## CHAPTER LVIII

### EXTENT AND LIMITS OF POLICE POWER OVER CONTRACTS

§ 2775. **General nature.**—The police power is an attribute of sovereignty inherent in the state.<sup>1</sup> It has no precise bounds,<sup>2</sup> but in its final analysis it is the power to govern,<sup>3</sup> and is justified on the theory that the welfare of the people is the supreme law.<sup>4</sup> In its nature it is a dormant power which in a large measure rests in the discretion of the state as to when the public interests demand its application.<sup>5</sup> Such power in general extends to the protection of health, safety, morals and general welfare of the public,<sup>6</sup> but it is not alone confined to the suppression of what is offensive, disorderly or unsanitary. Rules and regulations promoting the public good and prosperity,<sup>7</sup> the general intellectual and moral well-being,<sup>8</sup> and for regulating, but not prohibiting, employments, occupations and amusements which are not of themselves objectionable,<sup>9</sup> are familiar examples of the exercise of this broad power. Where, however, it is claimed that a statute or ordinance is enacted under the police power the court must be able to see that it tends in some degree toward the prevention of offenses or the promotion of the public health, morals, safety, or welfare.<sup>10</sup> It is held that statutes relating to the shipment of liquor are a valid exercise of the police power as an aid to the enforcement of the laws against illegal sales.<sup>11</sup>

§ 2776. **General nature illustrated.**—Under the police power the legislature, or those to whom the power may have

<sup>1</sup> Ex parte Cencinino, 31 Cal. App. 238, 160 Pac. 167; East Side Levee &c. Dist. v. East St. Louis &c. R. Co., 279 Ill. 123, 116 N. E. 720; People v. Brazee, 183 Mich. 259, 149 N. W. 1053; State v. Brown, 170 N. Car. 714, 86 S. E. 1042.

<sup>2</sup> Welch v. Cogan, 126 Md. 1, 94 Atl. 384.

<sup>3</sup> Gray v. Reclamation Dist. (Cal.), 163 Pac. 1024.

<sup>4</sup> Sterett &c. Packing Co. v. Portland, 79 Ore. 260, 154 Pac. 410.

<sup>5</sup> Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210.

<sup>6</sup> Sanitary Dist. v. Chicago &c. R. Co., 267 Ill. 252, 108 N. E. 312.

<sup>7</sup> State v. Perley, 173 N. Car. 783, 92 S. E. 504.

<sup>8</sup> People v. Goldberger, 163 N. Y. S. 663; State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209n.

<sup>9</sup> Ex parte Wisner, 32 Cal. App. 637, 163 Pac. 868.

<sup>10</sup> Chicago v. Drake Hotel Co., 274 Ill. 408, 113 N. E. 718, L. R. A. 1917A, 1170n.

<sup>11</sup> Smith v. Louisville &c. R. Co., 131 Tenn. 531, 175 S. W. 557, L. R. A. 1916A, 1107.

been delegated, may enact statutes or ordinances regulating the sale of intoxicating liquor,<sup>12</sup> payment of wages,<sup>13</sup> hours of service,<sup>14</sup> construction of buildings,<sup>15</sup> business of common carriers,<sup>16</sup> public utilities,<sup>17</sup> or to prescribe regulations for admission to professions requiring particular skill,<sup>18</sup> or for prohibiting the sale of adulterated foodstuffs,<sup>19</sup> or for adjusting claims for personal injury between employer and employé, commonly termed workmen's compensation laws.<sup>20</sup> Acts requiring an employer to furnish a discharged employé with a statement of the true cause of discharge are likewise sustained under such power.<sup>21</sup>

**§ 2777. Proper exercise not prohibited.**—The bounds of the police power can not be definitely prescribed, but where the means employed in a statute do not have any real, substantial relation to public objects such as the government may legally accomplish and they are arbitrary and unreasonable the courts will disregard mere form and interfere for the protection of rights.<sup>22</sup>

**§ 2778. Police power can not be contracted away.**—The legislature can not by contract divest itself of the power to exercise the police power.<sup>23</sup>

<sup>12</sup> *State v. Delaye*, 193 Ala. 500, 68 So. 993, L. R. A. 1915E, 640.

<sup>13</sup> *Ex parte Ballestra*, 173 Cal. 657, 161 Pac. 120; *Pond Creek Coal Co. v. Riley & Co. Bros.*, 171 Ky. 811, 188 S. W. 907; *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 27, 84 S. E. 906.

<sup>14</sup> *United States v. Grand Rapids & Co. R. Co.*, 224 Fed. 667; *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916D, 1051n; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819. See also *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, Ann. Cas. 1918A, 1024; *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435, Ann. Cas. 1918A, 1043n.

<sup>15</sup> *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917A, 1216n.

<sup>16</sup> *Chicago & Co. R. Co. v. State & Co. Commission*, 267 Ill. 544, 108 N. E. 737; *Greene v. San Antonio (Tex. Civ. App.)*, 178 S. W. 6. An ordinance prescribing the number of passengers that may be carried in a street car is held a proper exercise of the police power: *Minneapolis St. R. Co. v. Minneapolis*, 189 Fed. 445.

<sup>17</sup> *State v. Skagit River Tel. & Co.*, 85 Wash. 29, 147 Pac. 885.

<sup>18</sup> *State Board of Medical Examiners v. Harrison*, 92 Wash. 577, 159 Pac. 769.

<sup>19</sup> *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 S. Ct. 784, 56 L. ed. 1197; *New Orleans v. Toca*, 141 La. 551, 75 So. 238, L. R. A. 1917E, 761.

<sup>20</sup> *Middleton v. Texas Power & Co. (Tex. Civ. App.)*, 178 S. W. 956. See also *New York Cent. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247; *Hunter v. Colfax Consol. Coal Co. (Iowa)*, 154 N. W. 1037, L. R. A. 1917D, 15, 51-63n.

<sup>21</sup> *Cheek v. Prudential Ins. Co. (Mo.)*, 192 S. W. 387, L. R. A. 1918A, 166.

<sup>22</sup> *East Side Levee & Co. Dist. v. East St. Louis & Co. R. Co.*, 279 Ill. 123, 116 N. E. 720.

<sup>23</sup> *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816; *Public Service Committee of Montana v. Helena*, 52 Mont. 527, 159 Pac. 24.

§ 2779. **Limitations on its exercise.**—The equality clause of the fourteenth amendment does not deprive the states of their power, commonly called the police power.<sup>24</sup> The police power is to be exercised only in the interest of the public as distinguished from individual interest, and the laws enacted thereunder must be reasonable and not arbitrary.<sup>25</sup> Such power can not be exercised for purely esthetic purposes.<sup>26</sup> The police power is not derived from any written constitution, but is a necessary attribute of every sovereign state.<sup>27</sup>

§ 2780. **Police power of congress.**—In matters committed to the exclusive jurisdiction of congress it may enact police legislation, but until it does so the state legislatures may pass laws as to a subject not prohibited to the states.<sup>28</sup> Thus a state has the power until congress speaks to enact laws for the protection of passengers on interstate trains.<sup>29</sup>

§ 2781. **Freedom of contract as a constitutional right.**—Liberty of contract is an inalienable right of a citizen which includes the right to enter a lawful calling and to acquire and dispose of property.<sup>30</sup> But while an inalienable right, it is subject to governmental control. The right of contract exists only so far as such right is not abridged by law or public policy, and the law may rightfully abridge such right when the public welfare demands it.<sup>31</sup>

§ 2782. **Labor legislation—In general.**—Laws limiting hours of labor, regulating the payment of wages, providing standards for determining wages and workmen's compensation and in-

<sup>24</sup> *Durand v. Dyson*, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84n; *Booth v. State*, 179 Ind. 405, 100 N. E. 563, L. R. A. 1915B, 420n, Ann. Cas. 1915D, 987n; *Selvage v. Talbott*, 175 Ind. 648, 95 N. E. 114, 33 L. R. A. (N. S.) 973n, Ann. Cas. 1913C, 724n.

<sup>25</sup> *East Side Levee & Sanitary Dist. v. East St. Louis &c. R. Co.*, 279 Ill. 123, 116 N. E. 720.

<sup>26</sup> *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917A, 1216n.

<sup>27</sup> *East Side Levee and Sanitary Dist. v. East St. Louis &c. R. Co.*, 279 Ill. 123, 116 N. E. 720.

<sup>28</sup> *Western Union Tel. Co. v. Fos-*

*ter*, 224 Mass. 365, 113 N. E. 192.

<sup>29</sup> *Missouri &c. R. Co. v. State*, 107 Tex. 540, 181 S. W. 721.

<sup>30</sup> *Moyers v. Memphis*, 135 Tenn. 263, 186 S. W. 105.

<sup>31</sup> *Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. ed. 175, Ann. Cas. 1913B, 529n; *Ex parte Ballestra*, 173 Cal. 657, 161 Pac. 120; *Galveston &c. R. Co. v. State* (Tex. Civ. App.), 175 S. W. 1096. The right of contract is not an absolute and unlimited one, but on the contrary, it is subservient to the public welfare: *Pittsburg &c. R. Co. v. Kinney*, 95 Ohio 64, 115 N. E. 505, L. R. A. 1917D, 641.

insurance laws are enacted under the police power of the state.<sup>32</sup> It is by virtue of such power that statutes prohibiting relief associations from requiring any employé becoming a member to surrender or waive any right to damages against a railroad for personal injury or death, and declaring such agreement void, are upheld.<sup>33</sup> Among other labor legislation we find statutes which require an employer to furnish a discharged employé with a statement of the true cause of discharge. While the authorities are not in accord as to the validity of such laws most of the states have adopted laws of this nature, and the better reason seems in favor of their validity as being a valid exercise of the police power.<sup>34</sup>

§ 2783. **Restricting hours of labor.**—Legislation for the protection of labor which restrains individual liberty and property rights falls under the police power.<sup>35</sup> The right to labor or employ labor upon terms agreed by the parties is a property right and is protected by the federal constitution. It is subject, however, to reasonable limitations which are necessary to promote the health, safety, morals and general welfare of the public exercisable under the police power.<sup>36</sup> It has been held that the power vested in a municipality by a general welfare clause is authority for the passage of an ordinance limiting the hours of labor on public work.<sup>37</sup> It is within the power of Congress to limit the hours of service of employés of carriers engaged in interstate commerce.<sup>38</sup> Statutes of this nature are remedial in purpose

<sup>32</sup> *Superior &c. Copper Co. v. Tomich* (Ariz.), 165 Pac. 1101; *Baltimore &c. R. Co. v. Hagan*, 183 Ind. 522, 109 N. E. 194; *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 27, 84 S. E. 906. See also cases cited *supra*, notes 14, 20.

<sup>33</sup> *Keels v. Atlantic Coast Line R. Co.*, 104 S. Car. 497, 89 S. E. 388.

<sup>34</sup> *Check v. Prudential Ins. Co. (Mo.)*, 192 S. W. 387, L. R. A. 1918A, 166 (held constitutional—reviewing authorities); *Galveston &c. R. Co. v. State* (Tex. Civ. App.), 75 S. W. 1096 (held unconstitutional). For general discussion, see note 4 L. R. A. (N. S.) 1094, 1096.

<sup>35</sup> *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278, Ann.

Cas. 1916D, 1051n (statute requiring 24 consecutive hours rest in every seven days).

<sup>36</sup> *Bunting v. State*, 243 U. S. 426, 37 S. Ct. 435, 61 L. ed. 830, Ann. Cas. 1918A, 1043; *State v. Bunting*, 71 Ore. 259, 139 Pac. 731, L. R. A. 1917C, 1162, Ann. Cas. 1916C, 1003n (statute limiting length of day's labor). Ordinances regulating the hours of labor in a laundry must be reasonable: *Yee Gee v. San Francisco*, 235 Fed. 757 (held unconstitutional).

<sup>37</sup> *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

<sup>38</sup> *United States v. Grand Rapids, &c. R. Co.*, 224 Fed. 667. See also other authorities cited *supra* in note 14.



and scope and penal in their means of employment and should therefore be reasonably construed.<sup>39</sup>

**§ 2784. In regard to the wage rate.<sup>40</sup>**

**§ 2785. In regard to the method of paying wages.**—Laws regulating the time and medium of the payment of wages that are calculated to promote the general convenience, prosperity and welfare of the public are not unconstitutional as affecting the right to contract.<sup>41</sup> So a statute regulating the payment of wages and making it a penalty to pay in any medium not redeemable in lawful money does not unduly curtail any right of contract and is not an illegitimate exercise of the police power.<sup>42</sup>

**§ 2786. Protecting labor unions.<sup>43</sup>**

**§ 2788. Contracts in restraint of trade.**—There is an implied liability upon every holder that the use of his property may be so regulated that it shall not encroach injuriously on the enjoyment of property by others or be injurious to the community.<sup>44</sup> Thus it is held that the federal anti-trust statutes do not divest property interests vested before their passage.<sup>45</sup>

**§ 2789. Building regulations.**—A city may make reasonable regulations in regard to the construction and character of buildings within the corporate limits, establish fire zones and regulate the construction of buildings therein;<sup>46</sup> but it can not by

<sup>39</sup> *United States v. Atlantic Coast Line Co.*, 224 Fed. 160.

<sup>40</sup> Where a statute regulating the weighing of coal at the mines provided for payment to the miners according to quantity but did not restrict the right of contracting for labor of miners by the day, week, month or year, or in any other manner, it was held not invalid as interfering with the right of contract: *Rail River Coal Co. v. Yaple*, 214 Fed. 273. A mechanic's lien law which attempts to vest a subcontractor with the right to a lien in cases where the original contractor has waived his right thereto is invalid, as depriving the owner of the right to contract: *Rittenhouse & Embree Co. v. William Wrigley, Jr., Co.*, 264 Ill. 40, 105 N. E. 743.

<sup>41</sup> *Ex parte Ballestra*, 173 Cal. 657, 161 Pac. 120; *Pond Creek Coal Co.*

*v. Riley Lester Bros.*, 171 Ky. 811, 188 S. W. 907.

<sup>42</sup> *Atkins v. Grey Eagle Coal Co.*, 76 W. Va. 27, 84 S. E. 906.

<sup>43</sup> Where a union calls or threatens strike not primarily for lawful benefit of union or members but for purposes prohibited by law or contravening public policy, its action will render it liable in damages: *Grassi Cont. Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. S. 279. See also as to injunction, *Hitchman Coal Co. v. Mitchell*, 241 U. S. 644, 36 Sup. Ct. 450.

<sup>44</sup> *Pittsburg &c. R. Co. v. Chappell*, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627.

<sup>45</sup> *Venner v. New York &c. R. Co.*, 177 App. Div. 296, 164 N. Y. S. 626.

<sup>46</sup> *Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555.

ordinance set apart a section of a city as a residence district and thus limit the use of property in such district.<sup>47</sup> Upon the same principle the legislature can not limit or require that the buildings to be erected in a specified section of a municipality be limited to separate and unattached buildings not less than a prescribed distance apart.<sup>48</sup> The regulation of the construction of buildings as to lateral support is a proper exercise of the police power.<sup>49</sup>

**§ 2790. Concerning common carriers.**—The regulation of railroad rates is essentially one of legislative control and unless unreasonable will not be interfered with by the courts.<sup>50</sup> The business of operating a jitney for the carriage of passengers is that of a common carrier and is subject to the same liability and under the same obligation to the public.<sup>51</sup> A grant of a franchise by a city to a street railroad company and providing that the fare should not exceed five cents did not deprive the legislature of its right to regulate the rates.<sup>52</sup> While carriers the same as other owners of property are amenable to regulations prescribed under the police power, such regulation must be reasonable.<sup>53</sup>

**§ 2791. Regulation of hack-stands and hotel runners.**—A city under its police power may prohibit taxicab drivers from entering into or upon station grounds or wharves to solicit passengers or baggage and may restrict them to certain locations.<sup>54</sup>

<sup>47</sup> *People v. Roberts*, 153 N. Y. S. 143. To the same effect, see: *State v. Minneapolis*, 136 Minn. 479, 162 N. W. 477 (erection of flat building in residential district).

<sup>48</sup> *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917A, 1216n.

<sup>49</sup> *Bergen v. Morton Amusement Co.*, 159 N. Y. S. 935.

<sup>50</sup> *Chicago & C. R. Co. v. State Public Utilities Commission*, 267 Ill. 544, 108 N. E. 737; *State v. Public Service Commission*, 94 Wash. 274, 162 Pac. 523. See notes in L. R. A. 1917C, 98, 574.

<sup>51</sup> *Van Hoeffen v. Columbia Taxicab Co.*, 179 Mo. App. 591, 162 S. W. 694; *Jitney Bus Assn. v. Wilkes-Barre*, 256 Pa. 462, 100 Atl. 954; *Greene v. San Antonio (Tex. Civ. App.)*, 178 S. W. 6; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105.

<sup>52</sup> *Duluth St. R. Co. v. Railroad Commission*, 161 Wis. 245, 152 N. W. 887.

<sup>53</sup> A municipal ordinance requiring milk collected at station by carriers for delivery in the city be kept below a prescribed temperature was held impracticable and unreasonable: *Chicago v. Chicago & C. R. Co.*, 275 Ill. 30, 113 N. E. 849, L. R. A. 1917C, 238n. The regulation of the rate of speed of the carriage of livestock is held a proper exercise of the police power when reasonable and practicable in its operation: *Davison v. Chicago & C. R. Co.*, 100 Nebr. 462, 160 N. W. 877, L. R. A. 1917C, 135n.

<sup>54</sup> *People v. May*, 164 N. Y. S. 717 (sight-seeing car); *Seattle Taxicab & Transfer Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

§ 2792. **Concerning insurance.**—The business of insurance is so far affected with a public interest as to permit legislative regulation of its rates, although the public may have no legal right to demand service.<sup>55</sup> While the legislature has the right under the police power to regulate the insurance business within the state, it can not under such power create a monopoly in such business.<sup>56</sup>

§ 2793. **Concerning sales.**—The state or other authorities under the police power may enact laws regulating or prohibiting the sale of liquors or poisons or articles that may be deleterious to the health or safety of the community, and may require certain qualifications for persons who may deal therein.<sup>57</sup> Under such power the state or municipality has the right to prohibit the sale of intoxicating liquor,<sup>58</sup> or regulate the sale of revolvers and other deadly weapons and prohibit their display in show cases or show windows,<sup>59</sup> or regulate the sale of adulterated articles,<sup>60</sup> and the storage of foods.<sup>61</sup> Such power also extends to the sanitary handling of foods for human consumption.<sup>62</sup>

§ 2794. **Corporate charter as a contract and state regulation.**—A municipal corporation can not by the grant of a

<sup>55</sup> *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612, 58 L. ed. 1011, L. R. A. 1915C, 1189n; *National Fire Ins. Co. v. Dickinson*, 128 Ark. 367, 194 S. W. 254.

<sup>56</sup> A law giving a superintendent of insurance arbitrary power to exclude at his pleasure qualified persons acting as insurance solicitors is unconstitutional: *Stern v. Metropolitan Life Ins. Co.*, 154 N. Y. S. 283; *Welch v. Maryland Casualty Co.*, 47 Okla. 293, 147 Pac. 1046, L. R. A. 1915E, 708.

<sup>57</sup> *Seattle v. Gibson*, 96 Wash. 425, 165 Pac. 109.

<sup>58</sup> A statute prohibiting the circulation of advertisements of intoxicating liquor within the state held constitutional: *State v. Delaye*, 193 Ala. 500, 68 So. 993, L. R. A. 1915E, 640 (pioneer case). See *James Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326, L. R. A. 1917B, 1218n, Ann. Cas. 1917B, 845n (Webb-Kenyon law).

<sup>59</sup> *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.

<sup>60</sup> *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 S. Ct. 784, 56 L. ed. 1197; *Alcorn Cotton Oil Co. v. State*, 100 Miss. 299, 56 So. 397, 40 L. R. A. (N. S.) 875n; *American Linseed Oil Co. v. Wheaton*, 25 S. Dak. 60, 125 N. W. 127, 41 L. R. A. (N. S.) 149n; *State v. W. W. Robinson Co.*, 84 Wash. 246, 146 Pac. 628.

<sup>61</sup> A statute under which it is made unlawful for a warehouseman or bailor to keep food in cold storage longer than ten months was held not an illegitimate exercise of the police power: *People v. Finkelstein*, 152 N. Y. S. 875.

<sup>62</sup> *Hahn v. Newport*, 175 Ky. 185, 194 S. W. 114 (ordinance regulating sale of meat). An ordinance prohibiting the exposure of meat for sale unless inspected by municipal inspectors or bearing the inspection of the federal government is held a valid exercise of the police power: *State v. Maheu (Maine)*, 98 Atl. 819. An ordinance regulating the handling of milk in dairies and its sale was held a valid exercise of the police power:

franchise to a public service company prevent the enactment by the state or municipality of laws under the police power regulating the company in the conduct of its business.<sup>63</sup>

**§ 2795. License to pursue business prejudicial to safety and morals.**—Statutes declaring lotteries, gift enterprises, etc., misdemeanors and punishable by fine or imprisonment are sustained under the police power.<sup>64</sup>

**§ 2796. License to use streets or public property.**—Streets are affected by a trust for the public use and benefit and the legislature, or those to whom it has delegated such powers, have the right to impose reasonable rules and conditions for their use.<sup>65</sup> A use of the street granted for the service of the public is subject to regulation in the interest of the public.<sup>66</sup> A franchise granted by the state or a municipality for the use of the streets for certain purposes, when acted upon and accepted by the grantee, constitutes a contract which may not be impaired.<sup>67</sup> But as a state can not divest itself of the police power by contract or otherwise,<sup>68</sup> one state legislature can not by any agreement bind itself or its successors not to exercise the police power of the

Owensboro v. Evans, 172 Ky. 831, 189 S. W. 1153.

<sup>63</sup> Hunt v. Marianna Elec. Co., 114 Ark. 498, 170 S. W. 96, L. R. A. 1915B, 897; Idaho Power & Co. v. Blomquist, 26 Idaho 222, 141 Pac. 1083, Ann. Cas. 1916E, 282n; Chattanooga v. Southern R. Co., 128 Tenn. 399, 161 S. W. 1000. The power conferred upon a city to purchase a waterworks plant was not a contract that such power should continue or that the state could not burden it or take it away: Ashland Waterworks Co. v. Ashland, 230 Fed. 254.

<sup>64</sup> Brenard Mfg. Co. v. W. W. Benjamin & Sons, 172 N. Car. 53, 89 S. E. 797.

<sup>65</sup> A city having exclusive control over its streets may prohibit the private business of one operating a jitney as a common carrier, or it may license such use: Greene v. San Antonio (Tex. Civ. App.), 178 S. W. 6; Desser v. Wichita, 96 Kans. 820, 153 Pac. 1194. While the right of a person to drive a train or vehicle on a traveled street or haul by or-

dinary means his own goods thereon is common to all citizens, when he engages in the transportation of passengers or freight for hire he is pursuing a special business and the municipality may require the payment of a license fee for such use: Kurtz v. Southern Pac. Co., 80 Ore. 213, 155 Pac. 367, 156 Pac. 794; Public Service Commission Second Dist. v. Booth, 170 App. Div. 590, 156 N. Y. S. 140; Booth v. Dallas (Tex. Civ. App.), 179 S. W. 301.

<sup>66</sup> People v. Connolly, 153 N. Y. S. 721.

<sup>67</sup> Russell v. Sebastian, 233 U. S. 195, 34 S. Ct. 517, 58 L. ed. 912, Ann. Cas. 1914C, 1282n; Boise Artesian Hot & C. Water Co. v. Boise City, 230 U. S. 84, 33 S. Ct. 997, 57 L. ed. 1400; Grand Trunk & C. R. Co. v. South Bend, 227 U. S. 544, 33 S. Ct. 303, 57 L. ed. 633, 44 L. R. A. (N. S.) 405.

<sup>68</sup> Colorado Postal Tel. Co. v. Colorado Springs, 61 Colo. 560, 158 Pac. 816.

state.<sup>69</sup> Under its delegated power<sup>70</sup> a city may require the operator of a jitney to take out a license, provide an indemnity bond, and prescribe the routes and hours of service.<sup>71</sup>

**§ 2797. Impairing obligation of contract.**—All contracts, whether made by the state itself, by municipal corporations, or by individuals, are subject to subsequent statutes enacted in the bona fide exercise of the police power and do not by reason of the contract clause of the constitution enjoy any immunity from such legislation.<sup>72</sup> Statutes and ordinances, however, which impair the obligation of contracts are not to be held valid merely because they purport to be enacted in the exercise of the police power. Where they are in fact unreasonable or otherwise beyond the scope of the police power, they fall within the contract clause and are unconstitutional and void.<sup>73</sup>

**§ 2799. Regulation of telegraph and telephone lines in streets.**—It is well settled that telephone companies are common carriers and public service corporations and are therefore subject to control and regulation under the police power of the state.<sup>74</sup> Under such power it is held that enforced connections between telephone exchanges may be required.<sup>75</sup>

**§ 2800. Regulation of markets.**—The regulation of the marketing of foodstuffs is a legitimate exercise of the police power.<sup>76</sup>

**§ 2801. Control of location of livery stables.**—A city may

<sup>69</sup> Texas &c. R. Co. v. Miller, 221 U. S. 408, 31 S. Ct. 534, 55 L. ed. 789.

<sup>70</sup> Hedrick v. Lanz, 170 Iowa 437, 152 N. W. 610.

<sup>71</sup> Ex parte Cardinal, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850; Ex parte Sullivan, 77 Tex. Cr. 72, 178 S. W. 537; Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840n.

<sup>72</sup> Colorado Postal Tel. Co. v. Colorado Springs, 61 Colo. 560, 158 Pac. 816; Union Dry Goods Co. v. Georgia Public Service Commission, 142 Ga. 841, 83 S. E. 946; Pittsburg &c. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Yeatman v. Towers, 126 Md. 513, 95 Atl. 158; Raymond Lbr. Co. v. Ray-

mond Light &c. Co., 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574.

<sup>73</sup> State v. Gurry, 121 Md. 534, 88 Atl. 228, 546, 47 L. R. A. (N. S.) 1087n, Ann. Cas. 1915B, 957n.

<sup>74</sup> State v. Skagit River Tel. &c. Co., 85 Wash. 29, 147 Pac. 885.

<sup>75</sup> Milbank v. Dakota &c. Tel. Co., 37 S. Dak. 504, 159 N. W. 99. See also State v. Skagit River Tel. &c. Co., 85 Wash. 29, 147 Pac. 885.

<sup>76</sup> An ordinance prohibiting retailing of meats from vehicle was upheld although no public market place was provided: Hahn v. Newport, 175 Ky. 185, 194 S. W. 114; Mannix v. Frost, 164 N. Y. S. 1050 (prohibiting sale of dipped milk).

make it unlawful to build or keep a livery stable in any block without the consent of a majority of the owners.<sup>77</sup>

**§ 2802. Regulation of practice of medicine under police power.**—The legislature may regulate the practice of dentistry<sup>78</sup> or the practice of medicine<sup>79</sup> under its police power, and the imposition of reasonable fees for a license to practice medicine in the reasonable exercise of such power is not invalid because it produces revenue.<sup>80</sup>

**§ 2803. Police power to prevent fraud by adulteration.**—The protection of the public against the sale of adulterated food products, is an important phase of the exercise of the police power, and congress or the state may require all adulterated articles to be labeled.<sup>81</sup>

**§ 2804. Workmen's compensation laws an exercise of police powers.**—Workmen's compensation acts are enacted in the exercise of the police power of the state.<sup>82</sup>

**§ 2806. Municipality not liable for failure to exercise police powers.**—As a general rule a municipal corporation is not liable for damages resulting from the improper or negligent exercise of its police powers.<sup>83</sup>

**§ 2807. Private rights of persons or property.**—Private property is held subordinate to the police power, yet lawful property can not be taken under the mere guise of police regulation.<sup>84</sup> The police power as such term is understood is confined to such

<sup>77</sup> While recognizing the right of a city to restrict the location of livery stables the court refused to go further and apply the same rule to private stables: *People v. Oak Park*, 268 Ill. 256, 109 N. E. 11.

<sup>78</sup> *Lowrie v. State Board of Registration &c.* (N. J.), 99 Atl. 927.

<sup>79</sup> *Gray v. State* (Tex. Cr.), 184 S. W. 200; *State Board of Medical Examiners v. Harrison*, 92 Wash. 577, 159 P. 769; *Piper v. State*, 163 Wis. 604, 158 N. W. 319.

<sup>80</sup> *Ex parte Ambler*, 11 Okla. Cr. 449, 148 Pac. 1061.

<sup>81</sup> *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 S. Ct. 784, 56 L. ed. 1197; *People v. Price*, 257 Ill. 587, 101 N. E. 196, Ann. Cas. 27.

1914A, 1154n; *Alcorn Cotton Oil Co. v. State*, 100 Miss. 299, 56 So. 397, 40 L. R. A. (N. S.) 875n; *American Linseed Oil Co. v. Wheaton*, 25 S. Dak. 60, 125 N. W. 127, 41 L. R. A. (N. S.) 149n.

<sup>82</sup> *Hovis v. Cudahy Refining Co.*, 95 Kans. 505, 148 Pac. 626; *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276n; *Middleton v. Texas Power &c. Co.* (Tex. Civ. App.), 178 S. W. 956.

<sup>83</sup> *Brunson v. Santa Monica*, 27 Cal. App. 89, 148 Pac. 950; *Thomas v. Kennett* (Mo. App.), 178 S. W. 254 (city pound).

<sup>84</sup> *Spear v. Ward* (Ala.), 74 So.

restrictions upon private property as are practically necessary for the general welfare of all,<sup>85</sup> and where property partakes of a private character regulations under the police power must be reasonable.<sup>86</sup> Ordinances which provide for the segregation of the races, when bona fide and reasonable, are upheld as a proper exercise of the police power.<sup>87</sup> But a statute requiring all business, with certain exceptions, to close at a fixed time in cities of a prescribed population was held an unwarranted interference with the rights of others.<sup>88</sup>

<sup>85</sup> An ordinance which prohibited the owner of property from erecting a storeroom upon land within a residential district was held invalid, as an unlawful invasion of the rights secured to him by the constitution: *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017, L. R. A. 1917F, 1050n.

<sup>86</sup> *Michigan State Tel. Co. v. Michigan Railroad Commission*, 193 Mich. 515, 161 N. W. 240.

<sup>87</sup> *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114n.

<sup>88</sup> *Saville v. Corless*, 46 Utah 495, 151 Pac. 51, L. R. A. 1916A, 651n.

## CHAPTER LIN

### AGENCY—GENERAL PRINCIPLES—EXECUTION OF CONTRACT BY AGENT

§ 2831. **Definition.**—An agent acts for or in the place of another by authority from the latter.<sup>1</sup> Where an agent employs another as subagent, such subagent does not become the agent of the principal without the latter's consent.<sup>2</sup> As already said the members of a partnership are agents of the same and where two stockholders of a corporation agree to pool their stock and sell it for their joint account, each becomes the agent of the other.<sup>3</sup>

§ 2832. **Constituent or essential elements.**—Agency is not created by the mere designation of one as agent, and where goods are sold to a retailer with restrictions as to price and manner of selling to the consumer and a designation of the buyer as agent this does not constitute the relation.<sup>4</sup>

§ 2833. **General and special agents.**<sup>5</sup>—When a notary public is employed merely to take an acknowledgment, such notary is not clothed with authority to make representations as to the nature of the instrument.<sup>6</sup>

§§ 2834, 2835. **Authority — How executed — Descriptive words.**<sup>7</sup>

<sup>1</sup> Thomas B. Jeffrey Co. v. Lockridge, 173 Ky. 282, 190 S. W. 1103. The intermediary is the borrower's agent, where a borrower by written power of attorney makes an intermediary his agent to receive money from lender and authorizes him to pay off all mortgages outstanding and constituting liens on the property agreed upon as security for the loan: Routh v. Fitzgibbon (Okla.), 162 Pac. 702.

<sup>2</sup> Ely Walker Dry Goods Co. v. Smith (Okla.), 160 Pac. 898.

<sup>3</sup> Beers v. McNaught, 175 App. Div. 643, 162 N. Y. S. 514.

<sup>4</sup> W. T. Rawleigh Medical Co. v. Holcomb, 126 Ark. 597, 191 S. W. 215.

<sup>5</sup> When there is a delegation of authority to do all acts connected with a particular employment a general agency exists, and it is not a special agency by the fact that authority of an agent is limited to a particular business: Kissell v. Pittsburgh, Ft. W. & C. R. Co., 194 Mo. App. 346, 188 S. W. 1118. See also Thompson v. Michigan L. Ins. Co., 56 Ind. App. 502, 105 N. E. 780; Buchanan v. Caine, 57 Ind. App. 274, 106 N. E. 885.

<sup>6</sup> Ely Walker Dry Goods Co. v. Smith (Okla.), 160 Pac. 898.

<sup>7</sup> Nystrom v. Barker, 88 Conn. 382, 91 Atl. 649; Pugh v. Williams, 185 Ill. App. 104; Farmers Nat. Bank v. Hatcher (Iowa), 157 N. W. 876.



§ 2837. **Construction of simple contracts—Intention of parties.**<sup>8</sup>

§ 2838. **Negotiable instruments.**<sup>9</sup>—When a note was executed and placed in the hands of a third party on the same day and he received a part payment upon it, it is presumed that he had authority to indorse it.<sup>10</sup>

§§ 2839-2846. **Extrinsic evidence to explain negotiable instruments and parol evidence generally—Conflicting decisions.**<sup>11</sup>

§ 2847. **Sealed instruments—Execution by agent.**—Where a sealed instrument does not disclose the principal, the general rule is that no person except the parties named can sue to enforce its covenants.<sup>12</sup>

§ 2849. **Undisclosed principal—Parol evidence to hold liable.**—Where an obligation was created for and in behalf of an undisclosed principal, the fact that his connection in the transaction was not disclosed will not relieve him from obligation thereon.<sup>13</sup> An agent in making a contract for an undisclosed

<sup>8</sup> *Ellis v. Stone*, 21 N. Mex. 730, 158 Pac. 480; *Dean Jewelry Co. v. Storm* (Okla.), 166 Pa. 1046.

<sup>9</sup> The mother was liable on notes for money borrowed by her son to purchase stock and other supplies and pay the running expenses where she had given him sole charge of a farm: *Todd's Exrs. v. First Nat. Bank*, 173 Ky. 60, 190 S. W. 468.

<sup>10</sup> *Farmers' and Mechanics' Bank v. Whitehead*, 105 S. Car. 100, 89 S. E. 657.

<sup>11</sup> As to whether headings, marginal notes or the like should be considered, see *Reif v. Commercial Cabinet Co.*, 185 Ill. App. 577. For cases in which parol evidence was held admissible, see *Lutz v. Van Heynigen Brokerage Co.* (Ala.), 75 So. 284; *First State Bank v. Power* (Tex. Civ. App.), 166 S. W. 382. For cases in which parol evidence was excluded, see *Hay v. McDonald* (Cal. App.), 165 Pac. 1030; *Costello v. Bridges* 81 Wash. 192, 142 Pac. 687. An action can not be maintained against the alleged principal on a note executed

in the name of a purported principal by an agent without authority nor against the agent, the remedy against the latter being an action on the implied warranty or for false representation of authority: *Peoples Nat. Bank v. Dixwell*, 217 Mass. 436, 105 N. E. 435, Ann. Cas. 1915D, 722, where other recent cases to same effect are cited in note. The principal is not bound by an indorsement of a note by an agent in his own name: *Borschow v. Wilson* (Tex. Civ. App.), 190 S. W. 202.

<sup>12</sup> *O'Brien v. Clement*, 160 N. Y. S. 975. And the general rule is that the agent may sue on a contract made in his name where the principal is undisclosed: *Camp v. Barber*, 87 Vt. 235, 88 Atl. 812, Ann. Cas. 1917A, 451 and on p. 454, where additional cases are cited.

<sup>13</sup> *Colquhoun v. Pack*, 32 Cal. App. 97, 161 Pac. 1168. The principal was the proper party to sue for a breach though a contract was made by an agent who did not disclose his principal: *Levy v. Nevada-California-*

principal does not deprive the other party of any defense which he would have had against the agent.<sup>14</sup>

Oregon R. Co., 81 Ore. 673, 160 Pac. 808, L. R. A. 1917B, 564. The duty rests upon the agent to disclose his agency if he would avoid personal liability, and he will not be relieved by the fact that the other party has means of ascertaining name of principal, but agent must bring to him actual knowledge or its equivalent: *Harmon v. Parker*, 193 Mich. 542, 160 N. W. 380. An undisclosed principal is one that the contract does not disclose: *Unruh v. Roemer*, 135 Minn. 127, 160 N. W. 251. It is held in a recent English case that an action

can not be maintained by an undisclosed principal to enforce a contract where the only consideration moved from the agent to the defendant and not from the principal: *Dunlap Pneumatic Tyre Co. v. Selfridge & Co.* (1915), App. Cas. 847, Ann. Cas. 1915D.

<sup>14</sup> A party in making a contract in which he acts for an undisclosed principal does not thereby deprive the other party of any defense which he would have had against the agent: *Lane v. Leiter*, 237 Fed. 149, 150 C. C. A. 295.

## CHAPTER LX

### ATTORNEYS AT LAW

§ 2855. **Attorneys—Attorneys at law.**<sup>1</sup>—An attorney is an officer of the court and is answerable to its summary jurisdiction for failure to discharge his duties to his clients with the strictest fidelity.<sup>2</sup>

§ 2857. **General relation of attorney and client—The retainer.**<sup>3</sup>—A party to a suit has the absolute right to change his attorney at any time and have the one he prefers substituted as the attorney of record.<sup>4</sup> It is held that a client may, with or without reason, discharge his attorney at any time.<sup>5</sup> It is equivalent to original authority to act, where an attorney assumes to act for a party who afterward ratifies his acts.<sup>6</sup> The rule which prohibits an attorney once retained from accepting employment from the opposing party applies only in case of conflicting interest.<sup>7</sup> Where the attorney drew the contract, any ambiguity as to the

<sup>1</sup> The usual office and duty of an attorney at law is the representation of parties litigant in courts of justice, and embraces the preparation of pleadings and other papers incident to actions, and the management of such actions for his clients: *Seawell v. Parsons Lumber Co.*, 172 N. Car. 320, 90 S. E. 241.

<sup>2</sup> *Seawell v. Parsons Lumber Co.*, 172 N. Car. 320, 90 S. E. 241.

<sup>3</sup> As to when attorney has no implied authority, see *Treece v. Reinhart-Smith Grocer Co.*, 197 Ill. App. 40.

<sup>4</sup> *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153. No one is entitled to notice of motion for substitution of attorneys except the attorney first employed, and he may set aside a substitution obtained without sufficient notice to him: *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153.

<sup>5</sup> *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F, 402n.

<sup>6</sup> *Gallup v. Rozier*, 172 N. Car. 283, 90 S. E. 209.

<sup>7</sup> *Laybourne v. Bray* (Tex. Civ.

App.), 190 S. W. 1159. An agreement by attorneys to represent a vendor in a suit to recover the land for fraud does not preclude them from representing a grantee of the purchaser, such grantee claiming to be an innocent purchaser, against the vendor: *Trulin v. Plested* (Iowa), 159 N. W. 633. The attorney for the subsequent assignee could appear for the railroad in the action against it by plaintiff, the chief issue being whether plaintiff or such assignee had the better title, where claims against a railroad, which plaintiff claimed were assigned to him to sue, were assigned to another who sued the railroad, which, with knowledge of plaintiff's claim, settled with the subsequent assignee, taking an indemnity bond holding it harmless against plaintiff's demands: *Broadbent v. Denver & R. G. R. Co.*, 48 Utah 598, 160 Pac. 1185. Where attorney by fraud induced client to enter into contract which purported to be a loan and mortgage as security for another contract, and he acted for the other contracting

meaning of language used in a written retainer should be resolved in favor of the client.<sup>8</sup>

**§ 2858. Authority of attorney to appear—By whom, how, and when it may be questioned.**<sup>9</sup>—On motion to set aside a consent judgment, want of authority in the attorney may be shown, but the burden of showing it is clearly on the party attacking the judgment.<sup>10</sup>

**§ 2859. When and how far client is bound by act of attorney.**<sup>11</sup>—When an attorney represents interests antagonistic to those of his infant clients, he can not give binding consent to a decree against such infants, and such decree is invalid.<sup>12</sup> Unless an attorney has special authority, he can not enter a disclaimer for his client.<sup>13</sup> Where an attorney is employed to sue for and collect a debt, unless he has express or specific authority, he can not accept less than the amount due nor receive anything in satisfaction except money.<sup>14</sup> But a client can usually

party, among whom the loan was divided, and mortgagor obtained no part, the contract will be avoided except to operate as security as contemplated by mortgagor: *Naef v. Vergez*, 140 La. 196, 72 So. 935.

<sup>8</sup> *Newcomb v. Whitehouse*, 162 N. Y. S. 249.

<sup>9</sup> After an appearance and trial on the merits, the plaintiff ought not to be deprived of the result by the defendant's contention that he was not regularly in court, without some evidence from the latter that the attorney assuming to represent him was not authorized so to do: *Taylor v. Siers*, 63 Pa. Super. Ct. 564. The presumption is that an attorney who appears for a party is authorized to do so: *Cooper v. Jewett*, 233 Fed. 618, 147 C. C. A. 426; *Strand Imp. Co. v. City of Long Beach*, 173 Cal. 765, 161 Pac. 975; *Peck v. New England Tel. & Co.*, 225 Mass. 464, 114 N. E. 674; *Gardiner v. May*, 172 N. Car. 192, 89 S. E. 955; *Carpenter v. New York Trust Co.*, 174 App. Div. 378, 161 N. Y. S. 267.

<sup>10</sup> *Gardiner v. May*, 172 N. Car. 192, 89 S. E. 955.

<sup>11</sup> Counsel may bind his client to orders and judgments made in progress of cause and in interest of client, and a compromise settlement ap-

proved by his court is binding on the client: *Glover v. Bradley*, 233 Fed. 721, 147 C. C. A. 487, Ann. Cas. 1917A, 921n.

<sup>12</sup> *Glover v. Bradley*, 233 Fed. 721, 147 C. C. A. 487, Ann. Cas. 1917A, 921n.

<sup>13</sup> *McFarland v. Curtin*, 233 Fed. 728, 147 C. C. A. 494; *Glover v. Bradley*, 233 Fed. 721, 147 C. C. A. 487, Ann. Cas. 1917A, 921n.

<sup>14</sup> *Treece v. Reinhart-Smith Grocer Co.*, 197 Ill. App. 40. Unless there is fraud or mistake, where the undoubted attorneys of record for a party agree to settle and adjust the issues and subject-matter of the suit, he can not later repudiate the agreement: *Poore v. Poore*, 105 S. Car. 206, 89 S. E. 569. Where a client employs an attorney at law to collect a debt, he is bound to answer for the acts of the attorney which are necessary for the collection of such debts: *Treece v. Reinhart-Smith Grocer Co.*, 197 Ill. App. 40. But when the client gives the attorney specific instructions as to the acts to be done, he is not liable for the wrongful acts of the attorney which are contrary to his instructions and are not necessary for such collection: *Treece v. Reinhart-Smith Grocer Co.*, 197 Ill. App. 40. Where the attorney promised the de-

compromise a suit without his attorney's consent.<sup>15</sup> An attorney who succeeds in obtaining a judgment in favor of his client has no implied authority to file a motion to set it aside.<sup>16</sup>

**§ 2860. Duty of attorney to client—Confidential communications.**<sup>17</sup>—A client's remedy for the disclosure of confidential information by an attorney, is an action at law for damages.<sup>18</sup> A communication to a lawyer for the express purpose of having it brought to the attention of the public or communicated to another is not privileged.<sup>19</sup>

**§ 2861. Attorney's duty to exercise skill and care—Liability for negligence.**—The duty of an attorney to exercise reasonable care in the performance of a designated service in the absence of fraud, is to the client and not to third persons; but, notwithstanding want of privity of contract, he may be liable to third persons where there is fraud.<sup>20</sup>

**§ 2863. Attorney's liability for negligence.**<sup>21</sup>—It is necessary that the plaintiff, in a suit against an attorney for failure to prosecute a claim, to allege and prove sufficient facts to show that the claim was a good cause of action.<sup>22</sup>

fendant, on receipt of the amount due his client, that no judgment would be entered against him, but nevertheless took judgment and failed to note satisfaction, his client would be liable for any damages occasioned thereby: *Penna v. Atlantic Macaroni Co.*, 174 App. Div. 436, 161 N. Y. S. 191.

<sup>15</sup> *Snow v. Beard*, 82 Ore. 518, 162 Pac. 258.

<sup>16</sup> *Tritsch v. City of Covington*, 161 Ky. 171, 170 S. W. 518, Ann. Cas. 1916B, 722n.

<sup>17</sup> Generally, an attorney must exercise the most scrupulous good faith and fidelity towards his client, and must make known to the latter the exact status, so far as he is able, of the matter concerning which he is employed: *Laybourne v. Bray & Shifflett* (Tex. Civ. App.), 190 S. W. 1159. Moneys received by an attorney as the result of a suit and later invested improvidently by him pursuant to authority, could not be collected from him in a summary proceeding: *In re King*, 175 App. Div. 196, 161 N. Y. S. 238.

<sup>18</sup> *Universal Sav. Corp. v. Morris Plan Co. of New York*, 234 Fed. 382. It is unprofessional for attorneys to gain information from client adverse to his interests and afterwards to use such information to secure employment by persons in adverse relations to the former client: *In re Marron* (N. Mex.), 160 Pac. 391.

<sup>19</sup> *Stein v. Morris* (Va.), 91 S. E. 177.

<sup>20</sup> *In re Cushman*, 95 Misc. 9, 160 N. Y. S. 661. If the acts of attorneys at law are in good faith and pertinent to the matter in question, they are not liable: *Waugh v. Dibbens* (Okla.), 160 Pac. 589.

<sup>21</sup> An attorney at law employed to sue for and collect a debt can not lawfully do more than to obtain judgment, order execution, receive and receipt for the money collected on such execution in the absence of express or specific authority: *Treece v. Reinhart-Smith Grocer Co.*, 197 Ill. App. 40.

<sup>22</sup> *Schmitt v. McMillan*, 175 App. Div. 799, 162 N. Y. S. 437.

§ 2864. **Duty of attorney to obey instructions.**<sup>23</sup>—Counsel employed in a suit have large powers and authority as to entering into agreements and stipulations, but they have no authority to waive the legal rights of their clients, contrary to their clients' express wishes and directions.<sup>24</sup>

§ 2866. **Compensation of attorney.**<sup>25</sup>—Where a client sued an attorney for money collected which the attorney claimed was

<sup>23</sup> Where an attorney at law is employed to collect a debt and is given specific instructions by his client as to the acts to be done, he is personally liable for any wrongful acts done contrary to such instructions or not necessary for the collection of such debt: *Treese v. Reinhart-Smith Grocer Co.*, 197 Ill. App. 40.

<sup>24</sup> *Lyman v. Kaul*, 275 Ill. 11, 113 N. E. 944.

<sup>25</sup> Generally, where the client discharges the attorney the client is liable to pay the attorney only for the reasonable value of his services rendered by him up to the time of the discharge: *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F, 402n. To support a recovery for services rendered by an attorney upon quantum meruit, there must be evidence to show that there was a mutual understanding that some compensation was to be paid and that the services were rendered: *In re Mumford's Estate*, 173 Cal. 511, 160 Pac. 667. A contract for increased compensation, made after the relation of attorney and client has commenced, is presumptively void, where no additional services by the attorney are contemplated, and the burden was on the attorney to show that it was made fairly and was reasonable and without undue advantage: *Laybourne v. Bray & Shifflett* (Tex. Civ. App.), 190 S. W. 1159. Where the client did not request them nor understand that they were outside of the contract an attorney employed under contract fixing his compensation can not recover for unusual professional services: *Gabrielson v. Gorin*, 92 Wash. 408, 159 Pac. 387. Attorney's stipulated and earned compensation is not affected by any compromise that the client may make with the adverse party: *Snow v. Beard*, 82 Ore.

518, 162 Pac. 258. Where nothing was recovered by the attorney he is not entitled to compensation under an agreement with the owner of a ranch in Mexico to act in recovering cattle or the value thereof, which the agreement recited were converted by a Mexican general: *Sanford v. Weller* (Tex. Civ. App.), 189 S. W. 1011. The allowance of attorney's fees rests on a different basis from any other allowance by a court, and, though evidence is necessary in such case to show the ordinary and usual charges in similar cases where such fees are the subject of contract, yet the court is well qualified to form an opinion on this subject and will exercise an independent judgment thereon: *La Salle County Electric R. Co. v. Wylie*, 196 Ill. App. 113. The determination of what is the reasonable value of legal services depends upon a consideration of the nature and result of the controversy in which such services were rendered, the skill and labor required, the responsibility imposed, and the standing and character of the attorney rendering such services: *La Salle County Elec. R. Co. v. Wylie*, 196 Ill. App. 113. In the absence of an allegation or proof of fraud, mistake or imposition, a contract for attorney's fees and note and mortgage therefor, after inception of litigation, will not be set aside: *Spaulding v. Beidleman* (Okla.), 160 Pac. 1120. Generally, expressions of opinions made by attorneys as to probability of judgment secured by them being reversed on appeal, even if mistaken, are not such false representations as will entitle the client to avoid for fraud a contract for increased compensation based thereon: *Laybourne v. Bray* (Tex. Civ. App.), 190 S. W. 1159.

retained as a reasonable attorney's fee with the client's consent, it was held that the question of amount due was for the jury.<sup>26</sup>

§ 2867. **Attorney's lien.**<sup>27</sup>—Attorneys have no lien on judgments recovered for the state.<sup>28</sup> An attorney's lien may be waived and where an attorney permits his client to purchase property and the court confirms the sale and approves the deed to the client without objection, the lien is waived and does not follow the land.<sup>29</sup>

<sup>26</sup> Bosson v. Brash (Ind.), 114 N. E. 6; Ryan v. Bullion, 100 Nebr. 705, 161 N. W. 167; Laybourne v. Bray (Tex. Civ. App.), 190 S. W. 1159.

<sup>27</sup> Where a fund is recovered by the efforts of an attorney, he is entitled to a "charging lien" or right to recover fees from such fund: Prichard v. Fulmer, 22 N. Mex. 134, 159 Pac. 39; Snow v. Beard, 82 Ore. 518, 162 Pac. 258. Under the Utah code, an attorney has a lien on a cause of action, not from the time when employed, but "from the commencement of an action": Broadbent v. Denver &c. R. Co., 48 Utah 598, 160 Pac. 1185. An attorney had right at common law to "general" or "retaining lien," attaching to all papers, documents, and money which came into his hands professionally, by which he was entitled to retain possession till the money due him for services was paid: Prichard v. Fulmer, 22 N. Mex. 134, 159 Pac. 39. Act May 6, 1915, relating to the lien of fees of attorneys at law, is not retrospective, and does not apply to causes begun before its passage: Smyth v. Goebel, 63 Pa. Super. Ct. 585. Where an attorney has a charging lien he has the right to have the court interfere to prevent payment by the judgment debtor: Prichard v. Fulmer, 22 N. Mex. 134, 159 Pac. 39. Irrespective of statute, an attorney for defendant, against whom a complaint was dismissed, with costs, taxed against plaintiff and which attorney had not been paid for his services, had a lien upon such costs, deposited with clerk of court, and, as against any third party, a clear right to such costs: Fliashnick v. Burke, 176 App. Div. 367, 162 N. Y. S. 867. The at-

torney has a lien against all the world on the amount recovered, though the cause of action may be settled by the client himself at any time: Knipe v. Wheelehan, 160 N. Y. S. 1012; Prichard v. Fulmer, 22 N. Mex. 134, 159 Pac. 39. Contra: Levy v. Public Service R. Co. (N. J. Sup.), 98 Atl. 847. There is no ground on which the attorney may be permitted to continue the suit to protect his lien for fees due, where the precise nature of the retainer and contingent fee are not disclosed, and there is no allegation of fraud in a settlement by the client, though made without the attorney's knowledge or consent: Knipe v. Wheelehan, 160 N. Y. S. 1012. But see Nelson v. Berkner (Minn.), 167 N. W. 423.

<sup>28</sup> State v. National Surety Co., 29 Idaho 670, 161 Pac. 1026. The attorneys for an administratrix have no lien upon assets belonging to the estate to satisfy claims for services rendered administratrix in connection with administration of estate: In re O'Connor's Estate, 162 N. Y. S. 957. Under Judiciary Law, § 475, which creates attorney's lien, an attorney retained by administratrices held without lien on their distributive shares in the estate: In re Rabell, 175 App. Div. 345, 162 N. Y. S. 218.

<sup>29</sup> Prichard v. Fulmer, 22 N. Mex. 134, 159 Pac. 39. Stockholder of corporation held to have waived his right to a lien where he stipulated for appointment of trustee to collect its assets, without reserving his lien as attorney, for collecting claim given by Rem. & Bal. Code, § 136; Jensen v. Kohler, 93 Wash. 8, 159 Pac. 978.

## CHAPTER LXI

### AUCTIONEERS

§ 2870. **Auctioneers—Definition and description.**—There is some question as to whether or not an auctioneer acts in a fiduciary capacity. Some of the cases hold that he does,<sup>1</sup> while others take a contrary view.<sup>2</sup> Municipalities have no power to license auctioneers, unless such power is conferred by law, as such power is not one of the incidents of municipal corporations.<sup>3</sup> The tax must be reasonable.<sup>4</sup>

§ 2874. **Conduct of sale—Chilling bids—Puffing and by-bidding.**—By-bidding is illegal and the seller can not hold a purchaser where the price has been run up by such means, when the owner does not announce his intention to bid.<sup>5</sup>

§ 2875. **When contract is made—Acceptance of bid.**—In an auction sale, an offer made without notice of reservation, does not enable the highest bidder to complete a contract, specifically enforceable by him, by his mere announcement of his bid, where his bid is rejected, or the bid raised even by an agent of the owner. Acceptance of the bid is necessary to make a binding contract.<sup>6</sup>

§ 2877. **Rights, liabilities, and remedies of buyer and seller.**—The seller may at any time before actual sale withdraw the article to be sold from the sale and where property is offered and a high bid made, the bidder can not enforce a sale

<sup>1</sup> In re Lord, Fed. Cas. No. 8501; Jones v. Russell, 44 Ga. 460.

<sup>2</sup> Georgia R. Co. v. Cubbedge, Hazelhurst & Co., 75 Ga. 321; Gibson v. Gorman, 44 N. J. L. 325. Under the police power an auctioneer, as a condition to the exercise of his calling, may be required to take out a license: People v. Grant, 126 N. Y. 473, 27 N. E. 964; Port Jervis v. Close, 53 Hun. 634, 6 N. Y. S. 211; Buffalo v. Marion, 13 Misc. 639, 34 N. Y. S. 945.

<sup>3</sup> Fowle v. Alexandria, 3 Pet. (U. S.) 398, 7 L. ed. 719; Mankato v.

Fowler, 32 Minn. 364, 20 N. W. 361.

<sup>4</sup> Wiggins v. Chicago, 68 Ill. 372; Caldwell v. Lincoln, 19 Nebr. 569, 27 N. W. 647; Margolies v. Atlantic City, 67 N. J. L. 82, 50 Atl. 367.

<sup>5</sup> Freeman v. Poole, 37 R. I. 489, 93 Atl. 786, Ann. Cas. 1918A, 841, and note.

<sup>6</sup> Freeman v. Poole, 37 R. I. 489, 93 Atl. 786, L. R. A. 1917A, 63, Ann. Cas. 1918A, 841, reviewing many cases both in opinion and note. See also United States v. Meyer, 37 App. (D. C.) 282.



until his bid has been accepted, even though the property is bid in by and the property knocked down to a by-bidder.<sup>7</sup> There can be no dispute that where the vendor acts in a representative capacity he can not be bound by an unauthorized statement of the auctioneer.<sup>8</sup> But it is obvious that the auctioneer may bind himself by a personal warranty.<sup>9</sup> The purchaser at an auction sale can not complain of want of authority on the part of the auctioneer where the latter's acts are ratified by the owner, and such ratification will be presumed where the owner institutes an action for the money agreed to be paid by the purchaser.<sup>10</sup>

<sup>7</sup> *Tillman v. Dunman*, 114 Ga. 406, 40 S. E. 244, 88 Am. St. 28, 57 L. R. A. 784n; *Freeman v. Poole*, 37 R. I. 489, 93 Atl. 786, Ann. Cas. 1918A, 841, and note. See also *Scales v. Chambers*, 113 Ga. 920, 39 S. E. 396; *United States v. Meyer*, 37 App. Cas. (D. C.) 282. In the absence of express authority the general rule is that an auctioneer has no power to warrant the goods he offers at auction so as to bind the vendor: *Payne v. Leconfield*, 51 L. J. Q. B. (Eng.)

642; *The Monte Allegre*, 9 Wheat. (U. S.) 616, 6 L. ed. 174; *Layton v. Hennen*, 3 La. Ann. 1 and cases cited in note in Ann. Cas. 1915C, 581.

<sup>8</sup> *Blood v. French*, 9 Gray (Mass.) 197. See also *The Monte Allegre*, 9 Wheat. (U. S.) 645, 6 L. ed. 174.

<sup>9</sup> *Dent v. McGrath*, 3 Bush (Ky.) 174; *Ruben v. Lewis*, 20 Misc. 583, 46 N. Y. S. 426; *Somers v. O'Donohue*, 9 N. S. C. P. 208.

<sup>10</sup> *Steen v. Neva* (N. Dak.), 163 N. W. 272.

## CHAPTER LXII

### BANK AND OTHER CORPORATION OFFICERS AS AGENTS

§ 2886. **Relation of officers to corporation and to one another—Dealing with corporation.**—A national bank examiner who examines a bank is not an officer or agent of such bank.<sup>1</sup>

§ 2887. **General rules as to authority to bind corporation.**<sup>2</sup>—No officer of a bank has authority to bind the bank as surety for the debt or obligation of another.<sup>3</sup>

§ 2888. **Directors.**—It was held that a nonresident director of a national bank who did not have actual knowledge of an unlawful manipulation of the funds of the bank, which resulted in loss to the bank, and who did not assent to or connive at such unlawful manipulation, can not be placed in the same class or category with resident directors who knew of and assented to and connived at such unlawful acts.<sup>4</sup> Where a director of a bank does not participate in the wrongful act he is not liable for the misconduct of other directors, nor is he liable for mere omission to watch and restrain them from wrongdoing, provided such director has no wrong intention in such omission and has no knowledge of their wrongful acts.<sup>5</sup> Where the directors of an insurance company did not disclose the facts to the stockholders and undertook to transfer the contracts and assets of the corporation to another by transferring the capital stock and received ten times its par value for their own stock while buying

<sup>1</sup> Doerstler v. First Nat. Bank, 82 Ore. 92, 161 Pac. 386.

<sup>2</sup> The bank was estopped to deny the authority of its cashier to make the agreement, where he, having great inherent powers to transact usual bank business, obtained a note, by fraud, agreeing to deliver therefor corporation stock, which he failed to do, and secured renewals without other consideration: First Nat. Bank v. Wich (Colo.), 160 Pac. 1036.

<sup>3</sup> Bank of Omega v. Wingo &c.

Shoe Co., 19 Ga. App. 177, 91 S. E. 251.

<sup>4</sup> Wallach v. Billings, 195 Ill. App. 605, 619.

<sup>5</sup> Wallach v. Billings, 195 Ill. App. 605, 619. A director was held entitled to contribution from his codirectors where he was held liable for losses sustained by the bank while holding office as director, on the ground that he failed to perform his duties as director: Wallach v. Billings, 195 Ill. App. 605, 619.

in and transferring that of the other stockholders at little more than par value, they were held liable to the stockholders for the difference between the amount paid them and what they might have received had they known the facts.<sup>6</sup>

§ 2889. **President—Manager.**—Where the president of a national bank represented that he could make call loans for the benefit of a depositor and the depositor understood that he was acting for the bank, the bank was held liable for his appropriation of the depositor's funds.<sup>7</sup>

§ 2893. **The cashier.**—Unless he has special authority, the cashier of a bank can not obligate his bank for a loan made to him individually.<sup>8</sup> The general law of agency applies between a cashier of a bank and his employer and third persons, and where one deals with a cashier individually, such person is put on notice that the cashier is not acting for the bank.<sup>9</sup>

§ 2895. **Other officers and agents—Miscellaneous.**—An agent of an investment company, which was engaged in selling the capital stock of a trust company, was an agent of both companies.<sup>10</sup> The stockholders of a national bank have the power to create a pension fund for the benefit of the officers and employés.<sup>11</sup>

<sup>6</sup> Dawson v. National Life Ins. Co., 176 Iowa 362, 157 N. W. 929, L. R. A. 1916E, 878.

<sup>7</sup> Doerstler v. First Nat. Bank, 82 Ore. 92, 161 Pac. 386.

<sup>8</sup> First Nat. Bank v. Clark Nat. Bank (W. Va.), 90 S. E. 534. See also Haines v. First Nat. Bank (Ore.), 172 Pac. 505.

<sup>9</sup> Ohio Valley Banking & Trust Co. v. Citizens Nat. Bank, 173 Ky. 640,

191 S. W. 433. See as to when bank is estopped to deny that cashier acted for it: Wallace v. First Nat. Bank (Nebr.), 167 N. W. 416.

<sup>10</sup> Crawford v. Davis (Tex. Civ. App.), 188 S. W. 436; Sweeney v. Davis (Tex. Civ. App.), 188 S. W. 438.

<sup>11</sup> Heinz v. National Bank of Commerce in St. Louis, 237 Fed. 942, 150 C. C. A. 592.

## CHAPTER LXIII

### FACTORS AND BROKERS

#### § 2900. Factors and brokers—Definition and distinction.

—One is an agent and not a broker where he is empowered to examine property and determine whether or not other property should be traded for the property to be examined and where he is not employed to bring the parties together.<sup>1</sup>

§ 2901. Authority—How conferred.<sup>2</sup>—Under statutes in effect in many of the states an oral contract to pay a commission for the sale or exchange of real estate is void.<sup>3</sup>

§ 2902. Extent of authority—Usage.—A mere appointment of one as an agent to sell property does not authorize the agent to execute a contract of sale.<sup>4</sup>

<sup>1</sup> *Huss v. Ford*, 197 Ill. App. 199. See also for distinction between factor and broker: *Turner v. Crumpton*, 21 N. Dak. 294, 130 N. W. 937, Ann. Cas. 1913C, 1015n.

<sup>2</sup> Letter from broker offering to sell stock and answer of banker agreeing to pay compensation if sale was brought about held to constitute a contract: *C. C. Jones Inv. Co. v. Lowrey*, 99 Kans. 87, 160 Pac. 999.

<sup>3</sup> *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056; *Cram v. McNeil*, 32 Cal. App. 101, 162 Pac. 140; *Paul v. Graham*, 193 Mich. 447, 160 N. W. 616; *In re Brockway's Estate*, 100 Nebr. 281, 159 N. W. 421; *Fritsch v. Hess (Utah)*, 162 Pac. 70. See also *Lowe v. Mohler*, 56 Ind. App. 593, 105 N. E. 933; *Waddle v. Smith*, 58 Ind. App. 387, 108 N. E. 537; *Pierson v. Donham*, 55 Ind. App. 636, 104 N. E. 606. An oral contract made by brokers whereby one secures the co-operation of another to sell realty, is valid, Civil Code, § 1624, subdiv. 6, applying only to contracts with owner: *Sellers v. Solway Land Co.*, 31 Cal. App. 259, 160 Pac. 175. Where an agent is authorized to sell land, it is presumed that the sale is to be

made for cash, but if the owner fixes the amounts and times of payment, the agent must make his sale in conformity therewith: *Mitchell v. Hagge (Iowa)*, 160 N. W. 287. An agent for the sale of land has no implied authority to so agree to furnish an abstract of title: *Mitchell v. Hagge (Iowa)*, 160 N. W. 287. Letters and telegrams containing real estate broker's contract constitute "some note or memorandum thereof in writing subscribed by the party to be charged therewith": *Fritsch v. Hess (Utah)*, 162 Pac. 70. A broker is not entitled to a commission from the seller for producing a purchaser unless he is employed to do so or the seller agrees to pay a commission: *Bruchsaler v. Schlegel*, 162 N. Y. S. 246. The broker was not entitled to a commission where he subsequently produced a buyer for the other property where he was employed by defendant to sell either of two properties, and sold one and received his commission: *Bruchsaler v. Schlegel*, 162 N. Y. S. 246.

<sup>4</sup> *Thompson v. Scholl*, 32 Cal. App. 4, 161 Pac. 1006.

§ 2903. **Implied and particular authority of factors.**—A factor may maintain a suit in replevin in his own name for conversion of his principal's goods.<sup>5</sup> Where the principal ratifies his factor's acts with full knowledge of his departure from instructions, he can not recover damages resulting from said acts.<sup>6</sup>

§ 2904. **Implied and particular authority of brokers.**—It is held that a contract may be implied that the owner agreed to pay the broker a commission for negotiating a sale of the owner's real estate where the real estate broker effected a sale of the owner's property to another.<sup>7</sup>

§ 2905. **Relation between principal and factor or broker—General obligations of factors and brokers to principal.**—Having shown bad faith, a broker, having informed his principal that he could get \$500 for the land and having withheld the fact that he had an offer of \$750, was precluded from any recovery on the principal's refusal to consummate the sale on learning the facts.<sup>8</sup> Where a broker attempts to serve both parties without

<sup>5</sup> *Nacogdoches Compress Co. v. Hayter* (Tex. Civ. App.), 188 S. W. 506. The consignors were not bound by estoppel by the pledges for the factors' debts accompanied by neither actual nor symbolical delivery, where the consignors of cotton to a firm of factors did not participate in an arrangement whereby the firm stored the cotton in a warehouse, taking blanket warehouse receipts which it pledged for loans in accordance with a custom of the vicinity: *Interstate Banking & Trust Co. v. Brown*, 235 Fed. 32, 148 C. C. A. 526. The Uniform Warehousing Act of Tennessee which gives the right effectively to pledge the consignor's interest, which did not formerly belong to them, will be strictly construed: *Interstate Banking & Trust Co. v. Brown*, 235 Fed. 32, 148 C. C. A. 526.

<sup>6</sup> *Louisville Tobacco Warehouse Co. v. Lee*, 172 Ky. 171, 189 S. W. 16. Where the principal has knowledge of his factor's violation of his orders and the extent of his loss, and desires to hold factor responsible, he must within reasonable time thereafter complain to factor and disaffirm his acts, so as to reasonably apprise

him that he will look to him for indemnity: *Louisville Tobacco Warehouse Co. v. Lee*, 172 Ky. 171, 189 S. W. 16. Where specific authority is not given a commission merchant, employed by another to market fruit, he has no power to employ subagents at principal's expense: *Sherwood Bros. v. Seattle Fruit & Produce Auction Co.*, 93 Wash. 544, 161 Pac. 371. And a commission merchant could not charge principal with commissions paid subagents and had to refund such commissions, though larger than commissions it received: *Sherwood Bros. v. Seattle Fruit & Produce Auction Co.*, 93 Wash. 544, 161 Pac. 371.

<sup>7</sup> *Goldstein v. Setka*, 195 Ill. App. 584.

<sup>8</sup> *Bennett v. Thompson*, 126 Ark. 61, 189 S. W. 363, L. R. A. 1917B, 919n. Where broker sells his principal's land at price in excess of that agreed on, and fraudulently appropriates the difference or permits others to do so, he becomes liable for the value of the commissions: *Craig v. Parsons*, 22 N. Mex. 293, 161 Pac. 1117; *Ausley v. Cummings*, 145 Ga. 750, 89 S. E. 1071.

disclosing the fact to his principals he is not entitled to a commission from either.<sup>9</sup>

**§ 2906. Duties and obligations of brokers and factors to principals.**—Upon receipt of a stop loss order, a broker must sell at the price fixed, if he can do so, or at whatever price it is possible to get thereafter.<sup>10</sup> A contract is valid where an owner gives a broker authority to sell the land within a certain time with the option of purchasing it himself.<sup>11</sup>

**§ 2907. Rights and remedies of broker as against principal—Compensation—Real estate brokers.**<sup>12</sup>—It has also been held that where an owner gives a broker an exclusive right to sell land, he does not thereby deprive himself of a right to sell

<sup>9</sup> Keebler v. Devine, 197 Ill. App. 353; Cichon v. Gartner, 197 Ill. App. 394.

<sup>10</sup> Policastro v. Sprague, 175 App. Div. 417, 161 N. Y. S. 912. Where the factor's failure or refusal to obey instructions results in loss to the principal, he is liable to the principal for the resulting damages: Louisville Tobacco Warehouse Co. v. Lee, 172 Ky. 171, 189 S. W. 16.

<sup>11</sup> Burt v. Stringfellow, 48 Utah 330, 159 Pac. 527. A commission merchant is bound by the rule requiring open disclosure and full accounting of an agent: Sherwood Bros. v. Seattle Fruit and Produce Auction Co., 93 Wash. 544, 161 Pac. 371.

<sup>12</sup> Where the contract appointing an agent to procure a loan contemplates that agent expend time and money to carry it out, and the agent expends time and money in its performance, it is irrevocable by principal, except on burden of responding for damages suffered by agent: Deming Inv. Co. v. Christensen (Okla.), 159 Pac. 663. The plaintiff was entitled to his commission where he obtained for defendant a contract for manufacture of cartridges, although contract was not carried out because of defendant's refusal to comply with conditions precedent: Fuller v. Bradley Contracting Co., 98 Misc. 382, 162 N. Y. S. 673. Where defendant employed plaintiff to lease her realty, agreeing to pay a commission and she refused to lease at all, and to pay commission, plaintiff, hav-

ing procured prospective lessees on acceptable terms, was entitled to recover full commission: Merwin v. Shaffner, 31 Cal. App. 374, 160 Pac. 684. Without specific agreement for such compensation a broker can not have double commission for negotiating sale, getting surrender of the contract therefor, and negotiating a new sale: Forrer v. John Davis & Co., 92 Wash. 452, 159 Pac. 696. Where the principal does not have knowledge that the agent is acting for the other party to the contract and is receiving a commission for his services from such other party and does not consent thereto, he is not liable to pay a commission: Jones v. Vecek, 197 Ill. App. 119; Huss v. Ford, 197 Ill. App. 199. A cattle broker, who effected a sale for a less sum than the list price, is entitled to recover reasonable compensation for his services: Shaller v. Johnson-McQuiddy Cattle Co. (Tex. Civ. App.), 189 S. W. 553. Where one has an undisclosed interest in the purchase of real estate he is not entitled to a commission on its sale to himself and associates: Sterling Engineering & Co. v. Miller, 164 Wis. 192, 159 N. W. 732. Although the purchaser afterward refuses to perform, an agent to procure a purchaser of land is presumed to have earned his commission when he procures a purchaser who makes a written contract of purchase: Pratt v. Irwin (Mo. App.), 189 S. W. 398. Agent held entitled to commissions if he could show

it.<sup>13</sup> The one who secured the business is entitled to the commission, though the other solicited the business first and did not abandon the quest, where two brokers competed to secure the same customer for the same principal.<sup>14</sup> It was held in a recent case in Oklahoma that a lien was created against the real estate for the agent's commission, though the contract was not recorded, where it provided that the agent should procure a loan and that the employer would mortgage and pledge certain real estate to secure the agent's commission.<sup>15</sup>

**§ 2908. Obligation of principal to factor—Lien of factor.**—Unless there is a contrary agreement the consigned goods constitute the primary fund to which the factor must look for reimbursement.<sup>16</sup>

**§ 2909. Liability of principal to third parties.**—An owner of land is not liable to a purchaser to whom the broker conveyed for the latter's fraud, where he gave it to a broker for sale and afterward conveyed to the broker on payment of the price.<sup>17</sup>

**§ 2910. Rights and remedies of factors against third parties.**—Where brokers sell bonds and retain them as security for the purchase-price and pledge them for their own debts, they

that the party he procured was ready and able to close deal before date specified by contract, or that his principal's action prevented its consummation, where he negotiated a contract for exchange of realty: *Gaut v. Dunlap* (Tex. Civ. App.), 188 S. W. 1020. The broker was not entitled to a commission where his commission depended on his closing sale within 15 days, and the abstractor could not complete abstracts, and the owner thereafter refused to sell to the prospective purchaser: *Joseph Espalla, Jr., & Co. v. Warren*, 197 Ala. 601, 73 So. 23. Compare also *Paulson v. Reeds* (N. Dak.), 167 N. W. 371; *Philips & Co. v. Newoc Co.* (Wash.), 172 Pac. 355. It was held that the broker's right to a commission was not necessarily dependent on a conveyance actually being made under a contract to pay a commission on completion of sale: *Leonard v. Kendall* (Tex. Civ. App.), 190 S. W. 786. A broker is not required to prove that proper abstracts

showing good title were tendered in a suit for commission for procuring assignments of leases, where client wrongfully refused to accept assignments: *Rawlings v. Ufer* (Okla.), 161 Pac. 183.

<sup>13</sup> *Mitchell v. Hagge* (Iowa), 160 N. W. 287.

<sup>14</sup> *Esterly-Hoppin Co. v. Burns*, 135 Minn. 1, 159 N. W. 1069.

<sup>15</sup> *Deming Inv. Co. v. Christensen* (Okla.), 159 Pac. 663.

<sup>16</sup> *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 114 N. E. 846. Where the principal consigned goods to a factor for sale he was held chargeable with expenses incurred by him in employing counsel and detectives when informed that principal was secretly removing merchandise to escape his lien: *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 114 N. E. 846.

<sup>17</sup> *Nupen v. Pearce*, 235 Fed. 497, 149 C. C. A. 43.

are guilty of conversion and the liability of the purchaser is released.<sup>18</sup>

§ 2911. **Rights and remedies of principal as to third parties.**—Where an agent who had authority to buy and resell land fraudulently concealed the actual purchase-price from his principal and, for the purpose of effectuating the fraud, had an interest conveyed to third parties, who, with the knowledge of the fraud, disposed of their interest to a purchaser for value, such third parties are liable to the principal.<sup>19</sup>

<sup>18</sup> In re Sterling's Estate, 254 Pa. 89 S. E. 1071; Craig v. Parsons, 22 155, 98 Atl. 771.

N. Mex. 293, 161 Pac. 1117.

<sup>19</sup> Ausley v. Cummings, 145 Ga. 750,



## CHAPTER LXIV

### TRAVELING SALESMEN AS AGENTS

§ 2916. Duties and powers of traveling salesmen generally—No power to receive payment.—Where a traveling salesman takes orders for future delivery, a payment made to him is not valid as against the principal. But the general rule is that an agent who has possession of goods has an implied authority to receive payment therefor when sold by him.<sup>1</sup> An agent is not authorized subsequently to collect the price in the name of the principal where he is employed to make sales on credit, and the burden is on the purchaser to show that the agent had authority to make collection.<sup>2</sup>

<sup>1</sup> *Simmons Motor Co. v. Dudley*, 196 Ill. App. 329; *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

<sup>2</sup> *Woodworth v. School Dist. No. 2, Stevens County*, 92 Wash. 456, 159 Pac. 757. The purchaser is not authorized to make payment to the agent by the fact that the latter has

possession of the bill or account for the goods: *Woodworth v. School Dist. No. 2, Stevens County*, 92 Wash. 456, 159 Pac. 757. And an agent has no implied authority to accept payment in anything but money: *United States Nat. Bank v. Shupak (Mont.)*, 172 Pac. 324.

## CHAPTER LXV

### EVIDENCE IN AGENCY CASES

§ 2925. **Agency or authority—Question of law or fact—Burden of proof.**—Recovery by plaintiff against the defendant could be predicated only on the theory either of false representations or breach of warranty of agency where defendant, in ordering a dresser from plaintiff, notified plaintiff that defendant was purchasing for a third party.<sup>1</sup> The principal is bound where an agent signed his own name as salesman if he is authorized to make sales and to sign a contract for the principal.<sup>2</sup> It was not within the apparent scope of authority of the agent of the seller as a matter of law to warrant the car, where the manufacturer of automobiles warranted them and the order from the purchaser on the seller's order blank states that the seller does not warrant the cars further than to assist in securing adjustments.<sup>3</sup>

§ 2926. **Authority of agent—How proved—Parol evidence—Seal.**—Where the agent's authority is not reduced to writing, the agent is competent to testify as to the extent thereof.<sup>4</sup>

<sup>1</sup> Pocock v. Reynolds, 162 N. Y. S. 978.

<sup>2</sup> Happ Bros. Co. v. Hunter Mfg. & Commission Co., 145 Ga. 836, 90 S. E. 61.

<sup>3</sup> Crist v. Turner, 175 App. Div. 664, 161 N. Y. S. 856. A person dealing with an agent must take notice of his authority: Toledo Scale Co. v. Bailey (W. Va.), 90 S. E. 345. The other party to the contract, seeking to hold a third party liable as an undisclosed principal, has the burden of proving the existence of the agency, where a contract is made with one in his own name and apparently on his own responsibility: Sutton v. Horner, 177 Iowa 620, 159 N. W. 222; Renick v. Brooke (Mo. App.), 190 S. W. 641; Pocock v. Reynolds, 162 N. Y. S. 978; Overton v. First Texas State Ins. Co. (Tex. Civ. App.), 189 S. W. 514; Woodworth v. School Dist. No. 2, Stevens County, 92 Wash. 456, 159 Pac. 757. But, where the other party seeks to hold the agent liable on the

contract, it is not incumbent on him to show that the agent had no authority to act for a principal, that being a matter of defense and the burden of establishing it rests on the agent: Reed v. Bronson, 196 Ill. App. 518. Where there is a conflict in evidence as to actual authority of agent, it is a question of fact for the jury and it is error to direct a verdict if the case turns on that point: Doran v. First Nat. Bank, 22 N. Mex. 236, 160 Pac. 770; Simmons Motor Co. v. Dudley, 196 Ill. App. 329; United States Tire Co. of New York v. Kirk, 97 Kans. 531, 159 Pac. 392; Herrman v. New York Edison Co., 175 App. Div. 535, 162 N. Y. S. 145; Sorenson v. Kribs, 82 Ore. 130, 161 Pac. 405; Sanders v. Elberta Fruit Co. (Tex. Civ. App.), 190 S. W. 817; Gilman Bros. v. Booth (Vt.), 99 Atl. 730; Brown v. Aitken, 90 Vt. 569, 99 Atl. 265; Woodworth v. School Dist. No. 2, Stevens County, 92 Wash. 456, 159 Pac. 757.

<sup>4</sup> Roberts v. Williams (Ala.), 73

The adverse party may show the extent of the agency, notwithstanding the alleged agent denies his authority.<sup>5</sup>

**§ 2927. Evidence of agency—Circumstantial evidence.**<sup>6</sup>—The doctrine of apparent agency does not apply in the absence of circumstances known to the party dealing with an agent which tend to show authority in the agent to make the contract.<sup>7</sup>

**§ 2928. Agency inferred from relation of parties.**<sup>8</sup>—It will not be presumed that a special agent has authority to pay his own debts with his principal's goods.<sup>9</sup>

**§ 2929. Habit and course of dealing.**—Where one negotiated a loan his agency to collect the interest and principal when

So. 502; *Buttz v. Warren Mach. Co.*, 55 Ind. App. 347, 103 N. E. 812. The alleged agent may show that he had no authority to do the act in question: *Roberts v. Williams* (Ala.), 73 So. 502.

<sup>5</sup> *Roberts v. Williams* (Ala.), 73 So. 502. The doctrine of apparent authority may be invoked by one who has been misled to his detriment, where one is held out by the alleged principal as his agent or possessing the authority assumed by him within the scope of the principal's business: *Roberts v. Williams* (Ala.), 73 So. 502. The application of the rule of ostensible agency is dependent on the conduct or words of the principal, and where he has given other persons reason to suppose they are done by his authority he will be bound by the agent's acts: *Wiley B. Allen Co. v. Wood*, 32 Cal. App. 76, 162 Pac. 121. Only such acts as are incident and necessary to the exercise of the authority expressly granted are implied as being within his authority: *First Nat. Bank v. Schirmer*, 134 Minn. 387, 159 N. W. 800. A wood boss or field manager of lumber company does not have implied authority to enter into a contract for cutting of timber which might last for twenty years and involve many thousands of dollars: *Chesom v. Richmond Cedar Works*, 172 N. Car. 32, 89 S. E. 800. The apparent authority of an agent is such

authority as the agent appears to have by reason of the actual authority which he does have: *Kissell v. Pittsburgh, Ft. W. & C. R. Co.*, 194 Mo. App. 346, 188 S. W. 1118. The direction to an attorney to fill in the name of the grantee in a deed must be executed by a power under seal: *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366.

<sup>6</sup> The fact of agency may be established by circumstantial evidence: *Renick v. Brooke* (Mo. App.), 190 S. W. 641. The circumstance that plaintiff made no inquiry, and did not ask manager if he was acting for fruit company, could not be regarded as conclusively showing want of any contract to sell to fruit company in an action for the price of tomatoes sold to a fruit company through the company's manager: *Sanders v. Elberta Fruit Co.* (Tex. Civ. App.), 190 S. W. 817.

<sup>7</sup> *Overton v. First Texas State Ins. Co.* (Tex. Civ. App.), 189 S. W. 514.

<sup>8</sup> The mortgagors are justified in paying to him, as agent, money due the principal as interest and principal of mortgages when the principal constitutes one his agent to collect rents and principal and interest of mortgages and the agent so acts for a period of time: *Potter v. Sager*, 98 Misc. 25, 161 N. Y. S. 1088.

<sup>9</sup> *Excel Furniture Co. v. Brock* (Ind. App.), 114 N. E. 701.

due may be established by the course of dealing between such person and the mortgagees.<sup>10</sup>

**§ 2930. Course of dealing—Acts of agent in other transactions.**—It was held in Illinois that the fact that an agent has express authority to collect interest on a note is not sufficient to show authority to collect the principal.<sup>11</sup>

**§ 2931. Declarations and admissions of agent.**<sup>12</sup>—Where the fact of agency is to be inferred from the principal's conduct, and there is evidence tending to show the agency, the acts and declarations of the agent are admissible.<sup>13</sup>

**§ 2933. Notice to agent as notice to principal.**<sup>14</sup>—It was held in a recent Iowa case that the principal is bound by the knowledge of the agent, even though it was acquired before the agency commenced, if he remembers it when he acts for the principal.<sup>15</sup> As already said, the agent's knowledge is imputed to the principal, it being presumed that he will acquaint the principal with his knowledge; but where the interests of the agent and his principal are hostile or the agent is trying to defraud the principal, it will not be presumed that the agent communicated his knowledge to the principal.<sup>16</sup> Knowledge acquired by a corporation's officers or agents, while not acting for the corporation,

<sup>10</sup> Hamlin v. Nace, 99 Kans. 286, 161 Pac. 655.

<sup>11</sup> Griffin v. Halbert, 196 Ill. App. 601. The collection by an agent of other securities is not sufficient to raise an implication of authority in the agent to receive payment of another debt: Griffin v. Halbert, 196 Ill. App. 601.

<sup>12</sup> The agent's authority can not be established by his acts and declaration: Baker v. Armour Fertilizer Works, 18 Ga. App. 611, 90 S. E. 171; Roberts v. Williams (Ala.), 73 So. 502; Daly v. Arkadelphia Milling Co., 126 Ark. 405, 189 S. W. 1053; Roulard v. Gray, 30 Cal. App. 757, 159 Pac. 457; Ethington v. Rigg, 173 Ky. 355, 191 S. W. 98; Renick v. Brooke (Mo. App.), 190 S. W. 641; Western Carolina Realty Co. v. Rumbough, 172 N. Car. 741, 90 S. E. 931; Woodworth v. School Dist. No. 2, 92 Wash. 456, 159 Pac. 757. Nor by letters written by one claiming to be an agent:

Kleiman v. Henry Kupfer & Co., 176 App. Div. 253, 162 N. Y. S. 1083.

<sup>13</sup> Roberts v. Williams (Ala.), 73 So. 502; Lake Grocery Co. v. Chiostri, 34 N. Dak. 386, 158 N. W. 998; Ramsay v. Harrison, 119 Va. 682, 89 S. E. 977; Studebaker Corp. of America v. Hanson, 24 Wyo. 222, 157 Pac. 582, 160 Pac. 336, Ann. Cas. 1917E, 557.

<sup>14</sup> The agent's knowledge will be imputed to principal, and where agent acts with such knowledge as to constitute a waiver if the agent were acting as principal there is a waiver by the principal: Klein v. Supreme Council of Loyal Assn., 98 Misc. 218, 163 N. Y. S. 5.

<sup>15</sup> Lundean v. Hamilton (Iowa), 159 N. W. 163.

<sup>16</sup> Taulbee v. Hargis, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A, 762. See also Home State Bank v. Hunkey (Colo.), 165 Pac. 987; Scott County Milling Co. v. Powers, 112 Miss. 798, 73 So. 792.

but while acting for themselves, is not ordinarily imputed to the corporation.<sup>17</sup>

**§ 2934. Ratification.**<sup>18</sup>—Where an act was done as the personal transaction of the agent, and was so intended by both parties to it, there can be neither express nor implied ratification by retention of benefits by the principal.<sup>19</sup> Where an agent is authorized to make contracts subject to the principal's approval, such a contract is not binding on the principal until ratified.<sup>20</sup>

**§ 2935. Revocation and termination of authority.**—Where the agency contract leaves the agent free to terminate the contract at will, it is construed as authorizing the principal to also terminate at will.<sup>21</sup>

<sup>17</sup> Roess Lumber Co. v. State Exchange Bank, 68 Fla. 324, 67 So. 188, Ann. Cas. 1916B, 327n and note.

<sup>18</sup> Ratification of an agent's unauthorized act, to be effectual, must have been made with full knowledge of all material facts: Blackwell v. Kercheval, 29 Idaho 473, 160 Pac. 741; Reeb v. Bronson, 196 Ill. App. 518; Star Piano Co. v. Brockmeyer (W. Va.), 90 S. E. 338. Where the principal accepts money collected by one not an agent he is bound by the other party's action: Potter v. Sager, 98 Misc. 25, 161 N. Y. S. 1088. The principal may ratify an unauthorized sale by an agent and such ratification may be implied from the acts or silence of the principal: T. H. Brooke & Co. v. Cunningham Bros., 19 Ga. App. 21, 90 S. E. 1037; Antrim Lumber Co. v. Oklahoma State Bank (Okla.), 162 Pac. 723. The agent's unauthorized acts must be repudiated within a reasonable time or they will be held to have been ratified: T. H. Brooke & Co. v. Cunningham Bros., 19 Ga. App. 21, 90 S. E. 1037. There is no rati-

fication, where a principal does nothing except to assert his original rights, ignoring unauthorized acts of his agent: Doran v. First Nat. Bank, 22 N. Mex. 236, 160 Pac. 770. Notwithstanding his lack of knowledge, where owner of land accepts acts of another in negotiating its sale, thereby making such person his agent, he becomes liable for false representations made by the agent: Rush v. Leavitt, 99 Kans. 498, 162 Pac. 310. Ratification of an agent's acts may be shown by circumstances: Tidewater Southern R. Co. v. Harney, 32 Cal. App. 253, 162 Pac. 664.

<sup>19</sup> Blackwell v. Kercheval, 29 Idaho 473, 160 Pac. 741.

<sup>20</sup> Toledo Scale Co. v. Bailey, 78 W. Va. 797, 90 S. E. 345.

<sup>21</sup> Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 159 N. W. 344. An agent's employment to do a particular work may be terminated at any time by the principal: Fass v. Atlantic Life Ins. Co., 105 S. Car. 107, 89 S. E. 558.

## CHAPTER LXVI

### ARBITRATION

§ 2940. **Scope.**—It is held in Washington that the statutory regulations on the subject of arbitration have entirely supplanted common-law arbitrations.<sup>1</sup>

§ 2941. **Agreements for submission—Effect and necessity.**<sup>2</sup>—No special agreement to abide an award is necessary, unless the statute expressly requires it, as an agreement to abide the result is implied from the fact of submission.<sup>3</sup> Where one party, by his wrongful conduct, makes arbitration impossible, he can not defeat recovery, though the contract provides that any disagreement as to the amount due shall be submitted to arbitration.<sup>4</sup> And, unless the provision for arbitration makes arbitration a condition precedent to a right to sue, the fact that arbitration was not had will not bar an action.<sup>5</sup>

§ 2942. **Manner and form of submission.**—If no submission be produced and no evidence of it, an award will not be given effect, as the validity of an award is primarily dependent upon a submission.<sup>6</sup> In a recent Kansas case an award was held binding though the following provisions of the code as to submission had not been complied with: that requiring any bonds given to state the time and place of the meeting of the arbitrators; that requiring the arbitrators and witnesses to be sworn; that requiring a copy of the award to be delivered without delay

<sup>1</sup> *Suksdorf v. Suksdorf*, 93 Wash. 667, 161 Pac. 465; *Dickie Mfg. Co. v. Sound Construction &c. Co.*, 92 Wash. 316, 159 Pac. 129. Contra, see: *Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631.

<sup>2</sup> There can be no valid arbitration under the code, unless the parties enter into a proper agreement: *Dickie Mfg. Co. v. Sound Construction &c. Co.*, 92 Wash. 316, 159 Pac. 129. Contract for the payment of money construed and held that a stipulation as

to arbitration was not a condition precedent to plaintiff's right to recover on the contract: *Brocklehurst &c. Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646.

<sup>3</sup> *Suksdorf v. Suksdorf*, 93 Wash. 667, 161 Pac. 465.

<sup>4</sup> *Brocklehurst &c. Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646.

<sup>5</sup> *Brocklehurst &c. Co. v. Marsch*, 225 Mass. 3, 113 N. E. 646.

<sup>6</sup> *Ball-Thrash Co. v. McCormick*, 172 N. Car. 677, 90 S. E. 916.

to each party; that requiring the fees taxed to be stated in the award.<sup>7</sup>

§ 2947. **Revocation of submission.**—Parties to an agreement for statutory arbitration do not have a right to revoke such agreement either before or after the award.<sup>8</sup>

§ 2950. **Who may be arbitrators.**—Like jurors, arbitrators are held to the highest degree of good faith and if they have a secret interest in the subject-matter being arbitrated, the award will not be binding.<sup>9</sup> If one of the parties is indebted to an arbitrator, such arbitrator will be disqualified.<sup>10</sup>

§ 2952. **Authority and power of arbitrators.**—An arbitrator is not made a judge pro tempore of the court by an agreement that a submission to arbitration shall be entered as an order of the court.<sup>11</sup>

§ 2959. **Manner of reaching decision by arbitrators—Unanimity.**<sup>12</sup>

<sup>7</sup> Hopper v. Fromm, 92 Kans. 142, 141 Pac. 175, Ann. Cas. 1916B, 807n.

<sup>8</sup> Dickie Mfg. Co. v. Sound Construction & Co., 92 Wash. 316, 159 Pac. 129. But either party to a common-law arbitration may revoke the agreement to arbitrate any time before an award is actually returned: Dickie Mfg. Co. v. Sound Construction & Engineering Co., 92 Wash. 316, 159 Pac. 129.

<sup>9</sup> Bartels v. Rudloff, 197 Ill. App. 8; Brocklehurst & Co. v. Marsch, 225 Mass. 3, 113 N. E. 646.

<sup>10</sup> Bartels v. Rudloff, 197 Ill. App. 8.

<sup>11</sup> Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 162 Pac. 631.

<sup>12</sup> Where the submission expressly provides that a majority of the arbitrators may make an award, an award concurred in by a majority is valid: Toledo Steamship Co. v. Zenith Transp. Co., 184 Fed. 391, 106 C. C. A. 501; Walker v. Melcher, 14 Mass. 148; Atterbury v. Columbia College, 123 N. Y. S. 25, 66 Misc. 273; Turner

v. New York Cent. & Co., 168 App. Div. 359, 153 N. Y. S. 281; Slaughter v. Crisman (Tex. Civ. App.), 152 S. W. 205; Massie v. Campbellford & Co., 26 Ont. W. Rep. 421. It is held that, although the agreement for arbitration does not specifically provide for a decision by a majority, such authority may be inferred from a provision for the selection of a special arbitrator, who is authorized to act only upon a disagreement of those originally appointed: Grand Rapids & I. R. Co. v. Jaqua (Ind. App.), 115 N. E. 73, 76; Kile v. Chapin, 9 Ind. 150; Fisk v. Vermillion, 70 Kans. 348, 78 Pac. 811. If, after submission, a part of the arbitrators refuse to proceed, the majority may act: Grand Rapids & I. R. Co. v. Jaqua (Ind. App.), 115 N. E. 73, 76, 77. If an award made by a majority is authorized either by the agreement for submission or by statute, such award executed by a majority is sufficient: Hopper v. Fromm, 92 Kans. 142, 141 Pac. 175, Ann. Cas. 1916B, 807n.

## CHAPTER LXVII

### AWARD

§ 2963. **Form and requisites of award—Publication.**—Since the parties in effect agree to submit their case to the arbitrators both on the law and on the facts, the awards made by arbitrators partake of the character of the findings and judgments of courts.<sup>1</sup>

§ 2966. **Conformity of award with submission.**—An award which is not as broad as the submission is void.<sup>2</sup> After judgment on the award has been rendered mere defects in the proceedings for a statutory award will not avail to have it set aside. There must have been some such radical departure from the prescribed proceedings as to show want of jurisdiction.<sup>3</sup>

§ 2968. **Finality of award.**—The superior court's judgment confirming the award after it had properly acquired jurisdiction was final and could be vacated only in the manner and on the grounds prescribed by law for the vacation of judgments.<sup>4</sup> Awards made by arbitrators can not be corrected because of errors of law.<sup>5</sup>

§ 2973. **Recommitment of award.**—It was held that where three arbitrators had returned an award, they had exhausted their authority, and that two of them could not thereafter make a supplemental award.<sup>6</sup>

§ 2975. **Construction of award.**<sup>7</sup>

<sup>1</sup> Baker v. Pierce, 197 Ill. App. 158.

<sup>2</sup> Baker v. Pierce, 197 Ill. App. 158.

<sup>3</sup> Suksdorf v. Suksdorf, 93 Wash. 667, 161 Pac. 465. Where arbitrators were appointed to determine compensation due the owner of land for construction of poles and lines by street railway, they did not exceed their authority by considering future damages and right of defendant to pass over land at any place: Thornburgh v. West Penn R. Co., 254 Pa. 246, 98 Atl. 894.

<sup>4</sup> Suksdorf v. Suksdorf, 93 Wash. 667, 161 Pac. 465.

<sup>5</sup> Baker v. Pierce, 197 Ill. App. 158.

<sup>6</sup> Hightower v. Georgia Fertilizer &c. Co., 145 Ga. 780, 89 S. E. 827.

<sup>7</sup> For the purpose of giving effect to arbitration proceedings every reasonable intendment will be indulged in its favor: Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 162 Pac. 631.



§ 2979. **Impeachment of award—Grounds.**<sup>8</sup>—An award under the statute will not be vitiated by mistakes of arbitrators, consisting of erroneous conclusions of the facts.<sup>9</sup> An arbitrator is not an agent or representative of the party appointing him, and he is bound to exercise judicial impartiality and not be influenced in favor of the party appointing him merely because of such appointment.<sup>10</sup>

§ 2980. **Impeachment of award—Method.**<sup>11</sup>—Under the California code an appeal does not lie directly from a judgment on an award, but only from decisions on a motion to vacate.<sup>12</sup> Under the Washington statute it is held that an independent suit will not lie to set aside an award for unfairness, prejudice, improper conduct of the arbitrator or other reasons, and that the only remedy is by exceptions.<sup>13</sup>

§ 2982. **Enforcement of award.**<sup>14</sup>—It is held in Washington that the only remedy is an action at law on the award, where the defeated party to a common-law arbitration refuses to pay it.<sup>15</sup>

<sup>8</sup> Unless error appears on the face of the award, where the submission to arbitration is unqualified, a court will not set aside the award on the ground that it is contrary to the law or evidence: *Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631. But a failure to make an award in accordance with the law will avoid it, where arbitrators are required by the terms of submission to determine a matter according to law: *Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631. An award may be attacked on the ground that one of the parties to such arbitration was indebted to such arbitrators: *Bartels v. Rudloff*, 197 Ill. App. 8.

<sup>9</sup> *Johnson v. Wells*, 72 Fla. 290, 73 So. 188.

<sup>10</sup> *Fass v. Liverpool, London & Globe Fire Ins. Co.*, 105 S. Car. 364, 89 S. E. 1040.

<sup>11</sup> The jurisdiction of the court on appeal over a controversy submitted to arbitration under the Washington statute is limited to review of the proceedings upon exception: *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129. Where a bill was filed to set aside award because of the fraud

of one of the parties in making false entries in copartnership books and submitting them to the arbitrators, such bill was held not demurrable for want of equity: *Johnson v. Wells*, 72 Fla. 290, 73 So. 188.

<sup>12</sup> *Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631. If the proceedings are regular there is no appeal from the finding and award of arbitrators: *Baker v. Pierce*, 197 Ill. App. 158. Unless so provided by the terms of submission, the sufficiency of evidence to sustain award will not be reviewed on appeal: *Utah Const. Co. v. Western Pac. R. Co.* (Cal.), 162 Pac. 631.

<sup>13</sup> *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129.

<sup>14</sup> An action to set aside a judgment can be maintained only if there was in fact no statutory arbitration or if it was void where no exceptions are taken to a statutory award: *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129.

<sup>15</sup> *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129.

## CHAPTER LXVIII

### BAILMENTS—DEFINITION AND GENERAL PRINCIPLES

#### § 2985. Definition of bailment.<sup>1</sup>

§ 2988. **Classification of bailments.**—Where property is loaned for a temporary use, the lender still has possession but parts with the custody for the time being, and the lending constitutes one of the forms of bailment.<sup>2</sup>

§ 2992. **Delivery and acceptance of the property.**—Delivery to a carrier is sufficient.<sup>3</sup>

§ 2993. **Possession of the property.**—A business agent, who had taken possession of his principal's bonds where she acquired them and held them at the time of her death, became a bailee in behalf of her executor.<sup>4</sup>

#### § 2994. The bailor's title and rights.<sup>5</sup>

§ 2997. **Bailee's right to use property—Conversion.**—If a bailee who has borrowed property for a temporary use embezzles or fraudulently converts it to his own use, the title of the owner is not divested.<sup>6</sup>

<sup>1</sup> A milling company was held not to be a bailee as to the lender by borrowing money to buy grain and agreeing to keep the grain in its elevator as collateral for loans, there being no segregation of particular property: *National Bank of Commerce v. Flanagan Mills & Elevator Co.*, 268 Mo. 547, 188 S. W. 117.

<sup>2</sup> *McClemy v. Brown* (Del. Super.), 99 Atl. 48.

<sup>3</sup> *Outcault Advertising Co. v. Brooks*, 82 Ore. 434, 158 Pac. 517, 161 Pac. 961.

<sup>4</sup> *People v. Smith*, 219 N. Y. 222, 114 N. E. 50.

<sup>5</sup> A purchaser, although he purchased for value and without notice, from a lessee or bailee for hire, in possession by virtue of an ordinary lease, can not withhold the property

from the lessor or true owner: *Guest Piano Co. v. Ricker*, 274 Ill. 448, 113 N. E. 717.

<sup>6</sup> *McClemy v. Brown* (Del. Super.), 99 Atl. 48. There was a conversion whether the securities were held as a bailment or a pledge where a firm, holding corporate securities to cover advances, sold them without notice to the depositor: *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. S. 681. Where the bailee of a launch returned it to the bailor after notice of sale to plaintiff, and judgment sustaining bill of sale, he was guilty of conversion, though without knowledge of judgment in action against the bailee adjudging title in the present plaintiff: *Bonner v. McDonald*, 162 N. Y. S. 324.

§ 3000. **Care to be taken of the property bailed.**<sup>7</sup>—Regardless of negligence on his part, unlawful tortious possession renders the bailee liable for injury or loss.<sup>8</sup> The owner of a moving picture show, who had rented a piano and hired the owner to play it, is a bailee for hire of the piano and is bound to exercise ordinary care for its preservation.<sup>9</sup>

§ 3006. **Form of action and burden of proof.**—In a Georgia case it was held that where the evidence showed the bailment was for hire the burden of proof was on the bailee to show, by a preponderance of the evidence, that it had exercised ordinary care.<sup>10</sup>

<sup>7</sup> A bailee for hire must use at least ordinary care for the preservation of the article bailed under Rev. Laws 1916, § 1109: *Kesterson & Telle v. Marlow* (Okla.), 161 Pac. 186. Where after the goods were made into garments and before he was in default as to returning them, they were stolen without fault on his part, one with whom the goods had been left for the purpose of such manufacture was entitled to recover for his services: *Weiss v. Rothblatt*, 161 N. Y. S. 69.

<sup>8</sup> *Penter v. Ritter* (Mo.), 190 S. W. 29.

<sup>9</sup> *Kesterson & Telle v. Marlow* (Okla.), 161 Pac. 186. The bailee was liable only for gross negligence where he had voluntarily sold refreshments on excursion of workingman's club down a river as he was a gratuitous bailee of the money received: *Workingman's Club v. Boguszewski*, 161 N. Y. S. 382.

<sup>10</sup> *Bashinski v. J. H. & W. W. Williams Co.*, 18 Ga. App. 646, 90 S. E. 223. Where an action is brought to recover money from gratuitous bailee,

burden of establishing his negligence in its loss rests with plaintiff, and this burden is discharged, and a prima facie case made when it is shown that defendant failed to turn over the property upon demand: *Workingman's Club v. Boguszewski*, 161 N. Y. S. 382. When gratuitous bailee shows that, without his fault, property has been lost, stolen, or destroyed, he is relieved from imputation of negligence from failure to turn it over on demand, and burden shifts to plaintiff to show that the loss, theft, or destruction occurred from defendant's negligence: *Workingman's Club v. Boguszewski*, 161 N. Y. S. 382. It is held that the fact that the burden rests on gratuitous bailee, when it is shown that he failed to deliver property upon demand, to show his freedom from negligence, does not militate against rule imposing burden of proof upon plaintiff upon whole case: *Workingman's Club v. Boguszewski*, 161 N. Y. S. 382.

## CHAPTER LXIX

### GRATUITOUS BAILMENTS

§§ 3010, 3011, 3012. **For benefit of bailor—Defined and distinguished—Mandate—Deposits.**—One who receives earrings in the lobby of a crowded theater and at the request of the owner undertakes to appraise them without reward is a gratuitous bailee.<sup>1</sup> One who voluntarily sold refreshments on an excursion of a club was held a gratuitous bailee of the money received, and liable only for gross negligence.<sup>2</sup>

§§ 3015, 3016. **Bailee's duty—Care to be used by bailee.**—It is held in a recent case that the duty of a gratuitous bailee is to act in good faith, using such care in the undertaking as he uses toward his own property of a similar character under like circumstances.<sup>3</sup> The rule is generally stated in substantially the following terms: Where the bailment is for the sole benefit of the bailor the bailee is bound only to exercise good faith and a slight degree of care and diligence, and is responsible only for gross negligence or bad faith.<sup>4</sup>

§§ 3022, 3026. **For benefit of bailee—Care demanded of bailee.**—Where the bailment is for the sole benefit of the bailee he is bound to exercise great care and diligence and is responsible, in a proper case, for slight neglect.<sup>5</sup>

<sup>1</sup> Rubin v. Huhn (Mass.), 118 N. E. 290. See generally as to what are gratuitous bailments for benefit of bailor and their kinds: Copelin v. Berlin Dye Works & Co., 168 Cal. 715, 144 Pac. 961, L. R. A. 1915C, 712n; Tomko v. Sharp (N. J.), 94 Atl. 793; State's Prison v. Hoffman, 159 N. Car. 564, 76 S. E. 3; Bradford-Kennedy Co. v. Buchanan, 91 Wash. 539, 158 Pac. 76.

<sup>2</sup> Workingmen's Club v. Boguszewski, 161 N. Y. S. 382.

<sup>3</sup> Rubin v. Huhn (Mass.), 118 N. E. 290.

<sup>4</sup> St. Louis & C. R. Co. v. Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A.

(N. S.) 634n; Davis v. National Lumber Co., 22 Cal. App. 111, 133 Pac. 509; M. Kenny Transfer Co. v. Mayer Bros. Co., 170 Ill. App. 607; Kierce's Admr. v. Farmer's Bank, 174 Ky. 22, 191 S. W. 644; Adler v. Planter's Hotel Co. (Mo. App.), 181 S. W. 1062; Yates v. Ley (Va.), 92 S. E. 837. See also Cadwell v. Peninsular State Bank (Mich.), 162 N. W. 89. The care is to be measured by the nature of the article bailed: Rid-enour v. Woodward, 132 Tenn. 620, 179 S. W. 148.

<sup>5</sup> Carr v. Evans, 189 Mo. App. 282, 176 S. W. 298.

## CHAPTER LXX

### PLEDGES

§ 3030. **What is a pledge.**—It is held that there may be an equitable pledge of property, and bills of sale of property, the seller retaining possession as collateral security against indorsements by the person to whom they are given, create a lien in equity, which may be enforced against the original pledgor and his heirs, legal representatives, and assignees, purchasers and incumbrancers with notice.<sup>1</sup>

§ 3032. **Essentials of the relation.**<sup>2</sup>—It was held that there was no pledge where a milling company borrowed money to buy grain and agreed to keep the grain in its elevator as collateral for the loans the grain not to be segregated.<sup>3</sup>

§ 3036. **Delivery in pledges.**<sup>4</sup>

§ 3037. **Constructive delivery.**—As between the parties, a pledge contract is binding though the pledgor retains possession, and all who claim under the pledgor are bound, except purchasers for value without notice.<sup>5</sup>

<sup>1</sup> Davis v. Billings, 254 Pa. 574, 99 Atl. 163. The construction most favorable to the pledgor should be adopted where two constructions as respects the extent of a pledge are equally available: Citizens' Nat. Bank v. Rombauer, 194 Mo. App. 690, 189 S. W. 651.

<sup>2</sup> There must be a contract to constitute a pledge, but it is not essential that the contract be express; it may be implied: Citizens' Nat. Bank v. Rombauer, 194 Mo. App. 690, 189 S. W. 651. See also as to essentials of a pledge: In re Evans, 238 Fed. 543, 151 C. C. A. 479; Eckert v. Searcy, 114 Miss. 150, 74 So. 818; Brunswick-Balke & Co. v. Higgins (Mont.), 165 Pac. 1109; First Nat. Bank v. Hinkle (Okla.), 162 Pac. 1092.

<sup>3</sup> National Bank of Commerce v.

Flanagan Mills & Elevator Co., 268 Mo. 547, 188 S. W. 117.

<sup>4</sup> Either the pledgee or some one for him must take possession to constitute a pledge; the owner can not make pledge by delivery to himself: National Bank of Commerce v. Flanagan Mills & Elevator Co., 268 Mo. 547, 188 S. W. 117; Peoples' Bank of Buffalo v. Ætna Indemnity Co., 91 Conn. 57, 98 Atl. 353. Where there is no delivery, either actual or symbolical, the general rule is that a pledge is invalid against execution levying creditors of the pledgor: Interstate Banking & Trust Co. v. Brown, 235 Fed. 32, 148 C. C. A. 526. See also First Nat. Bank v. Campbell (Tex. Civ. App.), 193 S. W. 197.

<sup>5</sup> Davis v. Billings, 254 Pa. 574, 99 Atl. 163.

§ 3039. **Delivery of negotiable instruments in pledge.**—It is held that where notes are taken by the cashier of a bank as collateral, it is not necessary that he give notice to the payee of his acceptance of them as collateral in order to hold them as such, further than the keeping of the notes would indicate that they were thus accepted.<sup>6</sup>

§ 3042. **Pledgee's right to possession of pledge.**—Without possession, the pledgee can have no privilege as such against third persons, possession of the chattel being the essence of a pledge.<sup>7</sup>

§ 3043. **Pledgee's right to use—Expenses and profits.**—The collateral must be used for the exact purposes of the pledge and no other, and it can not be used in discharging a note signed by all three members of the firm, where two members of the firm executed a note and pledged collateral for that or any other of their obligations.<sup>8</sup> The maker authorized the note's use as collateral for any loan of any amount for any period of time obtainable within the time the note was to run, where he executed it for the purpose of pledging it as collateral but omitted the date of execution and the name of the payee.<sup>9</sup>

§ 3045. **Pledgee's right to assign pledge.**—Where commercial paper is pledged, the pledgee may assign it and the assignor holds it in the same capacity as the original pledgee, and when due, may sue to collect it.<sup>10</sup>

§ 3046. **Conversion by pledgee.**<sup>11</sup>

§ 3048. **Pledgor's right to assign subject to pledge.**—The pawner has the general property in the goods pledged, but the

<sup>6</sup> Central Bank v. Lyda (Mo. App.), 191 S. W. 245.

<sup>7</sup> New Albany Nat. Bank v. Brown (Ind. App.), 114 N. E. 486. As against the pledgor or attacking creditors, the delivery of the pledged property to the pledgor for a mere temporary or special purpose does not defeat the pledge, but does against bona fide purchasers from the pledgor: New Albany Nat. Bank v. Brown (Ind. App.), 114 N. E. 486.

<sup>8</sup> In re Evans, 235 Fed. 635.

<sup>9</sup> Hubbard v. First State Bank (Ind. App.), 114 N. E. 642.

<sup>10</sup> Pease v. Fitzgerald, 31 Cal. App. 727, 161 Pac. 506. Compare Manor v. Dunfield, 33 Cal. App. 557, 165 Pac. 983; Eckert v. Searcy, 114 Miss. 150, 74 So. 818.

<sup>11</sup> There is a wrongful act amounting to a conversion, where a defendant refuses to surrender pledged property upon proper demand and a proper tender of the amount due: Schwartz v. Chicago State Pawnors Soc., 195 Ill. App. 93. See also Park v. Swann (Ga. App.), 92 S. E. 398.

pawnee has a special property for the purposes of the bailment.<sup>12</sup>

§ 3050. **Pledgor's right to redeem.**—Unless an accounting is necessary to determine the amount necessary for redemption, a suit in equity can not ordinarily be maintained to redeem pledged securities.<sup>13</sup>

§ 3051. **Termination of the relation of the pledgor.**—In the absence of a showing that the parties had an understanding to the contrary, where a new note is given in renewal of a matured note secured by a pledge, the pledge remains as security for the new note.<sup>14</sup>

§ 3054. **Pledgee's remedies upon pledgor's default.**<sup>15</sup>—If the pledge is converted by the debtor, the pledgee may recover the value of the pledge, at least to the extent of his debt, as he has a special property in the pledge.<sup>16</sup>

§ 3056. **Common-law sale of the pledge.**<sup>17</sup>

<sup>12</sup> *Norris v. Manget-Brannon Co.*, 18 Ga. App. 639, 90 S. E. 79.

<sup>13</sup> *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. S. 681. It is an essential element of a pledge, however, that the pledgor should have the right to redeem: *Eckert v. Searcy*, 114 Miss. 150, 74 So. 818; *First Nat. Bank v. Hinkle (Okla.)*, 162 Pac. 1092.

<sup>14</sup> *New Albany Nat. Bank v. Brown (Ind. App.)*, 114 N. E. 486. The pledgee's lien upon the pledged property was extinguished where a pledgor of property tendered the amount due to redeem the pledge and demanded the property, and its retention of the same thereafter was unauthorized and unlawful, and amounted to a conversion, and such result was not affected by the pledgor's failure to keep his tender good: *New Albany Nat. Bank v. Brown (Ind. App.)*, 114 N. E. 486. The pledgee could not subsequently avoid the effect of the pledgor's tender on the ground that one day's interest should have been included, and the tender was therefore insufficient where a pledgor of property offered to pay the amount of money loaned with interest, and the pledgee refused such

amount, claiming that interest for another month was due: *Schwartz v. Chicago State Pawnors Soc.*, 195 Ill. App. 93.

<sup>15</sup> Suit in equity, under Rev. Laws, ch. 152, § 1, to foreclose is available, though the pledge contains a power of sale, in view of Rev. Laws, ch. 198, § 10, providing that two preceding sections relating to sale of pledge at public auction shall not limit right of pledgee to avail himself of other rights, and that such a sale would not be reasonably unimpeachable: *American Trust Co. v. Holtsinger*, 226 Mass. 30, 114 N. E. 956. The bank could at any time accept payment, or bring action thereon, if requested by maker and indorsers while it held note, of which it was payee, as collateral: *Brosemer v. Brosemer*, 99 Misc. 101, 162 N. Y. S. 1067.

<sup>16</sup> *Hardcastle v. National Clothing Co.*, 137 Tenn. 64, 191 S. W. 524.

<sup>17</sup> The payee retained a general interest in the note for the balance above the amount paid, where the payee pledged a note to secure a smaller amount and the maker subsequently paid the pledgee and got possession of the note: *Hunt v. Glassell*, 30 Cal. App. 676, 159 Pac. 227.

§ 3060. Further of pledgee's rights in case of default.—Where pledge is a chose in action, or corporate stock.<sup>18</sup>—Situs of right under certificate to compel performance of its obligations was held with the pledgee, where certificate of deposit of mortgage bonds was pledged as collateral for a note.<sup>19</sup> A holder for value, before maturity by indorsement from the payee may apply the collateral to payment of other obligations owing by the maker to him, as well as to the payment of the note, and need not surrender the collateral on tender of the amount of the note at maturity so long as other obligations of the maker to him remain unsatisfied, where the note recites that collateral has been deposited as security for its payment or for payment of any other liability "to the holder hereof now due or to become due or that may be hereafter contracted," and authorizes a sale of the property pledged on nonpayment of any of such liabilities, and application of the proceeds to the payment of "either or all of said above-mentioned liabilities as the holder hereof shall deem proper."<sup>20</sup>

§ 3062. Rights of purchaser at pledgee's sale.—A purchaser of notes at an execution sale can not raise the objection that the pledgee had no right to sell them.<sup>21</sup> It has been held that a bona fide purchaser of securities obtains good title to them where they are sold without notice to the pledgor.<sup>22</sup> But under the code in California where notes are sold under execution after maturity, the purchaser takes them subject to the defense that they were obtained by fraud.<sup>23</sup>

<sup>18</sup> It is held that a maker of a note put up as collateral may set up any defense good as against original payee, and if it be sustained, holder can not recover more than is due on the debt for which the note was given as collateral: *Clydesdale Bank v. Blackshear Mfg. Co.*, 18 Ga. App. 515, 89 S. E. 1051; *Central Bank v. Lyda* (Mo. App.), 191 S. W. 245.

<sup>19</sup> *American Trust Co. v. Holt-singer*, 226 Mass. 30, 114 N. E. 956.

<sup>20</sup> *Oleon v. Rosenbloom*, 247 Pa. St. 250, 93 Atl. 473, L. R. A. 1915F, 968n, Ann. Cas. 1916B, 233n.

<sup>21</sup> *Gault v. Wiens*, 32 Cal. App. 1, 161 Pac. 996.

<sup>22</sup> *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. S. 681.

<sup>23</sup> *Gault v. Wiens*, 32 Cal. App. 1, 161 Pac. 996.



## CHAPTER LXXI

### CONTRACTS OF HIRING

§ 3073. **Bailor's duties and rights—Warranty and disclosure of defects.**—A bailor for hire impliedly warrants that the thing hired is free from secret faults rendering it unfit for the purpose for which it is intended and contemplated by the contract.<sup>1</sup> Where a locomotive was hired under a contract requiring it to be in first-class operative condition for construction service, there was held to be a breach of warranty when the locomotive was not suitable for such work although mechanically in first-class operating condition.<sup>2</sup>

§ 3075. **Care demanded of hirer—Expenses.**—The duty of the hirer is to exercise ordinary care in the use and preservation of the property.<sup>3</sup> An undertaking by one hiring a mule to return it in as good condition as when he received it has been held not to make him liable for its accidental destruction by fire without negligence on his part.<sup>4</sup> One who hires a team by the day to remain in charge of the bailor's driver is not liable for injury to the team caused by the driver's negligence.<sup>5</sup>

§ 3076. **Bailee's misuse and conversion.**—The bailee's use of the property in a different way or to a greater extent than authorized ordinarily amounts to conversion for which trover will lie.<sup>6</sup>

<sup>1</sup>Williamson v. Phillipoff, 66 Fla. 549, 64 So. 269, 52 L. R. A. (N. S.) 412n; Cooper v. Layson Bros., 14 Ga. App. 134, 80 S. E. 666. But see Garrettsen & Co. v. Rinehart & Co., 75 W. Va. 700, 84 S. E. 929.

<sup>2</sup>Southern Iron & Co. v. Smith, 257 Mo. 226, 165 S. W. 804.

<sup>3</sup>Sawyer v. Wilkinson, 166 N. Car. 497, 82 S. E. 840, L. R. A. 1915B, 295n. See also Kesterson v. Marlow (Okla.), 161 Pac. 186; Thompson v. Seattle Park Co., 94 Wash. 539, 162 Pac. 994. As to burden of showing negligence, see: Stone v. Case, 34 Okla. 5, 124 Pac. 960, 43 L. R. A. (N. S.) 1168n.

<sup>4</sup>Sawyer v. Wilkinson, 166 N. Car. 497, 82 S. E. 840, L. R. A. 1915B, 295n. See also Wells v. Crawford, 23 Colo. App. 103, 127 Pac. 914; Cleayer v. Drake & Co. Constr. Co. (Tex. Civ. App.), 195 S. W. 206. Under a lease of a steam shovel requiring its return in good condition, ordinary wear and tear excepted, the lessee can not recover the expense of repairing it: Pacific Bridge Co. v. Riverside Rock Co., 70 Ore. 337, 141 Pac. 751.

<sup>5</sup>Foy-Proctor Co. v. Marshall, 169 Ky. 377, 183 S. W. 940, L. R. A. 1916F, 1036n.

<sup>6</sup>Burns v. Cline (Ala. App.), 77

§ 3077. **Third persons and sub-users.**—The purchaser from a lessee or bailee for hire under an ordinary lease can not withhold the property from the true owner even though he purchased for value and without notice.<sup>7</sup> Where the bailor furnishes the driver of a horse or automobile which he lets for hire, and the bailee exercises no control or supervision, except to direct the driver where to go, the bailor is liable for injuries caused by the driver's negligence.<sup>8</sup>

§ 3079. **Special classes of hiring the use of a thing—Property for exhibition.**<sup>9</sup>

§ 3081. **Termination of contract—Redelivery and recompense.**—The hiring of a chattel at the rate of a certain sum per month has been held to be for an indefinite period terminable at will and not a hiring by the month.<sup>10</sup>

So. 429. See also *Kennedy v. R. & L. Co.*, 224 Mass. 207, 112 N. E. 872. As to liability of infant bailee see note in *Ann. Cas.* 1913A, 975, 976.

<sup>7</sup> *Guest Piano Co. v. Ricker*, 274 Ill. 448, 113 N. E. 717. See also *McClemy v. Brown* (Del.), 99 Atl. 48; *Norris v. Boston Music Co.*, 129 Minn. 198, 151 N. W. 971, L. R. A. 1917B, 615.

<sup>8</sup> *Forbes v. Reinman*, 112 Ark. 417, 166 S. W. 563, 51 L. R. A. (N. S.) 1164n; *Meyers v. Tri-State Automobile Co.*, 121 Minn. 68, 140 N. W. 184, 44 L. R. A. (N. S.) 113n.

<sup>9</sup> *Colburn v. Washington State Art*

*Assn.*, 80 Wash. 662, 141 Pac. 1153, L. R. A. 1915A, 594n.

<sup>10</sup> *Karp v. Perry*, 164 N. Y. S. 685; *Sawyer v. Wilkinson*, 166 N. Car. 497, 82 S. E. 840, L. R. A. 1915B, 295n; *Missouri River Transp. Co. v. Minneapolis & C. R. Co.*, 34 S. Dak. 1, 147 N. W. 82. As to obligation to redeliver, see generally: *Doyle v. Peerless Motor Car Co.*, 226 Mass. 561, 116 N. E. 257. Bailee is liable only pro tanto for hire where property is destroyed without his fault after use for part of the time of bailment: *Williamson v. Philipoff*, 66 Fla. 549, 64 So. 269, 52 L. R. A. (N. S.) 412n.

## CHAPTER LXXII

### CONTRACTS OF HIRING SERVICES ABOUT A THING

§ 3088. **Diligence and skill required of bailee.**—One engaged in a certain business or occupation impliedly holds himself out as possessing ordinary skill therein, and if injury is caused to property entrusted to him for repair and in his exclusive possession by failure to exercise such skill, he is responsible therefor.<sup>1</sup> The bailee of an article left with him for repair must use reasonable care to safely keep it.<sup>2</sup> Where the owner of a horse or mule leaves it with a blacksmith to be shod, the blacksmith is under a duty to exercise ordinary care for its safety and to employ skill in the work.<sup>3</sup> A motor car company having possession of an automobile to make repairs where the details should be agreed on by the owner and such company, was held guilty of conversion and liable therefor to the owner for delivering it to the owner's daughter.<sup>4</sup> One with whom goods were left to be made into garments was held entitled to recover for services although they were stolen, where he was without fault.<sup>5</sup> But a cleaner receiving clothes to be cleaned is not bound to search the clothes for articles carelessly left in the pockets.<sup>6</sup>

§ 3091. **Compensation where work is completed but not according to contract.**—Where the article bailed is destroyed without negligence on the part of the bailee, he can not recover for work and labor performed thereon, but the loss of the article falls on the bailor.<sup>7</sup>

§ 3092. **Bailee's lien for amount of compensation.**<sup>8</sup>—A

<sup>1</sup> Claringbold v. Newark Garage &c. Co. (Del.), 97 Atl. 386.

<sup>2</sup> Grant v. Miller, 159 N. Y. S. 829.

<sup>3</sup> Miller v. Ben H. Fletcher Co., 142 Ga. 668, 83 S. E. 521.

<sup>4</sup> Doyle v. Peerless Motor Car Co., 226 Mass. 561, 116 N. E. 257; Beacon Motor Car Co. v. Shadman, 226 Mass. 570, 116 N. E. 559.

<sup>5</sup> Weiss v. Rothblatt, 161 N. Y. S. 69. See also Meyer v. Metropolitan Knitting Mills, 154 N. Y. S. 209.

<sup>6</sup> Copelin v. Berlin Dye Works &c. Co., 168 Cal. 715, 144 Pac. 961, L. R. A. 1915C, 712n.

<sup>7</sup> Hanes v. Shapiro, 168 N. Car. 24, 84 S. E. 33.

<sup>8</sup> Davenport v. Grundy Motor Sales Co., 28 Cal. App. 409, 152 Pac. 932 (California statute); Fox v. Smith, 143 Ga. 547, 85 S. E. 856 (Georgia statute); Olson v. Orr, 94 Kans. 38, 145 Pac. 900 (Kansas statute); Broom & Son v. Dale & Sims, 109

bailee making, altering or repairing personal property has a common-law lien thereon for the services so rendered.<sup>9</sup> But such lien, at least as against third persons, is dependent upon actual and continued possession.<sup>10</sup> In Michigan the lien of the owner of a garage for repairs on an automobile is assignable in connection with the assignment of the claim for repairs and delivery of possession, but he has no lien on the automobile for the price of a tire although he has a common-law lien on the tire itself.<sup>11</sup>

Miss. 52, 67 So. 659 (Mississippi statute); Kansas City Automobile School Co. v. Holcker-Elberg Mfg. Co. (Mo. App.), 182 S. W. 759; Milgrim v. Coon, 93 Misc. 78, 156 N. Y. S. 544.

<sup>9</sup> Mortgage Securities Co. v. Pfaffmann (Cal.), 169 Pac. 1033. A bailee has no lien where the bailment is gratuitous: G. A. Crancer Co. v. Combs, 95 Nebr. 403, 145 N. W. 863.

<sup>10</sup> Alexander v. Mobile Auto Co. (Ala.), 76 So. 944; Weber Implement

&c. Co. v. Pearson (Ark.), 200 S. W. 273; Rehm v. Viall, 185 Ill. App. 425 (as against third persons); Shaw v. Webb, 131 Tenn. 173, 174 S. W. 273, L. R. A. 1915D, 1141n, Ann. Cas. 1916A, 626n (as against third persons). See also Ford Motor Co. v. Freeman (Tex. Civ. App.), 168 S. W. 80.

<sup>11</sup> Gardner v. Le Fevre, 180 Mich. 219, 146 N. W. 653, Ann. Cas. 1916A, 618n.

## CHAPTER LXVIII

### CONTRACTS OF HIRING—THE CUSTODY OF A THING

§ 3096. **Warehouseman defined—Public and private warehouseman.**—In order to constitute a person a warehouseman it must be shown that he is engaged in the business of receiving and storing goods, wares and merchandise for others for hire.<sup>1</sup> It has been held, however, that by holding out as operating a warehouse one may render himself liable to another who acts upon such representation.<sup>2</sup> By statute in certain states certain classes of warehouses are made public warehouses.<sup>3</sup>

§ 3097. **Delivery and acceptance—Commencement of liability.**—A warehouse company may be liable for damage to goods before they are stored if it has consented to take charge of them.<sup>4</sup>

§ 3098. **Warehouse receipts—Their effect and assignability.**—A majority of the states have enacted uniform warehouse receipts acts and other special laws dealing with the form of warehouse receipts, their effect and assignability. It is generally held that where a statute prescribes a particular form a receipt will not be invalid because it fails in some minor detail to conform to the statute.<sup>5</sup> Warehouse receipts are negotiable

<sup>1</sup> Where a milling company borrowed money and agreed to keep grain in its elevator as collateral but there was no segregation of particular property, it was not doing a warehouse business: *National Bank of Commerce v. Flanagan Mills & Elevator Co.*, 268 Mo. 547, 188 S. W. 117.

<sup>2</sup> *Weigel v. W. C. Reebe & Bros. Co.*, 192 Ill. App. 283.

<sup>3</sup> *Interstate Banking & Trust Co. v. Brown*, 235 Fed. 32, 148 C. C. A. 526; *Security Nat. Bank of Dallas v. Farmers' Educational & Co-Op. Warehouse Co.* (Tex. Civ. App.), 185 S. W. 649.

<sup>4</sup> *Wainwright v. Massachusetts Storage Warehouse Co.*, 219 Mass. 247, 106 N. E. 1001.

<sup>5</sup> The failure of a warehouse re-

ceipt to state the rate of storage charge as provided by the Uniform Warehouse Receipts Act, is held not to render it non-negotiable: *Manufacturers' Mercantile Co. v. Monarch Refrigerating Co.*, 266 Ill. 584, 107 N. E. 885. An instrument labeled "negotiable warehouse receipt" and setting out the name of the depositor and providing for delivery of the goods upon return of receipt properly indorsed shows that the goods are to be delivered on order of depositor: *Arbuthnot-Latham Co. v. Richheimer & Co.*, 139 La. 797, 72 So. 251. It is held a receipt not conforming to the Uniform Warehouse Receipts Act which was stamped "negotiable" and so issued, is a negotiable receipt: *Kloch Produce Co. v. Diamond Ice*

and assignable by indorsement.<sup>6</sup> The transfer of nonnegotiable warehouse receipts by the bailor as between the parties operates as a symbolic delivery of the goods and carries the title and constructive possession to the transferee.<sup>7</sup>

**§ 3100. Duties and liabilities of warehouseman.**—The relationship between the holder of a storage receipt and a warehouseman is that of bailment,<sup>8</sup> and such contracts are governed by the same rule as are other contracts.<sup>9</sup> A warehouseman is bound in the use of property to keep within the terms of the bailment and it is no defense that a change in use is not injurious to the interests of the bailor.<sup>10</sup> Where goods are stored for no definite time and a simple receipt given which does not state the time for redelivery the obligation of the bailee is to use ordinary care to keep the goods and redeliver them to the bailor upon seasonable demand.<sup>11</sup> In the absence of contract the liability of a warehouseman must be determined by common-law principles,<sup>12</sup> and he is not liable for damage to property stored unless it was caused by his negligence.<sup>13</sup> He owes the duty to exercise ordinary care to prevent damage or injury to goods entrusted to him.<sup>14</sup> But where goods were damaged by an unprecedented flood a warehouseman is not liable.<sup>15</sup> A warehouseman is not bound to store the goods in a fireproof building, but if he represents that the warehouse is fireproof and in reliance on such representation an owner stores his goods, or fails to take out in-

& Storage Co., 90 Wash. 67, 155 Pac. 414.

<sup>6</sup> Frontier Milling & Elevator Co. v. Roy White Co-op. Mercantile Co., 25 Idaho 478, 138 Pac. 825.

<sup>7</sup> Dammann v. Schibbsby Implement Co., 30 N. Dak. 15, 151 N. W. 985; Morris v. Burrows (Tex. Civ. App.), 180 S. W. 1108.

<sup>8</sup> Frontier Milling & Elev. Co. v. Roy White Co-op. Mercantile Co., 25 Idaho 478, 138 Pac. 825; State v. Daniels (N. Dak.), 159 N. W. 17.

<sup>9</sup> Morris v. Burrows (Tex. Civ. App.), 180 S. W. 1108.

<sup>10</sup> Morris v. Burrows (Tex. Civ. App.), 180 S. W. 1108.

<sup>11</sup> Morris v. Burrows (Tex. Civ. App.), 180 S. W. 1108.

<sup>12</sup> Hecht v. Boston Wharf Co., 220 Mass. 397, 107 N. E. 990, L. R. A. 1915D, 725n, Ann. Cas. 1917A, 445n.

<sup>13</sup> Bethea-Starr Packing & Shipping

Co. v. Mayben, 192 Ala. 542, 68 So. 814. Where a warehouseman leaves goods exposed to the weather and the dust from the street he is liable in damages: Colonial Sugar Co. v. Railway Terminal & Warehouse Co., 191 Ill. App. 40.

<sup>14</sup> Hecht v. Boston Wharf Co., 220 Mass. 397, 107 N. E. 990, L. R. A. 1915D, 725n, Ann. Cas. 1917A, 445n; State v. Cochrane, 264 Mo. 581, 175 S. W. 599.

<sup>15</sup> Benedict Warehouse & Transfer Co. v. McKannon Piano Co. (Colo.), 161 Pac. 145. A warehouseman was not negligent in failing to anticipate that waters from an unprecedented rain would flood the basement, or in failing to have a large force of men on hand to remove them when such danger became apparent: Murray v. J. F. Hayes, Inc., 151 N. Y. S. 1.

surance, the law will imply a contract for storage in a fireproof building.<sup>16</sup> That the representations were made in good faith and after the contract of bailment is no defense.<sup>17</sup> But the bailor may waive his right to have his goods remain in a particular warehouse.<sup>18</sup> It is the duty of a warehouseman receiving goods to return them on demand or account for their loss, and if lost by fire to show the circumstances of such fire.<sup>19</sup> But where a bailor disposes of goods deposited with a warehouseman he can no longer recover damages for injury caused by the warehouseman's negligence.<sup>20</sup>

**§ 3101. Further of the warehousing relationship—Warehouseman's lien.**—A warehouseman has such interest in goods bailed as will support an action in his own name for its wrongful conversion.<sup>21</sup> It is generally provided by statute that a warehouseman has a special lien and may retain possession of property stored until payment of the storage charges.<sup>22</sup>

**§ 3102. Redelivery—Presumption in case of injury to goods—Termination of relation.**—Under the early decisions it was held as the general rule that the bailee could discharge his liability to the bailor only by returning the identical thing which he received or its proceeds under the terms of the bailment; but it is now recognized that a bailee may show that the property has been taken from him by process of law, or by a person having a paramount title, or perhaps excuse his default in some other way.<sup>23</sup> The holder of a warehouse receipt for stored grain may not require the restoration of the identical grain, but only grain of the same amount, kind and quality.<sup>24</sup> Where a warehouseman receives goods for hire it is his duty to redeliver them on demand or show some legal excuse for not returning them.<sup>25</sup>

<sup>16</sup> *Kirstein v. Bekins Van & Storage Co.*, 27 Cal. App. 586, 150 Pac. 999 (evidence held to show express contract).

<sup>17</sup> *Bethea-Starr Packing & Shipping Co. v. Mayben*, 192 Ala. 542, 68 So. 814.

<sup>18</sup> *Mandl v. McKegney*, 162 N. Y. S. 900.

<sup>19</sup> *Prescott v. Southern R. Co.*, 99 S. Car. 422, 83 S. E. 781.

<sup>20</sup> *Hecht v. Boston Wharf Co.*, 220

Mass. 397, 107 N. E. 990, L. R. A. 1915D, 725n, Ann. Cas. 1917A, 445n.

<sup>21</sup> *S. H. Pope & Co. v. Union Warehouse Co.*, 195 Ala. 309, 70 So. 159.

<sup>22</sup> *Penick v. Almand* (Ga. App.), 87 S. E. 845.

<sup>23</sup> *Street v. Farmers' Elevator Co.*, 33 S. Dak. 601, 146 N. W. 1077.

<sup>24</sup> *National Bank of Wheaton, Kans. v. Elkins*, 37 S. Dak. 479, 159 N. W. 60.

<sup>25</sup> *Prescott v. Southern R. Co.*, 99 S. Car. 422, 83 S. E. 781.

§ 3104. **Factors and commission merchants.**—Where one party agrees to consign to another certain goods and the other agrees to make advancements and charge a commission for the sale such contract is sufficient to create the relation of principal and factor.<sup>26</sup> It is the duty of a factor to follow his principal's instruction and he is liable to his principal for any loss occasioned by a breach of such duty.<sup>27</sup> But where a factor departs from his instructions and his principal with full knowledge of the circumstances ratifies or approves the factor's act he is estopped to claim damages.<sup>28</sup> A commission merchant employed by another to market fruit, in the absence of special authority, has no power to employ subagents at the expense of his principal.<sup>29</sup> Where there is no agreement to the contrary before advancements are made a factor having made advancements may, over his principal's objections, sell enough of the goods to make himself whole.<sup>30</sup> The property or the proceeds thereof held by a factor are in the nature of trust funds and may be followed, whenever they can be identified, into the hands of any one but a bona fide purchaser for value.<sup>31</sup> Thus where property is consigned to a factor for sale and the consignee wrongfully transfers it to liquidate his own debt, the consignor may recover the property from the transferee.<sup>32</sup>

§ 3105. **Safe-deposit companies.**—To some extent a safe deposit company occupies the relation of bailee as respects the property placed in its rented boxes.<sup>33</sup> And it has been held that where a corporation engaged in renting safe-deposit boxes rents such box to a party the relation of bailor and bailee is created and the corporation is bound to exercise ordinary care over the property entrusted to it.<sup>34</sup>

<sup>26</sup> *Koshland v. Weber*, 23 Wyo. 241, 148 Pac. 369; 152 Pac. 167.

<sup>27</sup> *Louisville Tobacco Warehouse Co. v. Lee*, 172 Ky. 171, 189 S. W. 16. But one who instructed its factor to sell eggs for it at a certain price could not recover damages for a sale at a less price, where the price ever since the sale had been even less than that obtained: *Loeb v. Johnson-Salkeld Co.*, 152 N. Y. S. 1046.

<sup>28</sup> *Louisville Tobacco Warehouse Co. v. Lee*, 172 Ky. 171, 189 S. W. 16.

<sup>29</sup> *Sherwood Bros. v. Seattle Fruit*

& Produce Auction Co., 93 Wash. 544, 161 Pac. 371.

<sup>30</sup> *Wm. D. Cleveland & Sons v. Jamison* (Tex. Civ. App.), 182 S. W. 1175.

<sup>31</sup> *C. M. Keys Commission Co. v. Beatty*, 42 Okla. 721, 142 Pac. 1102; *Cone v. United Fruit Growers' Assn.*, 171 N. Car. 530, 88 S. E. 860.

<sup>32</sup> *Norris v. Boston Music Co.*, 129 Minn. 198, 151 N. W. 971.

<sup>33</sup> *Moller v. Lincoln Safe Deposit Co.*, 174 App. Div. 458, 161 N. Y. S. 171.

<sup>34</sup> *Shoeman v. Temple Safety Deposit Vaults*, 189 Ill. App. 316.



§ 3107. **Other bailments for custody—Agisters and livery stable keepers.**—The delivery of a horse or vehicle to a livery stable keeper for keeping for hire creates a mutual benefit bailment and the bailee is liable for injury or loss resulting from the failure to take ordinary care of the property.<sup>35</sup> It is held that where an animal was afflicted with disease when received the livery stable keeper is not liable for loss in the absence of negligence.<sup>36</sup> One in whose custody an automobile is left for repairs is a bailee for hire and is required to exercise reasonable care to protect the property from being lost or damaged.<sup>37</sup>

<sup>35</sup> *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801; *Belt R. & Stockyard Co. v. Plummer*, 57 Ind. App. 292, 107 N. E. 17; *Belt R. & Co. v. McClain*, 58 Ind. App. 171, 106 N. E. 742; *Attaway v. Schmidt & Madigan Grocery Co.* (Tex. Civ. App.), 188 S. W. 1010.

<sup>36</sup> *Wood v. Clary*, 143 Ga. 495, 85 S. E. 694.

<sup>37</sup> *Stevens v. Stewart-Warner Speedometer Corp.*, 223 Mass. 44, 111 N. E. 771; *Tacoma Auto Livery Co. v. Union Motor Car Co.*, 87 Wash. 102, 151 Pac. 243.

## CHAPTER LXXIV

### INNKEEPERS AND THE POST OFFICE

§§ 3113, 3114. **Guest must receive accommodations—Innkeeper's duty to receive all comers.**—At common law an innkeeper is bound to receive and serve all persons properly applying for accommodations unless he has some reasonable ground for refusing.<sup>1</sup> But he is not required to serve a guest who has refused to pay a lawful charge for extra service.<sup>2</sup>

§ 3115. **Innkeeper's liability for goods of guest.**—An innkeeper has been held not liable for destruction of a guest's property by accidental fire where there was no negligence on the part of the innkeeper.<sup>3</sup> But there is conflict among the authorities upon the question as to whether an innkeeper is liable only for failure to exercise ordinary care.<sup>4</sup> The fact that a patron hung up his overcoat near a lunch counter, where signs gave notice that the keeper was not responsible for the property of patrons, and that the overcoat disappeared while he was eating, has been held not to establish negligence on the part of such keeper.<sup>5</sup>

§ 3116. **For what goods innkeeper is liable.**—Under some statutes an innkeeper is not liable for theft by an unknown person of jewelry or other valuable property of that character where he provides a safe in which it is required to be deposited and the guest fails to have it so deposited.<sup>6</sup> An innkeeper is not

<sup>1</sup> *Le Fevre v. Crossan* (Del.), 84 Atl. 128; *Van Sant v. Kowalewski* (Del.), 90 Atl. 421; note in 52 L. R. A. (N. S.) 740.

<sup>2</sup> *Morningstar v. Lafayette Hotel Co.*, 211 N. Y. 465, 105 N. E. 656, 52 L. R. A. (N. S.) 740n.

<sup>3</sup> *Treichlinger v. French Lick Springs Hotel Co.* (Mo. App.), 192 S. W. 101.

<sup>4</sup> *Wagner v. Congress Square Hotel Co.*, 115 Maine 190, 98 Atl. 660; *Parker v. Dixon*, 132 Minn. 367, 157 N. W. 583, L. R. A. 1916E, 534n, Ann. Cas. 1918A, 540; note in 45 L. R. A. (N. S.) 31.

<sup>5</sup> *Schleef v. Foodcraft Co.*, 165 N. Y. S. 209. See also *Gilson v. Pennsylvania R. Co.*, 86 N. J. L. 446, 92 Atl. 59.

<sup>6</sup> *Jones v. Savannah Hotel Co.*, 141 Ga. 530, 81 S. E. 874, 51 L. R. A. (N. S.) 1168n. But compare *Blake v. De Jonghe Hotel &c. Co.*, 260 Ill. 348, 103 N. E. 225, Ann. Cas. 1914D, 365n; *Weadcock v. Swart*, 163 Mich. 602, 128 N. W. 734, Ann. Cas. 1912A, 959n. As to liability for commercial travelers' samples, see note in 35 L. R. A. (N. S.) 350; *Abercrombie v. Edwards* (Okla.), 161 Pac. 1084.

liable as such for the safe-keeping of baggage or other property of one who is not a guest but is merely permitted to make free use of the facilities or conveniences of the hotel in writing letters, passing the time, or the like.<sup>7</sup> It has also been held that the relation of innkeeper and guest terminates when the guest pays his bill and leaves the hotel, and that the innkeeper then becomes merely a gratuitous bailee as to baggage left by the guest for his own convenience.<sup>8</sup>

**§ 3119. Innkeeper's lien.<sup>9</sup>**

**§ 3120. Termination of relation.<sup>10</sup>**

<sup>7</sup> *Baker v. Bailey*, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085n; *Parker v. Dixon*, 132 Minn. 367, 157 N. W. 583, L. R. A. 1916E, 534n, Ann. Cas. 1918A, 540; *Hirsh v. Anderson Hotel Co.*, 58 Pa. Super. Ct. 387.

<sup>8</sup> *Carol v. Kenney*, 139 La. 541, 71 So. 798, L. R. A. 1916F, 234n. See also *Portman v. Griffin* (1913), 29

Times L. R. 225. But compare *Kaplan v. Titus*, 140 App. Div. 416, 125 N. Y. S. 397.

<sup>9</sup> *Kieffer v. Keough* (Tex. Civ. App.), 188 S. W. 44.

<sup>10</sup> *Carol v. Kenney*, 139 La. 541, 71 So. 798, L. R. A. 1916F, 234n; *Kaplan v. Titus*, 140 App. Div. 416, 125 N. Y. S. 397; *Portman v. Griffin* (1913), 29 Times L. R. 225.

## CHAPTER LXXV

### CARRIERS OF GOODS—SUBJECT DEFINED AND DISTINGUISHED

§ 3126. **Common carrier defined.**<sup>1</sup>—It is held that cartmen and truckmen are common carriers where they carry goods for hire for the public generally and as a common employment.<sup>2</sup> The nature and character of the carriage and not the words of its contract, determine whether a company engaged in the business of carriage is a common or private carrier.<sup>3</sup>

§ 3127. **Private carriers.**<sup>4</sup>—A common carrier as to some kinds of carriage may be only a private carrier as to others, as, for instance, where it undertakes merely as a matter of accommodation or by special engagement in the particular case, to carry or transport something which is not in the line of its regular business and not such as it is under any legal duty to transport in the absence of such special undertaking.<sup>5</sup>

<sup>1</sup> It is not contemplated that carriage by a railroad different from that usually undertaken or required shall be treated as common carriage under Burns' Rev. Stat. 1914, § 5271, declaring railroad companies common carriers: *Vandalia R. Co. v. Stevens*, (Ind. App.), 114 N. E. 1001.

<sup>2</sup> *Hinchliffe v. Wenig Teaming Co.*, 274 Ill. 417, 113 N. E. 707; *Heuman v. M. H. Powers Co.*, 175 App. Div. 627, 162 N. Y. S. 590. A jitney line is a common carrier where it contracted to carry passengers between a ferry landing and a designated locality: *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 Pac. 467. See also generally as to jitney busses as common carriers and their regulation: *Nolan v. Riechman*, 225 Fed. 812;

*Memphis St. R. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C, 1045, 1051n; *Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, Ann. Cas. 1917C, 1056, 1060n.

<sup>3</sup> *Vandalia R. Co. v. Stevens* (Ind. App.), 114 N. E. 1001.

<sup>4</sup> Like bailees for hire, a private carrier of goods is liable only for loss or damage resulting from his failure to exercise ordinary care: *Hinchliffe v. Wenig Teaming Co.*, 274 Ill. 417, 113 N. E. 707.

<sup>5</sup> *Santa Fe &c. R. Co. v. Grant Bros. Const. Co.*, 13 Ariz. 186, 108 Pac. 467; *Cleveland &c. R. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710 (and it may contract against liability for its own negligence in such a case).

## CHAPTER LXXVI

### CREATION OF RELATION OF COMMON CARRIER, AND BEGINNING OF LIABILITY

§ 3140. **Duty to receive goods offered.**—A common carrier is under no obligation to accept merchandise for transportation, the carrying of which would violate an ordinance of the city of its destination or a statute of a state through which it passes or to which it is destined.<sup>1</sup>

§ 3141. **Time of delivery to carrier.**—The liability as a common carrier begins, not when the receipt or bill of lading is executed, but when the goods are actually delivered for transportation.<sup>2</sup>

§ 3146. **Completion of delivery and acceptance by carrier.**<sup>3</sup>—The liability of a common carrier does not depend on whether a bill of lading has been issued, but whether there has been a complete delivery of the goods for the purpose of transportation, unless there is a statutory rule or express agreement to the contrary.<sup>4</sup>

<sup>1</sup> Knight v. Georgia Southwestern & G. R. Co., 18 Ga. App. 539, 90 S. E. 81; Chicago v. Chicago & N. W. R. Co., 275 Ill. 30, 113 N. E. 849, L. R. A. 1917C, 238n.

<sup>2</sup> Blackwell v. Oregon Short Line R. Co., 82 Ore. 303, 161 Pac. 565.

<sup>3</sup> The duties and obligations of a

common carrier, with respect to transportation of property, attach when it is delivered to and accepted by the carrier; Knapp v. Minneapolis, St. P. & C. R. Co., 34 N. Dak. 466, 159 N. W. 81.

<sup>4</sup> Knapp v. Minneapolis, St. P. & C. R. Co., 34 N. Dak. 466, 159 N. W. 81.

## CHAPTER LXXVII

### BILLS OF LADING

§ 3155. **What a bill of lading is.**<sup>1</sup>—The presumption is that all oral negotiations, terms or conditions upon which goods are received are merged in a bill of lading, where one is issued.<sup>2</sup>

§ 3156. **Dual capacity of bill of lading as receipt and contract.**<sup>3</sup>

§ 3157. **Authority to give bill of lading.**<sup>4</sup>—It is held that a local freight agent does not have authority to bind his company by a contract to transport goods from places situated at a distance from the station.<sup>5</sup> But a traveling fast-freight solicit-

<sup>1</sup> A bill of lading is not essential to a contract of carriage though it is the usual evidence of a contract of shipment with a common carrier by rail, and such carrier is usually required to issue one on demand: *Davis v. Norfolk & S. R.*, 172 N. Car. 209, 90 S. E. 123. See also *John Vitucci Co. v. Canadian Pac. R. Co.*, 238 Fed. 1005 (contract for transportation of goods may be oral). A bill of lading is an instrument in writing, signed by a carrier or its agent, describing the freight for the purpose of identification, under Rev. Laws 1910, § 828: *Chicago & C. R. Co. v. Cleveland (Okla.)*, 160 Pac. 328. Where a uniform bill of lading was prepared by shipper and signed by carrier, forming part of freight specifications and tariff schedules filed by carrier with Interstate Commerce Commission, and was in force at time of shipment, it determined rights and obligations of parties: *Bers v. Erie R. Co.*, 176 App. Div. 241, 163 N. Y. S. 114. Though the Carmack Amendment, Act June 29, 1906, to Interstate Commerce Act, § 20, requires carrier receiving interstate shipment, to issue bill of lading in evidence of such contract, a carrier is not relieved from liability on contract of shipment en-

tered into without bill of lading: *Davis v. Norfolk & C. R.*, 172 N. Car. 209, 90 S. E. 123.

<sup>2</sup> *Prescott & C. R. Co. v. Davis*, 126 Ark. 366, 191 S. W. 210. Where an express company issues a receipt for interstate shipment, setting out terms of shipment on acceptance, it constitutes contract binding consignor by reasonable stipulations: *Lynch v. Southern Express Co.*, 18 Ga. App. 761, 90 S. E. 655.

<sup>3</sup> A bill of lading serves in the dual capacity of a receipt and a contract: *Knapp v. Minneapolis & C. R. Co.*, 34 N. Dak. 466, 159 N. W. 81. See also *Central R. R. of N. J. v. Berry*, 99 Misc. 560, 165 N. Y. S. 1041.

<sup>4</sup> Unless the goods were actually received, there can be no contract to carry and deliver goods, and carrier's agent has no authority to issue bill of lading unless he has actually received the goods, and can not bind carrier, even as to innocent holder of bill of lading: *Prescott & C. R. Co. v. Davis*, 126 Ark. 366, 191 S. W. 210; *Commercial Nat. Bank v. Seaboard Air Line Ry. (N. Car.)*, 95 S. E. 777.

<sup>5</sup> *Knapp v. Minneapolis & C. R. Co.*, 34 N. Dak. 466, 159 N. W. 81; *Strommer v. Chicago & C. R. Co.*, 38 S. Dak. 368, 161 N. W. 346.

ing agent is a general agent with power, it seems, even to bind the company to furnish cars at points off its lines.<sup>6</sup>

**§ 3158. Operation of bill of lading as receipt.<sup>7</sup>**

**§ 3160. Bill of lading as a contract.<sup>8</sup>**—Where demurrage charges were entered on the face of a bill of lading introduced in evidence by the shipper, the shipper was estopped to deny the correctness of the charges.<sup>9</sup>

**§ 3163. Transfer of title to goods by transfer of bill of lading.<sup>10</sup>**—A bank which owned a bill of lading had a right to the property covered by the bill as against an attachment creditor.<sup>11</sup>

**§ 3164. Bill of lading as evidence of title.**—In some respects a bill of lading is negotiable, and goods in the possession of the carrier may be transferred by the transfer of the bill.<sup>12</sup>

**§ 3165. Bill of lading with draft attached.<sup>13</sup>**—Where a draft is attached to a bill of lading to secure its payment and the

<sup>6</sup> *Kissell v. Pittsburgh & C. R. Co.*, 194 Mo. App. 346, 188 S. W. 1118. Where the carrier is not required by law to furnish cars at a point off its lines and on those of connecting carrier, but did so furnish them, it ratified its agent's acts and is bound by the contract: *Kissell v. Pittsburgh, Ft. W. & C. R. Co.*, 194 Mo. App. 346, 188 S. W. 1118.

<sup>7</sup> While a bill of lading or other receipt is not ordinarily essential to a complete delivery of goods for transportation, when one is duly issued it is competent evidence of delivery to the carrier for shipment: *Knapp v. Minneapolis & C. R. Co.*, 34 N. Dak. 466, 159 N. W. 81. But compare *Orunsten v. New York Cent. R. Co.*, 179 App. Div. 465, 165 N. Y. S. 996.

<sup>8</sup> Negotiable bills of lading are contracts for the carriage of property and are construed according to their terms: *Prescott & C. R. Co. v. Davis*, 126 Ark. 366, 191 S. W. 210. The bill of lading which is required to be issued by a carrier of interstate commerce by Carmack amendment to the Hepburn Act is the contract between shipper and carrier: *Aradalou v. New York & C. R. Co.*, 225 Mass. 235, 114 N. E. 297.

<sup>9</sup> *Powell v. Seaboard Air Line R.*, 19 Ga. App. 91, 90 S. E. 980.

<sup>10</sup> Though the bills of lading were not indorsed, the intention of the parties being to effect a transfer, there was a legal transfer of the cotton, where bills of lading to shipper's order for cotton were transferred to a bank, which had a lien on the cotton: *New York Cent. & C. R. Co. v. Bank of Holly Springs*, 236 Fed. 562. Under the Missouri Code bills of lading are transferable without indorsement for value and such transfer carries property in the goods covered: *Kinsolving v. State Saving & Trust Co.* (Mo. App.), 190 S. W. 379.

<sup>11</sup> *Commercial Bank of Port Huron v. Elliott*, 92 Wash. 357, 159 Pac. 377. As to where one is not a bona fide purchaser, see *Richlands Brick Corp. v. Hurst Hardware Co.* (W. Va.), 92 S. E. 685.

<sup>12</sup> *New York Cent. & C. R. Co. v. Bank of Holly Springs*, 236 Fed. 562.

<sup>13</sup> A purchaser of peas, with notice of the bank's rights, who takes the peas and pays the draft, can not, after so doing, attach the fund in the bank as the property of the grower, for damages for an alleged breach of contract of sale by the grower

bill is transferred for value, the property described in the bill is also transferred.<sup>14</sup>

where a grower of peas borrows money from a bank to be used in the production of his crop, and subsequently assigns to the bank a particular quantity of peas under an agreement by which he delivered to the bank a bill of lading in the name of the bank for the peas in question with a draft attached to the bill of lading payable to the bank, which is to apply the proceeds of the draft to the debt: *Sturgeon Bay Bank v. McLaughlin*, 63 Pa. Super. Ct. 588. The bank had paramount title where a shipper, having delivered to a bank genuine bill of lading with draft attached, forged a bill of lading which he transferred to a third person: *New York Cent. &c. R. Co. v. Bank of Holly Springs*, 236 Fed. 562. It is the

duty of a carrier, issuing a bill of lading for products for which it is the general custom for shippers to draw drafts with bill of lading attached, to use ordinary care as to the quantity and description of the product, under Rev. Laws 1910, §§ 828, 829, 830: *Chicago &c. R. Co. v. Cleveland (Okla.)*, 160 Pac. 328.

<sup>14</sup> *Sturgeon Bay Bank v. McLaughlin*, 63 Pa. Super. Ct. 588. See generally where draft is attached to bill of lading: *Downing Co. v. Pearson Banking Co.* (Ga. App.), 92 S. E. 968 (forged bill of lading); *Frank Adam Co. v. Orpheum Theatre Co.*, 195 Mo. App. 413, 193 S. W. 908; *West Texas Nat. Bank v. Wichita Mill &c. Co.* (Tex. Civ. App.), 194 S. W. 835.



## CHAPTER LXXVIII

### DUTIES AND LIABILITIES OF CARRIER

§ 3171. **In general of duties implied in carrier's contract.**—Notwithstanding an emergency, if a carrier receives goods and does not notify the shipper of a possible delay, it is bound to transport them within a reasonable time, and this is true even though the shipper has knowledge of the condition.<sup>1</sup>

§ 3172. **Duty to furnish sufficient accommodations.**—Where it is the custom of a railroad company to carry lumber requiring a forty-foot car, or the company holds itself out as a carrier of such lumber, it is bound to furnish the necessary cars.<sup>2</sup>

§ 3173. **Duty to furnish suitable accommodations.**—Such a carrier must also furnish cars suitable for the particular kind of freight shipped, considering the nature of the shipment and the season of the year.<sup>3</sup>

§ 3175. **Duty to show no preference.**<sup>4</sup>—The idea of equality is prominent in legislation as to receiving and transporting

<sup>1</sup> Florida East Coast R. Co. v. Peters, 72 Fla. 311, 73 So. 151; Warren Land Co. v. Chicago & C. R. Co., 195 Ill. App. 157. The carrier is obliged to use reasonable care and diligence in the transportation of goods, and to move them without unreasonable delay: Smith & Hoyt v. Bangor & A. R. Co., 115 Maine 223, 98 Atl. 737. A carrier is bound to observe its contract and the provisions of the law and the law imposes a duty to transport and deliver to consignee within reasonable time: Florida East Coast R. Co. v. Peters, 72 Fla. 311, 73 So. 151. Though the bill of lading contained no agreement to deliver wax beans in time for particular market, carrier was bound to deliver them within a reasonable time and liable for loss to shipper from fall in market price or damage to them, or from combination of such causes: Stevens v. Northern Cent. R. Co., 129 Md. 215, 98 Atl. 551.

<sup>2</sup> Wadley Southern R. Co. v. Kent & Downs, 145 Ga. 689, 89 S. E. 765.

Railroad company is bound to furnish sufficient cars within a reasonable time to transport usual and ordinary quantity of freight, which may be offered or expected: Wadley Southern R. Co. v. Kent, 145 Ga. 689, 89 S. E. 765. See also Illinois Cent. R. Co. v. River & C. Coal & C. Co., 150 Ky. 489, 150 S. W. 641, Am. & Eng. Ann. Cas. 1914C, 1255n, and compare Rowland v. Saline River R. Co. (Ark.), 177 S. W. 896.

<sup>3</sup> Smith v. Bangor & C. R. Co., 115 Maine 223, 98 Atl. 737. See also Louisville & C. R. Co. v. Tate, 19 Ga. App. 507, 91 S. E. 883; Levy v. Nevada & C. R., 81 Ore. 673, 160 Pac. 808, L. R. A. 1917B, 564; note in L. R. A. 1917C, 510.

<sup>4</sup> An electric traction company has been held entitled to the lower rate granted to manufacturers who ship their product outbound over the railroads on that portion of the coal which it used in generating electricity supplied by it to such manufacturers: Vandalia R. Co. v. Public Service

freight and carriers are not permitted to so exercise their charter rights as to benefit one individual to the detriment of another.<sup>5</sup>

**§ 3182. Care of goods in emergencies.**—The carrier is required to use reasonable diligence to save the shipment or prevent further loss where a shipment is caught in a flood of so unusual a character as to constitute an act of God.<sup>6</sup>

**§ 3183. Carrier's liability for loss.**<sup>7</sup>—A carrier of perishable freight, however, does not insure that it will be delivered at its destination in an undamaged condition.<sup>8</sup>

**§ 3185. Extent of carrier's liability.**—It has been held that where the carrier was guilty of no negligence other than delay, it is not liable for the destruction of property in its charge by an act of God not foreseen in time to be guarded against.<sup>9</sup> But the carrier is liable where goods are injured through the joint influence of the carrier's negligence and an act of God.<sup>10</sup>

Commission (Ind.), 114 N. E. 412. An agreement by the railroad and the plaintiff that the shipment should be treated as a carload lot was invalid under statute prohibiting carriers from discriminating, where railroad issued two bills of lading for plaintiff's machinery and furniture, and goods were not shipped as one carload lot: *Byrd v. Atlantic Coast Line R. Co.*, 106 S. Car. 1, 90 S. E. 181. A railroad and depot company may lawfully permit some hackmen or carriers of baggage to enter its grounds or station for the purpose of soliciting patronage, while it excludes others: *Skaggs v. Kansas City Terminal R. Co.*, 233 Fed. 827.

<sup>5</sup> *Quannah & C. R. Co. v. Moore* (Tex. Civ. App.), 189 S. W. 322. See generally under statutes and acts of congress: *Penna. R. Co. v. Olivit Bros.*, 243 U. S. 574, 37 Sup. Ct. 468, 61 L. ed. 908; *Atchison & C. R. Co. v. F. K. Stannard & Co.*, 99 Kans. 720, 162 Pac. 1176, L. R. A. 1917C, 1124n; *Foster Lumber Co. v. Atchison & C. R. Co.*, 270 Mo. 629, 194 S. W. 281.

<sup>6</sup> *Chicago & C. R. Co. v. Collins Produce Co.*, 235 Fed. 857, 149 C. C. A. 169.

<sup>7</sup> For loss or damage not resulting from the act of God or the public en-

emy, common carriers of goods are liable, as insurers: *Hinchliffe v. Wenig Teaming Co.*, 274 Ill. 417, 113 N. E. 707. See also *Atlantic Coast Line R. Co. v. Enterprise Cotton Oil Co.* (Ala.), 74 So. 232. Only such damages may be recovered as were contemplated or might reasonably be supposed to have been contemplated in an action for delay: *Florida East Coast R. Co. v. Peters*, 72 Fla. 311, 73 So. 151.

<sup>8</sup> *Geo. B. Higgins & Co. v. Chicago & C. R. Co.*, 135 Minn. 402, 161 N. W. 145, L. R. A. 1917C, 507n; *Fish v. Seaboard & C. R.*, 98 Misc. 662, 163 N. Y. S. 439.

<sup>9</sup> *Northwestern Consol. Milling Co. v. Chicago & C. R. Co.*, 135 Minn. 363, 160 N. W. 1028. See also *Seaboard Air Line R. Co. v. Mullin*, 70 Fla. 450, 70 So. 467, L. R. A. 1916D, 982. Ann. Cas. 1918A, 576. But compare *Harris v. Norfolk & C. R. Co.* (N. Car.), 91 S. E. 710, and see generally the notes in L. R. A. 1917E, 1011, and in L. R. A. 1916D, 988 (as to effect of prior delay or deviation).

<sup>10</sup> *Chicago & C. R. Co. v. Collins Produce Co.*, 235 Fed. 857, 149 C. C. A. 169.

§ 3189. **Burden of proof.**<sup>11</sup>—Where goods are shipped over the lines of two carriers and loss results, in an action against the initial carrier it is unnecessary for the shipper to show on which line the negligence occurred.<sup>12</sup> A shipper has the burden of showing that the carrier's negligence contributed to the loss claimed where a carrier shows that the property was destroyed by the act of God.<sup>13</sup>

§ 3190. **What may be act of public enemy.**—A common carrier will not be relieved of all liability in a district by the mere declaration of martial law therein.<sup>14</sup>

§ 3192. **Loss by act of shipper.**—In an action for damages to a shipment of strawberries, the mere fact that the shipper had knowledge of defects in the refrigerator car in which they were shipped and the probable effect of shipping in such car, would not necessitate a verdict for the carrier. The carrier would further have to show that another car could have been procured which would have materially avoided loss.<sup>15</sup> The carrier is not, in general, however, responsible for loss occasioned by the shipper's act, whether it is an act of negligence, misadventure, or misfortune.<sup>16</sup>

§ 3195. **Liability for delay.**—A common carrier, as already shown, is under a legal duty to transport goods and deliver without unreasonable delay goods or live stock carried by it, and

<sup>11</sup> The burden was on plaintiff to show the defendant was negligent in an action against a carrier for negligence in placing a car of interstate freight in its charge as warehouseman, where it was liable to be destroyed by flood: *Chalmers v. New York Cent. R. Co.*, 175 App. Div. 239, 161 N. Y. S. 577. The shipper is not ordinarily bound to show that the goods were lost through any act of the carrier in an action against a carrier for loss of goods: *Chicago & C. R. Co. v. Collins Produce Co.*, 235 Fed. 857, 149 C. C. A. 169; *St. Louis & C. R. Co. v. Cunningham Commission Co.*, 125 Ark. 577, 188 S. W. 1177; *Victor Produce Co. v. Chicago & C. R. Co.*, 135 Minn. 49, 160 N. W. 201; *Geo. B. Higgins & Co. v. Chicago & C. R. Co.*, 135 Minn. 402, 161 N. W. 145, L. R. A. 1917C, 507n.

<sup>12</sup> *Atlanta & West Point R. Co. v. Fairburn Marble Co.*, 145 Ga. 708, 89 S. E. 817. See also, under Carmack Amendment: *Kirsch v. Postal Tel. & C. Co.*, 100 Kans. 250, 164 Pac. 267; *O'Briant v. Pryor* (Mo. App.), 195 S. W. 759; note in L. R. A. 1917A, 265.

<sup>13</sup> *Northwestern Consol. Milling Co. v. Chicago & C. R. Co.*, 135 Minn. 363, 160 N. W. 1028.

<sup>14</sup> *Chicago & C. R. Co. v. Collins Produce Co.*, 235 Fed. 857, 149 C. C. A. 169.

<sup>15</sup> *Seneker v. Lusk* (Mo. App.), 190 S. W. 96.

<sup>16</sup> *Model Mill Co. v. Carolina & C. R. Co.*, 136 Tenn. 211, 188 S. W. 936. See also *Illinois Cent. R. Co. v. Rogers*, 162 Ky. 535, 172 S. W. 948, *Am. & Eng. Ann. Cas.* 1916E, 1201n, L. R. A. 1915C, 1220n.

such carriers have often been held liable for loss and injury caused by their breach of this duty.<sup>17</sup>

<sup>17</sup> *New York &c. R. Co. v. Peninsula Produce Exch.*, 240 U. S. 34, 36 Sup. Ct. 230, 60 L. ed. 511, L. R. A. 1917A, 193; *Elliott v. Chicago &c. R. Co.*, 38 S. Dak. 371, 161 N. W. 347; *Fort Worth &c. R. Co. v. Bryson* (Tex. Civ. App.), 195 S. W. 1165. See also *Lyons v. Grand Trunk R. Co.*, 185 Mich. 417, 152 N. W. 88, Am. & Eng. Ann. Cas. 1917D, 162n, and cases cited in note on measure of damages. Compare: *Brothers v. Illinois Cent.*

*R. Co. (Ala. App.)*, 77 So. 423; *Chicago &c. R. Co. v. Cunningham Commission*, 127 Ark. 246, 192 S. W. 211. Deviation may make carrier an insurer: *Ely v. Barrett*, 168 N. Y. S. 419; *Coyne v. Grand Rapids &c. R. Co.*, 185 Ill. App. 431. See also for liability and measure of damages for loss caused by deviation, *Bennett v. Missouri Pac. R. Co.*, 100 Kans. 537, 164 Pac. 1084, L. R. A. 1918A, 1061n.

## CHAPTER LXXIX

### LIMITATION OF LIABILITY BY CONTRACT

§ 3205. **In general.**—It has been held both under the common law and under the interstate commerce act that the liability of the carrier may be limited by special contract, provided such limitation be just and reasonable, and does not exempt the carrier from liability due to its own negligence.<sup>1</sup> The Carmack Amendment and other amendments supersede state laws on the subject and the liability thereunder in case of interstate shipments, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law.<sup>2</sup> But by the Act of Congress of March 4, 1915, it is provided that “notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the

<sup>1</sup> *Doster v. Michigan Cent. R. Co.*, 196 Ill. App. 49; *Cleveland &c. R. Co. v. Blind*, 182 Ind. 398, 105 N. E. 483; *Haskell v. St. Louis &c. R. Co. (Okla.)*, 162 Pac. 459. A common carrier may limit his liability by agreement with the shipper placing a maximum valuation of articles carried: *Heuman v. M. H. Powers Co.*, 175 App. Div. 627, 162 N. Y. S. 590. It is not against public policy for carrier to stipulate against liability for loss due to causes beyond its control, at common law, and so imposition as basis for freight rate of condition that shipper should assume loss from such causes is valid: *Moore v. Duncan*, 237 Fed. 780, 150 C. C. A. 534; *St. Louis &c. R. Co. v. Akard (Okla.)*, 159 Pac. 344. It is violation of both the common law and the Carmack

Amendment of the Hepburn Act for the initial carrier to insert a clause in bill of lading limiting liability to loss on its own lines: *St. Louis &c. R. Co. v. Akard (Okla.)*, 159 Pac. 344. It can not contract against liability for its own negligence: *Chesapeake &c. R. Co. v. Jordan (Ind. App.)*, 114 N. E. 461; *McDaniel Milling Co. v. Missouri Pac. R. Co. (Mo. App.)*, 191 S. W. 1021; *Western Union Tel. Co. v. Piper (Tex. Civ. App.)*, 191 S. W. 817.

<sup>2</sup> *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257n; *Missouri &c. R. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397. See also *Adams Exp. Co. v. Welborn*, 59 Ind. App. 330, 108 N. E. 163, 109 N. E. 420.

goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper.”<sup>3</sup>

**§ 3207. Essentials of the contract.**—A special contract limiting the carrier's liability in consideration of a lower freight rate is valid, if reasonable and fairly entered into.<sup>4</sup>

**§ 3209. Contract may be in parol.**—In an action for damages to a shipment, both parties are bound by the bill of lading where there was no conversation between the shipper and the carrier concerning limitation of liability.<sup>5</sup>

**§ 3211. To be effectual the terms of limitation must be a part of the contract.**<sup>6</sup>

**§ 3213. Character of limitations.**<sup>7</sup>

**§ 3214. Limitation of amount of liability.**<sup>8</sup>—Where the shipper concealed the true value of express packages and thus

<sup>3</sup> L. ed. Stat. Ann., Pamphld. Supp. No. 2, p. 30.

<sup>4</sup> Haskell v. St. Louis & C. R. Co. (Okla.), 162 Pac. 459.

<sup>5</sup> Aradalous v. New York & C. R. Co., 225 Mass. 235, 114 N. E. 297.

<sup>6</sup> It is held that a limitation of express company's liability contained in its receipt for parcel is a part of contract between shippers and express company: Greenberg v. Rapid Delivery Express Co., 163 N. Y. S. 102.

<sup>7</sup> Regardless of the federal statute relating to interstate shipments, carriers may limit and define the extent of their liability for interstate shipments, but they can not relieve themselves from liability from the effect of their negligence or the negligence of their employees: Chesapeake & C. R. Co. v. Jordan (Ind. App.), 114 N. E. 461; St. Louis Southwestern R. Co. v. Miller (Tex. Civ. App.), 190 S. W. 819.

<sup>8</sup> A contract which limits the carrier's liability to an agreed valuation, made in consideration of a lesser freight rate, is valid on theory that,

by freely and deliberately electing to contract for carriage at rate fixed on agreed value, shipper is estopped to assert a higher value after sustaining loss or damage: Moore v. Duncan, 237 Fed. 780, 150 C. C. A. 534. See also Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257n; Kansas City & C. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391; Cleveland & C. R. Co. v. Detlebach, 239 U. S. 588, 36 Sup. Ct. 177; George N. Pierce Co. v. Wells Fargo Co., 236 U. S. 278, 35 Sup. Ct. 351; Atlanta & West Point R. Co. v. Fairburn Marble Co., 145 Ga. 708, 89 S. E. 817; Bass v. Erie R. Co., 195 Ill. App. 508; Wilson v. Chicago Great Western R. Co. (Mo. App.), 190 S. W. 22; Louisville & N. R. Co. v. Hobbs, 136 Tenn. 512, 190 S. W. 461. Where a clause in a contract of carriage expressly limits liability of a carrier to a given sum, it is equivalent to a valuation of goods: Heuman v. M. H. Powers Co., 175 App. Div. 627, 162 N. Y. S. 590. It was held that a shipper could not recover

secured a lower rate, and the goods were stolen by the express company's agent, the shipper could not recover the true value.<sup>9</sup>

**§ 3216. Limitation of time in which claim for loss must be made.**—Limitations as to the time within which notice of loss or injury or claims therefor must be made and the manner of presenting the same, when reasonable, have often been upheld.<sup>10</sup> The written notice of loss is sufficient if it is a plain

more than the agreed price for jewelry stolen by defendant's employes from safe, where a contract with a general truckman as carrier to remove household effects limited responsibility of truckman to \$50 for any articles, together with general contents thereof: *Heuman v. M. H. Powers Co.*, 175 App. Div. 627, 162 N. Y. S. 590. A bill of lading in accordance with the Interstate Commerce Act and the Carmack Amendment, on an interstate shipment, which stipulates that the loss or damage for which the carrier is liable shall be computed on the basis of the value of the property at the time and place of the shipment, etc., limits the carrier's liability, even in suit for its conversion of the goods: *F. W. Brockman Commission Co. v. Missouri Pac. R. Co.*, 195 Mo. App. 607, 188 S. W. 920. The rights of the shipper can not be affected within limits established by his declaration of value by rate which carrier exacts, when it did not arise from any mistake, silence or conduct of the shipper, where a shipper makes express representation of value to enable the carrier to fix rate, and rate is fixed by carrier, which by mistake is based on theory that a much lower valuation was fixed than that in fact contained in the shipper's written statement of value: *Aradalou v. New York & C. R. Co.*, 225 Mass. 235, 114 N. E. 297.

<sup>9</sup> *D'Utassy v. Barrett*, 219 N. Y. 420, 114 N. E. 786.

<sup>10</sup> *St. Louis & C. R. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462; *Erisman v. Chicago & C. R. Co. (Iowa)*, 163 N. W. 627; *Metz Co. v. Boston & C. R. Co.*, 227 Mass. 307, 116 N. E. 475; *Otto v. Manistee & C. R. Co. (Mich.)*, 163 N. W. 49. It is a reasonable and valid stipulation in bill of lading terminating liability of car-

rier unless notice of loss or damage is filed with the agent at delivery point within ten days of receipt of shipment: *Phillips v. Seaboard Air Line R.*, 172 N. Car. 86, 89 S. E. 1057. It is a reasonable and valid stipulation in bill of lading that notice of a claim for damages, etc., shall be filed within four months after delivery of the property, and that unless claim is so made carrier will not be liable: *Aydlett v. Norfolk-Southern R. Co.*, 172 N. Car. 47, 89 S. E. 1000. It was held that the written contract, requiring notice of injury within 30 days of the date thereof was reasonable and valid in an action by a caretaker of a shipment of livestock and that notice was a condition precedent to recovery: *Missouri & C. R. Co. v. Lynn (Okla.)*, 161 Pac. 1058. A stipulation providing that recovery for injury to livestock shipped shall be barred unless notice of the injury is given to the carrier within five days is reasonable, and compliance therewith is not onerous: *Sweetser v. Chicago & Alton R. Co.*, 196 App. 623. It was held that oral notice of damage or loss made to carrier's agent not authorized to receive such notice, made by a shipper of livestock, was not a compliance with a contract of shipment requiring written notice thereof to be filed with named agents within ten days after delivery: *Illinois Cent. R. Co. v. W. J. Davis & Co.*, 112 Miss. 119, 72 So. 874. A provision in contract that claims for loss or damage must be made in writing within a specified time does not relate to claims for special damages from delay: *Florida East Coast R. Co. v. Peters*, 72 Fla. 311, 73 So. 151. When notice was given without delay on discovering the loss, failure to give notice of damage by delivery of other and inferior livestock instead

statement of the demand, where stipulations in a bill of lading for filing of notice of loss are reasonable and valid.<sup>11</sup> It was held that in view of section 1 of the Interstate Commerce Act damage occasioned by delay to an interstate shipment of cattle at the pens before they began the trip falls within the terms of the contract requiring notice of claim for loss or injury by delay in "transportation" as a condition precedent to recovery.<sup>12</sup>

§ 3217. **When limitation does not apply—Waiver.**<sup>13</sup>—It has been held that it would require a finding that defendant's conduct relied upon as a waiver must have misled the plaintiff

of those consigned, within five days of delivery, does not preclude recovery: *Chesapeake & O. R. Co. v. Rebmán & Clark*, 120 Va. 71, 90 S. E. 629. Unless notice is given within a named time, the object of a provision in a contract of shipment of livestock requiring notice within a specified time is to force those claiming to have been damaged by the negligence of the carrier to present their claims promptly for adjustment, while the facts and circumstances on which the claims are based are fresh in the memories of parties and witnesses: *Sweetser v. Chicago & Alton R. Co.*, 196 Ill. App. 623. In absence of circumstances rendering stipulation invalid or exercising noncompliance the failure to comply with "uniform livestock contract," under which interstate shipment was made, as to presentation of claim for damages and verification thereof, held to defeat recovery for injury to shipment: *Chesapeake & O. R. Co. v. McLaughlin*, 242 U. S. 142, 37 S. Ct. 40, 61 L. ed. 207. But it was held that plaintiff's failure to give notice of injury within 10 days after arrival at destination, as required by contract, would not preclude recovery where the carrier was entirely familiar with injuries to plaintiff's cattle: *Southern Pac. Co. v. Stewart*, 233 Fed. 956, 147 C. C. A. 630. Shipper's claim for damages to a shipment of livestock is not invalid because "1907" instead of "1913" was written therein as the date of the shipment: *Baird v. Denver & C. R. Co. (Utah)*, 162 Pac. 79. Notice to the carrier of injuries within time fixed by contract for shipment

of livestock is a condition precedent to action: *Chicago, R. I. & C. R. Co. v. Brightwell (Okla.)*, 162 Pac. 484. The written contract for an interstate shipment being free from fraud, prevails over the precedent oral contract, and a provision in the written contract for notice of claim of damages, if reasonable, controls: *Panhandle & C. R. Co. v. Bell (Tex. Civ. App.)*, 189 S. W. 1097.

<sup>11</sup> *Phillips v. Seaboard Air Line R.*, 172 N. Car. 86, 89 S. E. 1057.

<sup>12</sup> *Chicago, R. I. & C. R. Co. v. Whaley (Tex. Civ. App.)*, 190 S. W. 833. But compare *Chicago & C. R. Co. v. Cunningham Commission Co.*, 127 Ark. 246, 192 S. W. 211.

<sup>13</sup> It was held that substantial and not literal compliance with the terms was sufficient, and the provision could therefore be waived by the carrier's station agent under a bill of lading requiring immediate written notice as condition precedent to recovery for injuries to livestock: *New Orleans & C. R. Co. v. Wood*, 112 Miss. 614, 73 So. 615. In shipper's action for damages to shipment of livestock, carrier's claim agent, who received the claim, and considered it on its merits, did not waive the presentation of a valid claim in an action for damages to shipment of livestock: *Baird v. Denver & R. G. R. Co. (Utah)*, 162 Pac. 79. Where the carrier's agents have actual notice of accident and circumstances and the carrier sends a veterinarian, requirement in contract of shipment of horse for written notice of claim within 30 days is waived: *Reynolds v. Adams Express Co.*, 172 N. Car. 487, 90 S. E. 510.



and have prevented him from giving the required notice, waiver being founded upon the doctrine of estoppel.<sup>14</sup>

**§ 3218. Condition precedent and burden of proof.**—If cattle are injured by lack of feed and water, the burden is on the shipper to show that the carrier was negligent in carrying them, where the shipper accompanies them, and under the contract of carriage, assumes specific duty to care for them.<sup>15</sup>

**§ 3221. Construction of contracts limiting liability.**—Though after injuries to cattle their value exceeded thirty dollars, it was held that recovery for injuries to them might be had, notwithstanding the contract of carriage fixed the maximum recovery for injuries at thirty dollars per head.<sup>16</sup>

<sup>14</sup> *International & G. N. R. Co. v. Hudson* (Tex. Civ. App.), 188 S. W. 277. It is held that the laws relating to bills of lading, being founded upon considerations of public policy, can not be evaded by the device of waiver: *Metz Co. v. Boston & C. R. Co.*, 227 Mass. 307, 116 N. E. 475.

<sup>15</sup> *Ft. Worth & D. C. R. Co. v. Allen* (Tex. Civ. App.), 189 S. W. 765; *Kansas City & C. R. Co. v. James* (Tex. Civ. App.), 190 S. W. 1136. The burden is on the carrier to show its freedom from negligence where livestock is injured in the custody of the carrier: *Teeter v. Southern Express Co.*, 172 N. Car. 616, 90 S. E. 761. The burden is on the carrier to show reasonableness of stipulations in bills of lading limiting liability of the carrier, or in derogation of common law: *Phillips v. Sea Board Air Line R.*, 172 N. Car. 86, 89 S. E. 1057; *St. Louis, I. M. & C. R. Co. v. Cunningham Commission Co.*, 125 Ark. 577, 188 S. W. 1177. The burden is on the carrier to show that the shipper accepted the written contract of shipment imposing limitations on its liability, knew the contents thereof, and assented to its terms: *Moyers v. Ill. Cent. R. Co.*, 197 Ill. App. 179. As against a shipper, the burden is on railroad, to show that it gave notice to connecting ocean carrier of arrival of cotton at pier in time for ocean carrier to have taken cotton aboard for intended sailing: *Louisville & C. R. Co. v. Williams* (Ala.), 73 So. 548. But in an action

against an intermediate carrier for loss occurring on its line only, burden is on shipper to show not only damage, but that it occurred on defendant's and not on connecting line: *Southern R. Co. v. Avey*, 173 Ky. 598, 191 S. W. 460. The burden is not placed upon the shipper of establishing whether the loss was caused by the initial carrier or a connecting carrier in a suit against the initial carrier by Carmack's Amendment to Interstate Commerce Act, § 20, but merely extends common-law liability of initial carrier to all losses whether occurring on its line or that of connecting carrier: *Chicago & E. I. R. Co. v. Collins Produce Co.*, 235 Fed. 857, 149 C. C. A. 169. Burden is on delivering carrier to show that injury to goods shipped occurred without its fault or negligence: *St. Louis & C. R. Co. v. Akard* (Okla.), 159 Pac. 344. Although contract limiting liability casts burden of showing negligence on shipper, where cars of stock were 76, 62, and 53 hours in covering a distance usually requiring 30 to 36 hours, held that there was an unreasonable delay sufficient to raise inference of negligence, and that burden shifted to carrier to show that delay was beyond its control: *Louisville & N. R. Co. v. Montgomery*, 136 Tenn. 171, 188 S. W. 1146. Plaintiff must show proper statement of loss required by bill of lading: *Erisman v. Chicago & C. R. Co.* (Iowa), 163 N. W. 627.

<sup>16</sup> *Southern Pac. Co. v. Stewart*, 233 Fed. 956, 147 C. C. A. 630; *Baird*

§ 3223. **Act of carrier which prevents taking advantage of contract limitations—Deviation or departure from contract.**—A carrier is liable for the value of the goods without regard to limitation of liability contained in shipping order, where it agreed to ship over a certain route, but shipped over another and they were burned.<sup>17</sup>

v. Denver & R. G. R. Co. (Utah), 162 Pac. 79. Limitation of recovery to the \$100 valuation put by the contract on each horse does not control, though it is an interstate shipment when the contract of carriage by express is abandoned by putting the car in a freight train: Reynolds v. Adams Express Co., 172 N. Car. 487, 90 S. E. 510. It was held that a limitation of liability in a bill of lading in an interstate shipment, in relation to time for presenting a claim was bar to an action against an initial carrier for loss arising from a conversion of goods by the final carrier: Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 175 App. Div. 823, 162 N. Y. S. 549. Though in intrastate shipments, not being through shipments, a car-

rier may contract to limit its liability to damages through negligence on its own line, if the damages proved are shown to have resulted from joint negligence of two carriers, each may be held responsible for proportion which its negligence bears to entire negligence: St. Louis Southwestern R. Co. v. Miller & White (Tex. Civ. App.), 190 S. W. 819.

<sup>17</sup> O. K. Transfer & Storage Co. v. Neill (Okla.), 159 Pac. 272, L. R. A. 1917A, 58; Morrison v. Shaw & Co. (1916), 1 K. B. 747, 84 L. J. K. B. (N. S.) 724, 32 L. T. (N. S.) 307. See also Saxon Mills v. New York & R. Co., 214 Mass. 383, 101 N. E. 1075. Older cases on both sides of this question are reviewed in a note in 35 L. R. A. (N. S.) 1046.

## CHAPTER LXXX

### THE CARRIER'S RIGHTS

§ 3235. **Who must pay the freight.**—The consignees, and not the shippers, became liable to pay any balance of legal freight charges, where defendants shipped goods on a straight bill of lading under agreement with consignees to pay freight at destination, and the consignees accepted the goods and paid the charges demanded.<sup>1</sup>

§ 3245. **Demurrage as applied to railroads.**—It was held that the plaintiff could not recover charges accruing to other lines operated by the same system in an action to recover demurrage charges.<sup>2</sup> The defendant was held liable for demurrage on cars held on a spur track on the defendant's property, such track being held not to be a privately-owned track within the railroad company's demurrage rules.<sup>3</sup> An interstate carrier may make demurrage charges on private cars detained on its tracks while in railroad service.<sup>4</sup>

§ 3246. **Charges for special services.**—The consignee is liable for reasonable storage charges till the carrier can properly dispose of the goods for freight and storage charges where he is responsible for the freight charges, but refuses to pay them and receive the goods.<sup>5</sup>

<sup>1</sup> King v. Van Slack, 193 Mich. 105, 159 N. W. 157. But see Pennsylvania R. Co. v. Townsend (N. J.), 100 Atl. 855. Consignee becomes liable when he accepts the shipment and pays a part of the freight under bill of lading providing that he shall pay the freight, and if required should pay it before delivery: King v. Van Slack, 193 Mich. 105, 159 N. W. 157. The consignor may be held liable, however, in a proper case, where the consignee fails to pay: Wells Fargo & Co. v. Cuneo, 241 Fed. 727; Southern R. Co. v. Southern Cotton Oil Co., 19 Ga. App. 453, 91 S. E. 876; Atchison & C. R. Co. v. Stannard & Co., 99 Kans. 720, 162 Pac. 1176, L. R. A.

1917C, 1124n; Miller & C. Lumber Co. v. Atchison & C. R. Co. (Tex. Civ. App.), 192 S. W. 354. But compare: Yazoo & C. R. Co. v. Zemurray, 238 Fed. 789, 151 C. C. A. 639.

<sup>2</sup> Detroit, G. H. & M. R. Co. v. Owosso Sugar Co., 192 Mich. 533, 159 N. W. 378.

<sup>3</sup> National Refining Co. v. St. Louis, I. M. & S. R. Co., 237 Fed. 347, 150 C. C. A. 361.

<sup>4</sup> Swift & Co. v. Hocking Valley R. Co., 243 U. S. 281, 37 Sup. Ct. 287.

<sup>5</sup> Norfolk & S. R. Co. v. New Bern Iron Works & Supply Co., 172 N. Car. 188, 90 S. E. 149. It is the consignee's duty to take the goods from

§ 3254. **The carrier's lien.**<sup>6</sup>—A carrier has been held to have a lien for charges even where the contract was that of an interstate carrier and invalid because made at a rate other than that prescribed by its published schedule rates.<sup>7</sup>

the time that a carrier refuses to pay for damages to the shipment, they not having become worthless by the carrier's act, with right to sue for damages; so that not taking them he is liable for storage charges: *Holloman v. Southern R. Co.*, 172 N. Car. 372, 90 S. E. 292, L. R. A. 1917C, 416n, Ann. Cas. 1917E, 1069. See also as to right to charge for storage where strike prevents delivery: *Boston &c. R. Co. v. Oceanic Steam Nav. Co.*, 226 Mass. 509, 116 N. E. 260. But when the carrier wrongfully detains goods it is not entitled to storage charges: *Panhandle & S. F. R. Co. v. Hubbard* (Tex. Civ. App.), 190 S. W. 793. See also *Hall & Co. v. Norfolk So. R. Co.*, 173 N. Car. 108, 91 S. E. 607; *Belknap v. Baltimore &c. R. Co.* (W. Va.), 91 S. E. 656, L. R. A. 1917D, 916.

<sup>6</sup>A railroad company which receives cotton seed on which freight and demurrage charges have accrued has a lien therefor, and may detain shipment until payment or agreement by consignee to pay: *Powell v. Seaboard Air Line R.*, 19 Ga. App. 91, 90 S. E. 980. A carrier to whom

he delivered the goods for shipment to his order can not hold them as against the seller, or assert any lien for transportation charges, and on failure to deliver is liable to the seller for their value where a buyer of the goods for cash failed to pay the consideration: *Ocean S. S. Co. v. Southern States Naval Stores Co.*, 145 Ga. 798, 89 S. E. 838. Until all transportation charges are paid, a carrier may lawfully refuse to deliver goods: *Yazoo & M. V. R. Co. v. Picher Lead Co.* (Mo. App.), 190 S. W. 387. A carrier loses its lien by voluntarily parting with the possession of freight: *Beckwith v. Atlantic Coast Line R. Co.*, 72 Fla. 522, 73 So. 593. But delivery of a portion does not discharge the lien from the balance unless so intended: *Sheppard v. New York &c. R. Co.*, 227 Mass. 234, 116 N. E. 556 (and the intention is usually a question for the jury).

<sup>7</sup>*St. Louis I. M. &c. R. Co. v. McNabb* (Okla.), 162 Pac. 811. Carrier has lien on goods for accrued storage charges which are within Interstate Commerce Act: *Boston &c. R. v. Oceanic Steam Nav. Co.*, 226 Mass. 509, 116 N. E. 260.

## CHAPTER LXXXI

### TERMINATION OF THE RELATION OF CARRIER

§ 3260. **Termination of the relation of carrier.**<sup>1</sup>—Where the carrier made delivery at the general storage track of a large manufacturing plant which covered one hundred eighty acres and contained an elaborate intermural trackage system, it was held that this was sufficient, and the carrier was not obliged to distribute the cars throughout the plant on the trackage system of the manufacturer.<sup>2</sup>

§ 3261. **Delivery to right person.**<sup>3</sup>—It was notice to the carrier that the consignee was not the owner of the goods where goods were shipped to the order of the shipper with directions to notify another.<sup>4</sup>

§ 3262. **Place of delivery.**—A carrier is bound to deliver at the destination fixed by the contract, and can not compel the owner to accept the goods elsewhere.<sup>5</sup>

<sup>1</sup> As to what is delivery sufficient to terminate relation of carrier and the conflicting rules in different jurisdictions as to when it ceases and liability as warehouseman begins, see generally: *Chicago &c. R. Co. v. Stouffer*, 61 Ind. App. 190, 111 N. E. 809; *Gary Bros. &c. Co. v. Chicago &c. R. Co.*, 49 Mont. 524, 143 Pac. 955; *Farmer's Mercantile Co. v. Missouri Pac. R. Co.*, 27 N. Dak. 302, 146 N. W. 550; *Layton & Sons v. Charleston &c. R. Co.*, 90 S. Car. 323, 72 S. E. 988; *Dunlap v. Great Northern R. Co.*, 34 S. Dak. 320, 148 N. W. 529, Ann. Cas. 1916D, 805n; post § 3264.

<sup>2</sup> *New York Cent. & H. R. R. Co. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115.

<sup>3</sup> Notice to the "notify party" not being sufficient under Rev. Stat. 1909, § 3113, where fruit consigned to shipper, another to be notified, is rejected by the latter, the carrier is liable in conversion if it sells the fruit with-

out notifying the consignor, if practicable: *F. W. Brockman Commission Co. v. Missouri Pac. R. Co.*, 195 Mo. App. 607, 188 S. W. 920. Where, while in possession of the property, it received notice from the true owner of his title and a demand for delivery was made, a common carrier received goods from a purchaser who was the apparent owner, is no defense against the true owner: *Ocean S. S. Co. v. Southern States Naval Stores Co.*, 145 Ga. 798, 89 S. E. 838. There is a conversion where the carrier demands excessive and illegal freight charges, and on the refusal of the shipper to pay them declines to deliver the goods, and sells them for the charges: *Panhandle & S. F. R. Co. v. Hubbard* (Tex. Civ. App.), 190 S. W. 793.

<sup>4</sup> *Dodge & Dent Mfg. Co. v. Pennsylvania R. Co.*, 175 App. Div. 823, 162 N. Y. S. 549.

<sup>5</sup> *Belknap v. Baltimore &c. R. Co.* (W. Va.), 91 S. E. 656, L. R. A. 1917D, 916.

§ 3264. **Delivery as warehouseman.**<sup>6</sup>—Where a portion of a car of interstate freight was destroyed by flood ten days after its arrival and notice given to remove it within forty-eight hours, the carrier was liable only as a warehouseman.<sup>7</sup>

§ 3272. **Liability as warehouseman.**<sup>8</sup>—An initial carrier is not liable for damages occasioned by any breach of duty on the part of the last carrier as warehouseman.<sup>9</sup>

§ 3278. **Stoppage in transitu.**—Where the consignee gave notice to hold grain as against purchaser whose transfer was not validated by statute, he has a right of action based on right of stoppage in transitu as for conversion by wrongful delivery to another.<sup>10</sup>

§ 3280. **Delivery to connecting carrier, and liability of connecting carrier—In general.**—A carrier breaching its contract to carry goods to a certain point and there deliver them to a connecting carrier, and thus causing loss to the shipper, is liable in an action for breach of contract.<sup>11</sup> The Carmack Amendment makes the initial carrier liable for loss or injury caused by its connecting carriers to a through interstate shipment;<sup>12</sup> but it does not abrogate the liability of a connecting carrier to be sued by the shipper, if he sees fit, for loss or injury caused on its own

<sup>6</sup> A railroad company is liable in Georgia as a common carrier until a reasonable time after notice of arrival, and then it becomes liable as a warehouseman: *Knight v. Georgia Southwestern & G. R. Co.*, 18 Ga. App. 539, 90 S. E. 81.

<sup>7</sup> *Chalmers v. New York Cent. R. Co.*, 175 App. Div. 239, 161 N. Y. S. 577; *Dodge & Dent Mfg. Co. v. Pennsylvania R. Co.*, 175 App. Div. 823, 162 N. Y. S. 549.

<sup>8</sup> A carrier, in charge of a shipment of interstate freight as warehouseman only, is obligated to exercise the degree of care which an ordinarily prudent person would exercise as to property at the time and under the circumstances: *Chalmers v. New York Cent. R. Co.*, 175 App. Div. 239, 161 N. Y. S. 577. It was held that delivering carrier which stored merchandise at its own wharf to await arrival of vessel which was to transport it to its ultimate destination was liable as a warehouseman

under the terms of the bill of lading: *Coate Bros. v. New Orleans Terminal Co.*, 139 La. 958, 72 So. 678.

<sup>9</sup> *Dodge & Dent Mfg. Co. v. Pennsylvania R. Co.*, 175 App. Div. 823, 162 N. Y. S. 549.

<sup>10</sup> *Bell v. Chicago & N. W. R. Co.*, 164 Wis. 277, 159 N. W. 914. See generally as to stoppage in transitu post § 4929 et seq.

<sup>11</sup> *Bennett v. Missouri Pac. R. Co.*, 100 Kans. 537, 164 Pac. 1084.

<sup>12</sup> *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7n; *Kirsch v. Postal Tel. Cable Co.*, 100 Kans. 250, 164 Pac. 267; *O'Briant v. Pryor (Mo. App.)*, 195 S. W. 759; *Stoddard Lumber Co. v. Oregon & C. R. Co.*, 84 Ore. 399, 165 Pac. 363; *Gulf & C. R. Co. v. Nelson (Tex.)*, 192 S. W. 1056 (and for damages caused by delay); note in *Am. & Eng. Ann. Cas.* 1915B, 83. See also *Toledo & C. R. Co. v. Milner (Ind. App.)*, 110 N. E. 756; and post § 3284.

line.<sup>13</sup> An initial interstate carrier has a right of action against a connecting carrier for reimbursement for any damages it has been required to pay the shipper because of the connecting carrier's negligence.<sup>14</sup>

**§ 3282. Contract for through carriage.**—An interpretation making the initial carrier liable for damages, as for through shipment, wherever occurring, is favored in considering contracts for shipment over connecting lines.<sup>15</sup>

**§ 3284. Which carrier is liable to consignee.**—While an initial carrier which receives goods for interstate shipment is liable for loss or injury occurring beyond its lines, under the Carmack Amendment to the Interstate Commerce Act, a con-

<sup>13</sup> Nashville &c. R. Co. v. Abramson &c. Produce Co. (Ala.), 74 So. 350; Central of Georgia R. Co. v. Waxelbaum Produce Co., 18 Ga. App. 489, 89 S. E. 635; Southern R. Co. v. Waxelbaum Produce Co., 19 Ga. App. 64, 90 S. E. 987; Cincinnati, H. & D. R. Co. v. Quincey & Rogers, 19 Ga. App. 167, 91 S. E. 220; Collier v. Wabash R. Co. (Mo. App.), 190 S. W. 969. The terminal carrier is not liable unless it obligates itself to pay such damages under the Carmack Amendment where damages to goods occur on the line of the initial carrier: Cedar Rapids Fuel Co. v. Illinois Cent. R. Co. (Iowa), 160 N. W. 353. Shipper over connecting lines still has remedy against intermediate carrier for loss occurring on its line only under the Carmack Amendment: Southern R. Co. v. Avey, 173 Ky. 598, 191 S. W. 460. See also note in L. R. A. 1917A, 265. Where the railroad delivered it on pier where steamship was loading in ample time to be loaded, the railroad contracting to carry cotton to port, and to deliver to ocean carrier, was not liable for ocean carrier's failure to transport: Louisville & N. R. Co. v. Williams (Ala.), 73 So. 548. Both companies were responsible for delays and consequent damages proximately resulting from such negligence, where negligence of railroad in failing or refusing to accept shipment of livestock at connecting point concurred with negligence of connecting road in failing to deliver shipment in question,

on transfer track: St. Louis Southwestern R. Co. v. Miller & White (Tex. Civ. App.), 190 S. W. 819. The connecting carrier was not liable where it could not have discovered the unfitness of the cars by reasonable inspection, where potatoes in sacks were injured because bottoms of cars in which they were shipped were permeated with salt: Geo. B. Higgins & Co. v. Chicago, B. & Q. R. Co., 135 Minn. 402, 161 N. W. 145, L. R. A. 1917C, 507n. But a railroad receiving potatoes from steamboat company to which the skipper had delivered them, and negligently furnishing unprepared car for interstate shipment, so that potatoes were damaged, was liable under the Carmack Amendment: Aydtlett v. Norfolk-Southern R. Co., 172 N. Car. 47, 89 S. E. 1000.

<sup>14</sup> St. Louis & S. F. R. Co. v. Akard (Okla.), 159 Pac. 344.

<sup>15</sup> Keithley & Quinn v. Lusk, 195 Mo. App. 143, 189 S. W. 621. The initial carrier does not destroy its through character by issuing a bill of lading over its own line only, and itself re-consigning the goods to the connecting carrier, where the parties contemplated a through shipment, part over a connecting line, at a through rate: Keithley & Quinn v. Lusk, 195 Mo. App. 143, 189 S. W. 621. As to duty of connecting carrier to know contract made by initial carrier, see: Alcorn v. Adams Exp. Co., 148 Ky. 352, 146 S. W. 747, 52 L. R. A. (N. S.) 858n.

necting carrier is not liable for loss or injury occurring before they reach its line.<sup>16</sup>

<sup>16</sup> *Knapp v. Minneapolis, St. P. & C. R. Co.*, 34 N. Dak. 466, 159 N. W. 81; *St. Louis, I. M. & S. R. Co. v. Cunningham Commission Co.*, 125 Ark. 577, 188 S. W. 1177. At common law a shipper has a right of action against each carrier in a line in turn for damage occurring upon its division, a common carrier for hire being an insurer of safe delivery: *Southern R. Co. v. Avey*, 173 Ky. 598, 191 S. W. 460. Under Carmack Amendment an initial carrier is responsible for a delay occurring on the line of a connecting carrier: *Van Epps v. Atlantic Coast Line R. Co.*, 105 S. Car. 406, 89 S. E. 1035. It was held that the issuing carrier was the initial carrier within the Carmack Amendment to the Interstate Commerce Act, and liable for damages to shipment, where interstate shipment was transferred on direction of consignee at destination named in bill of lading and shipped to another point on the same bill of lading: *Baltimore & O. R. Co. v. Montgomery & Co.*, 19 Ga. App. 29, 90 S. E. 740; *Victor Produce Co. v. Western Transit Co.*, 135 Minn. 121, 160 N. W. 248; *Keith-*

*ley & Quinn v. Lusk*, 195 Mo. App. 143, 189 S. W. 621. Where goods were received for through transportation the initial carrier became responsible for the destruction of the goods while in custody of delivering carrier, in transit under terms of contract: *Wilson v. Chicago Great Western R. Co.* (Mo. App.), 190 S. W. 22. The initial carrier held not liable for the warehouseman's negligence, storage, or unlawful sale at the instance of the delivering carrier where it had no part in keeping or disposing of flour after its rejection by buyer, and shipper's failure to remove it, and its delivery to a licensed warehouseman at shipper's risk: *Model Mill Co. v. Carolina, C. & O. R. Co.*, 136 Tenn. 211, 188 S. W. 936. Initial carrier is responsible for entire damage occurring in transit over connecting lines, but is entitled to recoup for any part of loss occurring upon line of connecting carriers, under Carmack Amendment to Interstate Commerce Act: *Southern R. Co. v. Avey*, 173 Ky. 598, 191 S. W. 460. See also ante § 3280.



## CHAPTER LXXXII

### CARRIERS OF LIVE STOCK

§ 3290. **Carriers of live stock in general.**—The shipper and carrier may make such agreements as they see fit upon the matter of delivery to the carrier.<sup>1</sup> The carrier of live stock is an insurer against all perils except the act of God, the public enemy, the shipper's negligence and animals' "proper vice."<sup>2</sup>

§ 3293. **Carrier's duty as to accommodations.**—A common carrier of live stock is under a duty to provide proper facilities for loading, transporting and delivery, and during transportation it must exercise reasonable precaution to insure safe delivery.<sup>3</sup> But it has been held that a railroad company is not required to watch a car of live stock, sidetracked in its yard, to see that it is not injured and moved.<sup>4</sup>

§ 3294. **Loading and unloading.**—If such care is necessitated by delay, notwithstanding the fact that a shipping contract requires the shipper to care for the cattle while awaiting shipment, the carrier must use ordinary care to prevent injury while they are in pens awaiting shipment after acceptance for transportation.<sup>5</sup> The carrier will not be justified, under the twenty-eight-hour law relating to transportation of cattle, in unloading cattle in hot and dusty pens unprotected from the sun.<sup>6</sup>

§ 3295. **Care of stock in transit.**—It is a part of the service required by the shipping contract for the carrier to dip cattle under quarantine laws, and negligence in its performance must be measured by the terms of the contract.<sup>7</sup>

<sup>1</sup> Blackwell v. Oregon Short Line R. Co., 82 Ore. 303, 161 Pac. 565.

<sup>2</sup> Baker v. Bush (Mo. App.), 194 S. W. 1061; post § 3296.

<sup>3</sup> Walton Land & Timber Co. v. Louisville & N. R. Co., 72 Fla. 66, 72 So. 485.

<sup>4</sup> Illinois Cent. R. Co. v. Wm. Atkinson & Co., 113 Miss. 678, 74 So. 616.

<sup>5</sup> Panhandle & S. F. R. Co. v.

Vaughn (Tex. Civ. App.), 191 S. W. 142.

<sup>6</sup> Southern Pac. Co. v. Stewart, 233 Fed. 956, 147 C. C. A. 630.

<sup>7</sup> Missouri, K. & T. R. Co. v. Skinner (Okla.), 160 Pac. 875. Under a contract requiring the shipper to care for stock, a carrier must furnish reasonable facilities and opportunities for feeding and watering: Ft. Worth & D. C. R. Co. v. Allen (Tex. Civ. App.), 189 S. W. 765.

§ 3296. **Liability for loss or delay.**<sup>8</sup>—Only in case the storm was the sole proximate cause of the injury is the carrier of live stock relieved from liability on the ground that a storm constituted an act of God.<sup>9</sup> The carrier is liable for the damages occasioned by its delay in supplying cars for shipment of live stock.<sup>10</sup>

§ 3297. **Special contract and limitation of liability.**—Special contracts limiting liability or the time and manner of giving notice of loss or injury and presenting claim and bringing suit, have frequently been made in the case of live stock shipments and sustained as valid where reasonable and not stipulating against the carrier's negligence nor contrary to statute or Act of Congress.<sup>11</sup> Unless the shipment was made under agreement that the contract could be executed later, a special contract limiting the liability of the carrier of live stock is unsupported by any

<sup>8</sup> A carrier of livestock is liable as insurer against such loss or damage as does not arise from act of God, the public enemy, or from nature and propensities of animals against which due care could not provide unless the contract contains contrary provisions: *Ft. Worth & D. C. R. Co. v. Allen* (Tex. Civ. App.), 189 S. W. 765. The carrier, if it used ordinary care, would not be liable if there was no unreasonable delay, no rough handling out of the ordinary, or if cattle were damaged owing to their nature or condition or other causes over which the carrier had no control: *Panhandle & S. F. R. Co. v. Morrison* (Tex. Civ. App.), 191 S. W. 138. But the carrier is bound to use ordinary care to transport the stock with reasonable dispatch: *Ft. Worth & C. R. Co. v. Bryson* (Tex. Civ. App.), 195 S. W. 1165. Where damages to livestock in transit are caused by an animal's viciousness or by the viciousness of other animals, the carrier is not liable: *Teeter v. Southern Express Co.*, 172 N. Car. 616, 90 S. E. 761.

<sup>9</sup> *Tobin v. Lake Shore & M. S. R. Co.*, 192 Mich. 549, 159 N. W. 389.

<sup>10</sup> *Levy v. Nevada-California-Oregon R.*, 81 Ore. 673, 160 Pac. 808, L. R. A. 1917B, 564. If the delay is occasioned by unloading to feed in compliance with 28-hour law, the carrier

is not liable: *Wood v. Boston & M. R. R.* (N. H.), 98 Atl. 480. Where at the suggestion of the carrier, martial law having been declared in a flood district, a shipment of chickens was appropriated by the military authorities, the carrier can not defeat recovery by the shipper on the ground that there was a confiscation, it having caused the appropriation: *Chicago & E. I. R. Co. v. Collins Produce Co.*, 235 Fed. 857, 149 C. C. A. 169.

<sup>11</sup> *American Exp. Co. v. United States Horse Shoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595; *Erie R. Co. v. Stone*, 244 U. S. 332, 37 Sup. Ct. 633; *Lusk v. Long*, 127 Ark. 261, 192 S. W. 213; *Atchison & C. R. Co. v. Miller* (Colo.), 163 Pac. 836; *Chicago & C. R. Co. v. Priddy* (Ind. App.), 115 N. E. 266; *Chicago & C. R. Co. v. Parsons* (Okla.), 162 Pac. 955. See also notes in *Am. & Eng. Ann. Cas.* 1913D, 974; 1913E, 868; 1914A, 231. The carrier was not liable for resulting damages from shrinkage under contract for shipment of livestock requiring shipper to feed and water them, where that was not done in an ordinary prudent way: *Ft. Worth & D. C. R. Co. v. Allen* (Tex. Civ. App.), 189 S. W. 765. A provision of contract for interstate carriage for notice of claim before removal from destination is reasonable as regards a claim for shrinkage of livestock: *Panhandle*

consideration, where issued and accepted after shipment.<sup>12</sup> A stipulation for nonliability for injury to live stock for delay caused by stress of weather or for causes beyond control of the carrier has been held not to include an injury caused by derailling of cars.<sup>13</sup> And a limitation of the carrier's liability for any "loss, injury, or damage" for which it might otherwise be responsible has been held not to limit its liability for damages from delay in transit resulting in loss of an advantageous market.<sup>14</sup>

**§ 3299. Termination of relation and delivery.**—For the purposes of delivery, the agent of a delivering carrier in an interstate shipment of cattle is the agent of the initial carrier and he may waive notice of injury required by the bill of lading issued by the initial carrier.<sup>15</sup>

& S. F. R. Co. v. Bell (Tex. Civ. App.), 189 S. W. 1097; Sweetser v. Chicago & Alton R. Co., 196 Ill. App. 623. Provisions of contract for shipment of livestock for notice of claim for damages, and that stock be not removed till three hours after notice are separable, and any invalidity of the second does not invalidate the first: Panhandle & S. F. R. Co. v. Bell (Tex. Civ. App.), 189 S. W. 1097. There was a sufficient consideration upon which to base a clause in contract of shipment, requiring shipper to make claim for any damage within ten days from date of delivery where two different rates were offered a shipper of livestock and he accepted the lower: Illinois Cent. R. Co. v. W. J. Davis & Co., 112 Miss. 119, 72 So. 874. In the transportation of livestock, a common carrier can not limit its liability for negligence: Moyers v.

Illinois Cent. R. Co., 197 Ill. App. 179. The fact that a shipper of livestock in interstate commerce did not read the contract of shipment at the time of signing it would not under the federal law relieve him from the binding force of the provisions of the contract under the Carmack Amendment to the Interstate Commerce Act: Panhandle & S. F. R. Co. v. Bell (Tex. Civ. App.), 189 S. W. 1097.

<sup>12</sup> Chesapeake & O. R. Co. v. Jordan (Ind. App.), 114 N. E. 461; Atchison, T. & S. F. R. Co. v. White (Tex. Civ. App.), 188 S. W. 714.

<sup>13</sup> Slider v. Pere Marquette R. Co. (Mich.), 161 N. W. 961.

<sup>14</sup> Elliott v. Chicago & C. R. Co., 38 S. Dak. 371, 161 N. W. 347.

<sup>15</sup> Baltimore & Ohio R. Co. v. Leach, 173 Ky. 452, 191 S. W. 310.

## CHAPTER LXXXIII

### CARRIERS OF PASSENGERS

#### § 3308. Creation of relation—Offer to become passenger.<sup>1</sup>

—A caretaker of live stock being transported by the train is a passenger while riding in the caboose.<sup>2</sup> In the absence of an invitation, express or implied, a person will not ordinarily be a passenger where he attempts to board a street car at a place which is not a regular stopping place.<sup>3</sup> One may become a passenger before he purchases a ticket or pays fare,<sup>4</sup> and one who comes to a station for the purpose of becoming a passenger is entitled for a reasonable time to the protection of a passenger.<sup>5</sup>

§ 3310. Duties of carrier toward passenger.<sup>6</sup>—Where the passenger is bereft of reason and has not sufficient intelligence to enable him to care for himself by reason of intoxication, and the

<sup>1</sup> See generally as to when intending passenger becomes an actual passenger: *Kentucky Highlands R. Co. v. Creal*, 166 Ky. 469, 179 S. W. 417, L. R. A. 1916B, 830n, Ann. Cas. 1917C, 1205n, 1206, where the authorities are reviewed in a note. As to express messengers, see: *Baltimore & C. R. Co. v. Duke*, 38 App. D. C. 164, Ann. Cas. 1913C, 832n.

<sup>2</sup> *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499, L. R. A. 1917F, 1128; *McGregor v. Great Southern R. Co.*, 31 N. Dak. 471, 154 N. W. 261, Ann. Cas. 1917E, 141, 150, where many authorities are reviewed; *Missouri, K. & T. R. Co. v. Lynn* (Okla.), 161 Pac. 1058. See also as to when employé riding home after work or the like is a passenger: *Indianapolis Trac. & C. Co. v. Isgrig*, 181 Ind. 211, 104 N. E. 60, and cases there cited. One riding on a freight train merely with the consent of the engineer is not a passenger: *Tuder v. Oregon Short Line R. Co.*, 135 Minn. 294, 160 N. W. 785, L. R. A. 1917C, 86. Compare, however, *Vandalia R. Co. v. Darby*, 60 Ind. App. 294, 108 N. E. 778; *Chicago, R. I. &*

*P. R. Co. v. Shadid* (Okla.), 159 Pac. 913.

<sup>3</sup> *Nuttall v. Worcester Consol. St. R. Co.*, 225 Mass. 167, 114 N. E. 291; *Horwitz v. Jefferson County Traction Co.* (Tex. Civ. App.), 188 S. W. 26.

<sup>4</sup> *Berkebile v. Johnstown Trac. Co.*, 255 Pa. 310, 99 Atl. 871.

<sup>5</sup> *Thomas v. Southern R. Co.*, 173 N. Car. 494, 92 S. E. 321. See also *Kansas City So. R. Co. v. Willsie*, 224 Fed. 908, 140 C. C. A. 352; *Baril v. New York & C. R. Co.*, 90 Conn. 74, 96 Atl. 164; *Lake Erie & C. R. Co. v. McConkey* (Ind. App.), 113 N. E. 24. But see as to duty as to station premises: *Illinois Cent. R. Co. v. Sanderson*, 175 Ky. 11, 192 S. W. 869, L. R. A. 1917D, 890n.

<sup>6</sup> Carriers of passengers are bound to exercise the highest practicable care for safety of passengers: *United Rys. & Electric Co. v. Phillips*, 129 Md. 328, 99 Atl. 355, L. R. A. 1917C, 384; *Hagerstown & F. R. Co. v. State*, 129 Md. 318, 99 Atl. 376; *Larskowski v. Detroit United Ry.*, 193 Mich. 409, 159 N. W. 530; *Lentz v. Minneapolis & St. Paul Suburban R. Co.*, 135 Minn.

carrier's servants know of the passenger's condition, it is negligence to abandon him in a known place of danger.<sup>7</sup> The carrier is bound to exercise such care as is reasonably necessary to protect a sick, aged or infirm passenger.<sup>8</sup> Where a passenger rides on a freight train, however, he assumes the risks and inconveniences necessarily and reasonably incident to being carried on such a train in its ordinary operation.<sup>9</sup>

**§ 3311. Carrier's duty as to accommodations.**—It is ordinarily the duty of a railroad carrier of passengers to furnish a sufficient number of cars to accommodate such traffic and to provide each passenger with a seat.<sup>10</sup> There is no common-law

310, 160 N. W. 794; *Mills v. Atlantic Coast Line R. R.*, 172 N. Car. 266, 90 S. E. 221; *Chicago & C. R. Co. v. Dizney* (Okla.), 160 Pac. 880. As other carriers of passengers, proprietors of elevators are held to a high degree of care: *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492. The failure of a railroad company to stop its freight and mixed trains carrying passengers at stations a sufficient length of time to permit passengers to enter and leave is negligence: *Witham v. Lusk* (Mo. App.), 190 S. W. 403; *Union Traction Co. of Indiana v. McVey* (Ind.), 114 N. E. 438. Prospective passengers are entitled to a reasonable time to board a street car, and, when that is not allowed they may recover: *Schernbeck v. New Orleans R. & Light Co.*, 140 La. 682, 73 So. 771. After the car has stopped, passengers are entitled to a reasonable time in which to get off: *Tuttle v. Detroit J. & C. R. Co.*, 193 Mich. 390, 159 N. W. 498; *Comer v. Atlantic Coast Line R. Co.*, 105 S. Car. 480, 90 S. E. 188. Unless it was unnecessary and violent, a carrier is not liable for an accident happening on account of a jerk unless it was unnecessary and violent: *Louisville R. Co. v. Osborne*, 171 Ky. 348, 188 S. W. 419. It is a carrier's duty to provide its passengers with reasonably safe and convenient facilities for leaving a car: *Chesapeake & O. R. Co. v. Clarke*, 172 Ky. 811, 189 S. W. 882; *Gore v. Delaware, L. & W. R. Co.*, 89 N. J. L. 224, 98 Atl. 389. An inference of negligence is warranted,

where the carrier did nothing to remove from its car platform ice which had formed some time previous to the accident and gave the passenger no notice of its presence: *Altberger v. New York Consol. R. Co.*, 162 N. Y. S. 739. See note in *L. R. A.* 1917E, 663. It is only when passenger's helplessly intoxicated condition or incapability of protecting himself is, or by ordinary care could be, known by trainmen, that they are required to give him any extra care: *Louisville & N. R. Co. v. Mudd's Admx.*, 173 Ky. 330, 191 S. W. 102. It is the carrier's duty to use reasonable care to keep the traps and doors of vestibuled cars closed: *St. Louis Southwestern R. Co. v. Christian* (Tex. Civ. App.), 191 S. W. 175.

<sup>7</sup> *O'Rourke v. Louisville & N. R. Co.*, 197 Ill. App. 45.

<sup>8</sup> *Weiriling v. St. Louis & C. R. Co.*, 115 Ark. 505, 171 S. W. 901, Ann. Cas. 1916E, 253n; *Steketee v. Waters*, 193 Mich. 177, 159 N. W. 368; *Middleton v. Whitridge*, 213 N. Y. 499, 108 N. E. 192, Ann. Cas. 1916C, 856n.

<sup>9</sup> *Indianapolis Southern R. Co. v. Tucker*, 51 Ind. App. 480, 98 N. E. 431; *McGregor v. Great Northern R. Co.*, 31 N. Dak. 471, 154 N. W. 261, Ann. Cas. 1917E, 141 (but not such as are unnecessary and unusual and not incident to its proper handling); *Missouri & C. R. Co. v. Lynn* (Okla.), 161 Pac. 1058. See also note in *L. R. A.* 1917C, 86.

<sup>10</sup> *Chicago & C. R. Co. v. Lindahl*, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914A, 561n; *Cave v. Seaboard*

duty on the part of such a carrier to provide waiting rooms and toilets, but in many states this duty is imposed by statute.<sup>11</sup> A street car company has been held liable for any defects in its car appliances that a most rigid examination would disclose.<sup>12</sup>

**§ 3312. Duty to protect passengers from third persons.<sup>13</sup>**

—The carrier is under a duty to use a high degree of care to protect its passengers from the acts of other passengers and third persons where they could reasonably have been foreseen and controlled.<sup>14</sup> But this duty does not extend to acts of third persons that could not reasonably have been anticipated or controlled.<sup>15</sup> If by ordinary care its servants or agents should have known of obstruction and negligently failed to remove it or to make passage safe, a carrier is liable to a passenger for injury sustained by falling over baggage or other obstructions placed in aisles of its car by other passengers.<sup>16</sup>

**§ 3314. Carrier's rules and regulations.**—A rule of a carrier prohibiting the turning of seats so that passengers can ride backward is reasonable and enforceable.<sup>17</sup> A street car company has a right to adopt and enforce reasonable rules as to the use of

Air Line R., 94 S. Car. 282, 77 S. E. 1017, L. R. A. 1915B, 915n, Ann. Cas. 1915A, 1065n.

<sup>11</sup> Louisville &c. R. Co. v. Commonwealth, 160 Ky. 769, 170 S. W. 162, Ann. Cas. 1916A, 405n; West Bloomfield Twp. v. Detroit United R. Co., 140 Mich. 198, 109 N. W. 258, 117 Am. Stat. 628; State v. Texas &c. R. Co. (Tex.), 173 S. W. 900.

<sup>12</sup> Batch v. Helena Light & R. Co., 52 Mont. 517, 159 Pac. 411.

<sup>13</sup> Repp v. Indianapolis &c. Trac. Co. (Ind. App.), 109 N. E. 441. Where there was nothing in the conduct of the other passenger when in the presence of the conductor before the assault sufficient to indicate that passenger was quarrelsome or unruly, defendant carrier was held not responsible to passenger assaulted on train by another passenger in absence of conductor: Mills v. Atlantic Coast Line R. R., 172 N. Car. 266, 90 S. E. 221.

<sup>14</sup> Dixon v. Great Falls &c. R. Co., 38 App. Cas. (D. C.) 591, Ann. Cas. 1913C, 571n; Chicago &c. R. Co. v. Fisher, 61 Ind. App. 10, 110 N. E.

340; Adams v. Chicago &c. R. Co., 156 Iowa 31, 135 N. W. 21, 42 L. R. A. (N. S.) 373n; Kliner v. Milwaukee Elec. R. &c. Co., 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 276n.

<sup>15</sup> Chicago &c. R. Co. v. Brown, 111 Ark. 288, 163 S. W. 525; Tracy v. Boston Elec. R. Co., 217 Mass. 569, 105 N. E. 351; Pruett v. Southern R. Co., 164 N. Car. 3, 80 S. E. 65, 49 L. R. A. (N. S.) 810n, Ann. Cas. 1915D, 54n; Sure v. Milwaukee &c. R. &c. Co., 148 Wis. 1, 133 N. W. 1098, 37 L. R. A. (N. S.) 724n, Ann. Cas. 1913A, 1074n.

<sup>16</sup> Atkinson v. Dean (Ala.), 73 So. 479. See also Seaboard Air Line R. v. Andrews, 140 Ga. 254, 78 S. E. 925, Ann. Cas. 1914D, 165n. But compare Beiser v. Cincinnati &c. R. Co., 152 Ky. 522, 153 S. W. 742, 43 L. R. A. (N. S.) 1050n; Jackson v. Boston Elec. R. Co., 217 Mass. 515, 105 N. E. 379, 51 L. R. A. (N. S.) 1152n. And see note in Ann. Cas. 1913B, 811.

<sup>17</sup> Chesapeake &c. R. Co. v. Spiller, 157 Ky. 222, 162 S. W. 815, 50 L. R. A. (N. S.) 394n, Ann. Cas. 1915D, 186n.

transfers.<sup>18</sup> A rule of the company refusing transfer at a point which would enable the passenger to make a continuous round trip held reasonable and right, where the law requires a street railroad company to carry passengers on a continuous trip between two points for a single fare.<sup>19</sup> A passenger on an electric interurban car is entitled to a seat, but if he can not obtain one, he is not entitled to ride free but must leave the car on being given a reasonable opportunity, and if he refuses to pay his fare those in charge may eject him.<sup>20</sup> It appears that the conductor is guilty of assault and battery and that the company is liable, where the conductor takes hold of a passenger to eject her for nonpayment of fare before he has stopped his train.<sup>21</sup>

**§ 3315. Ejection for failure to comply with regulations or because of faulty ticket.<sup>22</sup>**

<sup>18</sup> *Duke v. Metropolitan St. R. Co.*, 166 Mo. App. 121, 148 S. W. 166; *Jones v. Omaha &c. St. R. Co.*, 95 Nebr. 798, 146 N. W. 959; *Taylor v. Spartanburg R. &c. Co.*, 98 S. Car. 206, 82 S. E. 404, 52 L. R. A. (N. S.) 908n, Ann. Cas. 1916D, 585n. See also note in Ann. Cas. 1916D, 586.

<sup>19</sup> *Hickman v. International R. Co.*, 97 Misc. 53, 160 N. Y. S. 994. Where the conductor on the original trip returned the wrong part of the round trip fare to the passenger and the passenger was put off on the return trip after handing the conductor the part of the ticket returned to him by the first conductor, the company was liable: *Cohen v. Erie R. Co.*, 97 Misc. 1, 160 N. Y. S. 1091. In case the passenger refuses to either pay his fare or deliver a proper ticket, he may be removed from the train: *Cohen v. Cleveland, C. & St. L. R. Co.*, 197 Ill. App. 88; *Fleck v. Missouri, K. & T. R. Co.* (Tex. Civ. App.), 191 S. W. 386. Passenger who holds a ticket over road running out of a joint station, and who takes the wrong train by misdirection, can ride thereon to reasonably safe and convenient point from which he can reach his proper train, and his ejection at such point is proper: *Mobile & O. R. Co. v. Dill*, 173 Ky. 412, 191 S. W. 80. Where the carrier ejected a passenger without demanding payment of the fare, the railroad is liable to one who boarded its train in good faith, believing an

order for a ticket was a ticket: *Jones v. Mobile & O. R. Co.*, 112 Miss. 283, 72 So. 1009. The company is justified in ejecting the passenger with the child when the passenger refuses to pay fare for a child over five years old: *Fleck v. Missouri, K. & T. R. Co.* (Tex. Civ. App.), 191 S. W. 386. The passenger's offer to pay fare after process of ejection has begun will not render his ejection unlawful where he has failed and refused to produce a ticket or pay fare after having been given a reasonable opportunity to do so, and the train is stopped to put him off: *Fleck v. Missouri, K. & T. R. Co.* (Tex. Civ. App.), 191 S. W. 386.

<sup>20</sup> *Rossman v. Georgia R. & Power Co.*, 146 Ga. 264, 91 S. E. 90, L. R. A. 1917C, 483.

<sup>21</sup> *Briggs v. Lusk* (Mo. App.), 190 S. W. 380.

<sup>22</sup> See generally as to when and how a passenger may be ejected and when the carrier is liable therefor: *Rossman v. Georgia R. &c. Co.*, 146 Ga. 264, 91 S. E. 90, L. R. A. 1917C, 483; *Union Trac. Co. v. Vestal*, 184 Ind. 21, 110 N. E. 211; *Terre Haute &c. Trac. Co. v. Hornaday* (Ind. App.), 109 N. E. 189; *Fagan v. Atlantic Coast Line R. Co.*, 220 N. Y. 301, 115 N. E. 704, L. R. A. 1917E, 663; *Missouri &c. R. Co. v. Ashinger* (Okla.), 162 Pac. 814, L. R. A. 1917D, 1180; notes in Ann. Cas. 1912C, 488, 730, Ann. Cas. 1913A, 1198. A rail-

§ 3316. **Carrier's right to compensation.**—While the carrier is entitled to a fare for carriage and notwithstanding the fact that a passenger's presence on the train, without paying a fare, was illegal, the company is liable for injury caused by its negligence.<sup>23</sup> Where the scheduled fare on an interurban line was greater for through transportation to a certain stop than the combined local fares from the point where a passenger boarded the car to such stop, and, for the purpose of taking advantage thereof the passenger paid the local fare to an intermediate point and on reaching it then tendered the local fare to the stop in question, he was held to have a right to do so, and, in any event, the conductor could not, while retaining the fare to the first point, eject him on the theory that he was a through passenger to such stop.<sup>24</sup>

§ 3318. **Conclusiveness of ticket.**<sup>25</sup>

§ 3326. **Limitation of liability by contract**—Where one travels on pass.—The entire subject of contracts limiting liability has already been considered.<sup>26</sup> Reference is here made, therefore, to only a few recent decisions which relate specifically to such contracts in the case of passengers.<sup>27</sup> It has been held

road company has been held not liable for wanton act of Pullman conductor in ejecting a trespasser where not for the protection of passengers: *Louisville &c. R. Co. v. Marlin*, 135 Tenn. 435, 186 S. W. 595, L. R. A. 1917A, 417n. Where fare demanded by carrier was that fixed and filed under the law, a passenger can not maintain action at common law on ground of unreasonableness of rates, the remedy being through the railroad commission: *Adams v. Central of Georgia R. Co. (Ala.)*, 73 So. 650.

<sup>23</sup> *Illinois Cent. R. Co. v. Messina*, 111 Miss. 884, 72 So. 779.

<sup>24</sup> *Brown v. Terre Haute &c. Trac. Co. (Ind. App.)*, 110 N. E. 703. See also *Terre Haute &c. R. Co. v. Hornaday (Ind. App.)*, 109 N. E. 189.

<sup>25</sup> See generally as to effect of ticket and where there is a right to eject when ticket is not good: *Louisville &c. R. Co. v. Fish (Ky.)*, 127 S. W. 519, 43 L. R. A. (N. S.) 584n (company held liable); *Melody v. Great Northern R. Co.*, 25 S. Dak. 606, 127 N. W. 543, 30 L. R. A. (N.

S.) 568, Ann. Cas. 1912C, 727n (company held not liable). Though no unnecessary force was used, where a passenger has paid for a ticket to his destination but has failed to receive the proper ticket owing to a mistake of the agent, he may recover for being removed from the train in consequence of failing to produce the proper ticket or to pay the extra fare demanded: *Cohen v. Cleveland, C. & St. L. R. Co.*, 197 Ill. App. 88.

<sup>26</sup> See ante §§ 765-776, and also ante Chapter LXXIX on Limitation of Liability by Contract, and post § 3337.

<sup>27</sup> *Norfolk So. R. Co. v. Chatman*, 222 Fed. 802; *Pittsburgh &c. R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; *Buckley v. Bangor &c. R. Co.*, 113 Maine 164, 93 Atl. 65, L. R. A. 1916A, 617, and numerous authorities reviewed in opinion and note. See also as to contract attempting to relieve a railroad company from liability to employes of sleeping car company, express messengers, or others, occupying a somewhat sim-



under the Nebraska constitution and statute that a contract is void that provided that operatives of a circus train shall be regarded as employes of the owners of the circus and not of the railroad, and that the railroad shall not be liable for injuries.<sup>24</sup>

**§ 3327. Limitation of liability where fare paid.**<sup>29</sup>—A common carrier of passengers may contract to limit his common-law liability as insurer, but he can not limit his liability for his negligent acts.<sup>30</sup>

**§ 3328. Termination of relation of carrier and passenger.**—As a general rule the relation of carrier and passenger continues to the end of the journey and until the passenger has had reasonable opportunity to leave the car and station in safety.<sup>31</sup> Where there was an obstruction on the track so that passengers had to be transferred from one car to another, the relation still existed while the passenger was making the transfer.<sup>32</sup> But where a passenger left the train for refreshments during a short stop and did not return in time to resume the journey, the rela-

ilar position to one or the other. Compare *Robinson v. Baltimore & C. R. Co.*, 237 U. S. 84, 35 Sup. Ct. 491, with *Pittsburgh & C. R. Co. v. Kinney*, 95 Ohio St. 64, 115 N. E. 505, L. R. A. 1917D, 641, and see other authorities reviewed in note to the latter case; also note in 50 L. R. A. (N. S.) 432-437, 689. The intended wrongful act of a servant will not be included within the provisions of a railroad pass for employe's family, saving the company from liability, "under any circumstances, whether of negligence of servant or otherwise": *Turman v. Seaboard Air Line R.*, 105 S. Car. 287, 89 S. E. 655. Except in case of a gratuitous pass, a common carrier of passengers can not, by contract, relieve himself from liability for his negligence: *Vandalia R. Co. v. Stevens* (Ind. App.), 114 N. E. 1001.

<sup>28</sup> *Maucher v. Chicago, R. I. & P. R. Co.*, 100 Nebr. 237, 159 N. W. 422.

<sup>29</sup> The carrier is liable for injuries sustained in a rear end collision, where the contract makes operatives of a circus train employes of the owners of the circus, and a contract by a circus employe releases all claims for injuries in travel: *Maucher v.*

*Chicago, R. I. & P. R. Co.*, 100 Nebr. 237, 159 N. W. 422.

<sup>30</sup> *Vandalia R. Co. v. Stevens* (Ind. App.), 114 N. E. 1001.

<sup>31</sup> *Terre Haute & T. Co. v. Hunter* (Ind. App.), 111 N. E. 344. See also *Mize v. Southern R. Co.*, 15 Ga. App. 265, 82 S. E. 925; *Georgia & C. R. Co. v. Thigpen*, 141 Ga. 90, 80 S. E. 626; *Ray v. Chicago & C. R. Co.*, 163 Iowa 430, 144 N. W. 1018; *Sterneman v. Springfield Trac. Co.*, 178 Mo. App. 64, 163 S. W. 258; *Hill v. Boston & C. R. Co.*, 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714n; *Turk v. Norfolk & C. R. Co.*, 75 W. Va. 623, 84 S. E. 569. And compare: *Texas & C. R. Co. v. Stewart*, 228 U. S. 357, 33 Sup. Ct. 548; *Waldrop v. Nashville & C. R. Co.*, 183 Ala. 226, 62 So. 769. See where fare to an intermediate station to which passenger goes is more than through fare and passenger pays through fare to take advantage thereof: *Brown v. Terre Haute & C. Trac. Co.* (Ind. App.), 110 N. E. 703; *Terre Haute & C. R. Co. v. Hornaday*, 59 Ind. App. 207, 109 N. E. 189.

<sup>32</sup> *Killmyer v. Wheeling Trac. Co.*, 72 W. Va. 148, 77 S. E. 908, 48 L. R. A. (N. S.) 683n, Ann. Cas. 1915C, 1220.

tion of carrier and passenger was terminated, and the passenger had no right to resume the journey on some other train without further payment of fare.<sup>33</sup> One is not, however, as a matter of law, a passenger, where she left a street car and was injured on a public highway while transferring to another car, where she could have chosen her own route.<sup>34</sup>

§ 3329. **Duty to stop at stations, to announce stations, to conform with schedules, and to give passenger proper instructions.**<sup>35</sup>—It is held that it is no defense that the passenger failed to tender the fare, where he was carried beyond his station while asleep, and when awakened expressed an intention to continue his journey and offered to pay fare.<sup>36</sup>

§ 3330. **Sleeping and parlor-car companies.**<sup>37</sup>—A sleeping car company is liable to a woman and her daughter for an assault committed on them by a negro while the conductor was assisting them to board a pullman car, the conductor having failed to prevent the assault.<sup>38</sup>

<sup>33</sup> *Tuder v. Oregon Short Line R. Co.*, 135 Minn. 294, 160 N. W. 785, L. R. A. 1917C, 86. See generally as to duty of carrier where passenger alights temporarily at an intermediate station, note to *Wetherla v. Missouri Pac. R. Co.*, 90 Kans. 702, 136 Pac. 221, 51 L. R. A. (N. S.) 899n.

<sup>34</sup> *Niles v. Boston Elevated R. Co.*, 225 Mass. 570, 114 N. E. 730.

<sup>35</sup> The passenger is entitled, where he has purchased a ticket, to be transported to destination on the particular line, to be notified of arrival, and to be furnished time and opportunity for disembarking: *Gilkerson v. Atlantic Coast Line R. Co.*, 105 S. Car. 132, 89 S. E. 549, L. R. A. 1915C, 664, and note where many authorities are cited to the effect that it is the duty of the company to announce the station. Railroad is not liable which carried woman passenger past destination, she needlessly walking back and suffering exposure: *Le Beau v. Minneapolis, St. P. & S. S. M. R. Co.*, 164 Wis. 30, 159 N. W. 577, L. R. A. 1917A, 1017. As to liability of the company for its ticket agent or other employé misdirecting a passenger and latter's duty to inquire, see: *Louisville & C. R. Co. v.*

*Gaddie*, 162 Ky. 205, 172 S. W. 514, L. R. A. 1915D, 705-715n.

<sup>36</sup> *Southern R. Co. v. Williams*, 146 Ga. 200, 91 S. E. 46. Where he is apparently asleep, the road is liable for carrying him past his destination, where a conductor, having cause to expect that a passenger is asleep at destination, fails to awaken him, either wilfully or negligently: *Gilkerson v. Atlantic Coast Line R. Co.*, 105 S. Car. 132, 89 S. E. 549, L. R. A. 1915C, 664.

<sup>37</sup> *Robinson v. Southern R. Co.*, 40 App. D. C. 549, L. R. A. 1915B, 621n, Ann. Cas. 1914C, 959n (duty as to baggage); *Calder v. Southern R. Co.*, 89 S. Car. 287, 71 S. E. 841, Ann. Cas. 1913A, 894 (duty to protect passengers).

<sup>38</sup> *Garrett v. Southern R. Co.*, 172 N. Car. 737, 90 S. E. 903, L. R. A. 1917F, 885n. The carrier was not liable for conversion of valuables where a passenger had not turned them over to the carrier's servants, but merely placed them in an upper berth above her own berth and they were lost: *Pinkus v. Pittsburgh, C., C. & St. L. R. Co.* (Ind. App.), 114 N. E. 36. Compare *Repp v. Indianapolis & C. Trac. Co.* (Ind. App.), 109 N. E.

§ 3333. **Liability for baggage of passengers.**<sup>39</sup>—In case of the loss of baggage, the rights and liabilities of an interstate passenger and the carrier depend upon federal legislation, the agreement to carry, and the principles of the common law as accepted and enforced in federal tribunals.<sup>40</sup> Where a passenger retains his personal effects in his possession, the carrier is not an insurer of them, but is only liable for failure to exercise reasonable care and caution to protect them.<sup>41</sup> Where a carrier affirmatively refused to take baggage into its own possession and thereby required the passenger to retain it in his own custody on the train, the carrier was liable for its loss, by theft or otherwise.<sup>42</sup>

§ 3335. **Personal baggage.**—It was held that three rings and a lavalier belonging to a woman passenger and contained in a suitable handbag were articles of baggage.<sup>43</sup>

§ 3337. **Limitation of liability for baggage.**<sup>44</sup>—The limitation is *prima facie* valid where an interstate passenger accepts

441. Passengers in a parlor car which belongs to another company are passengers of the railroad company, and where the car porter, though not a servant of the railroad company, was allowed to announce stations, the railroad company is liable for his act: *Spiesberger v. Michigan Cent. R. Co.*, 235 Fed. 864, 149 C. C. A. 176.

<sup>39</sup> *Robinson v. Southern R. Co.*, 40 App. D. C. 549, L. R. A. 1915B, 621n, Ann. Cas. 1914C, 959n; *Union Pac. R. Co. v. Grace*, 22 Wyo. 452, 143 Pac. 353, L. R. A. 1915B, 608n.

<sup>40</sup> *New York & C. R. Co. v. Beaham*, 242 U. S. 148, 37 Sup. Ct. 43, 61 L. ed. 210. It was liable to both owners for loss or injury of such dogs, where a railroad sold, to one of two joint owners of hunting dogs, authorized to act for the other, tickets for the transportation of the party and their dogs: *Louisville & N. R. Co. v. Dickson* (Ala. App.), 73 So. 750.

<sup>41</sup> *Louisville & N. R. Co. v. Dickson* (Ala.), 73 So. 750; *Pinkus v. Pittsburgh, C. C. & St. L. R. Co.* (Ind. App.), 114 N. E. 36. The company is not liable where a passenger without the carrier's knowledge has in his possession large sums of money or other property of exceptional value: *Pinkus v. Pittsburgh, C. C.*

& St. L. R. Co. (Ind. App.), 114 N. E. 36.

<sup>42</sup> *Borden v. New York Cent. R. Co.*, 98 Misc. 574, 162 N. Y. S. 1099. If, having made a rule requiring jewelry to be intrusted to it for safe-keeping, the passenger chooses to retain possession, a carrier is relieved from liability for jewelry in the passenger's possession as baggage: *Borden v. New York Cent. R. Co.*, 98 Misc. 574, 162 N. Y. S. 1099.

<sup>43</sup> *Borden v. New York Cent. R. Co.*, 98 Misc. 574, 162 N. Y. S. 1099.

<sup>44</sup> *Boston & C. R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593n; *St. Louis & C. R. Co. v. Faulkner*, 111 Ark. 430, 164 S. W. 763; *Southern R. Co. v. Dinkins & Co.*, 139 Ga. 332, 77 S. E. 147, 43 L. R. A. (N. S.) 806n; *Louisville & C. R. Co. v. Miller*, 156 Ky. 677, 162 S. W. 73, 50 L. R. A. (N. S.) 819n; *Baack & C. Millinery Co. v. Chicago & C. R. Co.*, 177 Mo. App. 282, 164 S. W. 175; *Zetler v. Tonopah & C. R. Co.*, 35 Nev. 381, 129 Pac. 299, L. R. A. 1916A, 1270n; *Cooper v. Norfolk & C. R. Co.*, 161 N. Car. 400, 77 S. E. 339; *Crout v. Yazoo & C. R. Co.*, 131 Tenn. 667, 176 S. W. 1027, L. R. A. 1915E, 281n; note in L. R. A. 1915B, 612.

and uses a ticket purporting to limit the baggage liability, unless greater value should be declared and excess charges paid.<sup>45</sup>

<sup>45</sup> New York &c. R. Co. v. Beaham,  
242 U. S. 148, 37 Sup. Ct. 43, 61 L.  
ed. 210.

## CHAPTER LXXXIV

### BILLS AND NOTES—DEFINITIONS AND GENERAL OBSERVATIONS

§ 3352. **Definition of a promissory note.**—Negotiability is not necessarily a quality of a promissory note, as it may be non-negotiable.<sup>1</sup>

§ 3353. **Form and negotiability of a promissory note.**<sup>2</sup>

§ 3356. **Instruments governed by the law merchant.**—It was held in a recent federal court case that a certificate of deposit is a negotiable instrument.<sup>3</sup> But where a coal company issued coupon books to its employes, redeemable in merchandise only, and by their terms not transferable, they were held not negotiable.<sup>4</sup>

§ 3357. **Negotiability in general.**<sup>5</sup>—Where a note contained the statement, "This note is given in accordance with a land contract of even date between B and C," it was held to be negotiable within the meaning of the Negotiable Instruments Act.<sup>6</sup> Where a mortgage provided that if the mortgagor permitted taxes to become delinquent or the property to sell for taxes, or if he failed to pay interest when due, that the note should be due sixty days thereafter, and foreclosure might proceed if contained in note, it was held not to affect its negotiability.<sup>7</sup> So, a mortgage provision that the mortgagee might pay taxes, assessments and insurance, which the mortgagor failed to pay, and recover the amount, and that the mortgage should stand as security for any sum so paid, did not destroy the negotiability of the note.<sup>8</sup>

<sup>1</sup> Colley v. Summers Parrott Hardware Co., 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375n.

<sup>2</sup> Corr v. Evans Colliery Co., 63 Pa. Super. Ct. 56.

<sup>3</sup> National City Bank v. Titlow, 233 Fed. 838. See also Bingham v. Newton Bank (Ind. App.), 118 N. E. 318; Kreig v. Palmer Nat. Bank (Ind. App.), 111 N. E. 81.

<sup>4</sup> Pond Creek Coal Co. v. Riley Lester & Bros., 171 Ky. 811, 188 S. W. 907.

<sup>5</sup> Where a note is made payable to bearer it is a negotiable instrument: Sivley v. Williamson, 112 Miss. 276, 72 So. 1008.

<sup>6</sup> Doyle v. Considine, 195 Ill. App. 311.

<sup>7</sup> Lundeau v. Hamilton (Iowa), 159 N. W. 163.

<sup>8</sup> Lundeau v. Hamilton (Iowa), 159 N. W. 163; Moore & Co. v. Burling, 93 Wash. 217, 160 Pac. 420.

## CHAPTER LXXXV

### BILLS AND NOTES—THE CONTRACT

§ 3365. **Nonnegotiable instruments.**—A note is nonnegotiable where it recites that it was given for the purchase of a threshing machine, and that the title to the same was reserved in the payee, with a right to declare forfeiture at any time for non-payment, even before the note was due.<sup>1</sup>

§ 3371. **Designation of parties.**—Where various persons sign a note as joint makers, they can not impose their attitude of sureties inter sese upon the payee or holder so as to affect his rights.<sup>2</sup>

§ 3372. **Same—Designation of parties.**—Where notes contained the words, "We promise to pay to the order of" payee, and were signed by the lumber company and by each member of the partnership doing business under the firm name, it was held that they were "joint notes."<sup>3</sup> Where a note recited that it was given under the hand and seal of each party and was signed in the name of the corporation and this followed by the letters "[S. S.]", and on the next line by an individual name, followed by the abbreviation "Pres.", it was held to be the note of the corporation and not the joint note of the corporation and the president individually.<sup>4</sup> But in a similar case, under Negotiable Instruments Law, where notes were given for a piano purchased by a corporation and were signed by the corporation and another person with no official designation, although the latter was in fact secretary of the corporation and intended to sign as such, it was held that the latter signer was liable to the payee.<sup>5</sup>

§ 3373. **Designation of payee.**—In Indiana, a note which is incomplete because of the absence of the name of the payee is not negotiable under the law merchant.<sup>6</sup>

<sup>1</sup> *Western Farquhar Machinery Co. v. Burnett*, 82 Ore. 174, 161 Pac. 384.

<sup>2</sup> *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327.

<sup>3</sup> *Anderson v. Stayton State Bank*, 82 Ore. 357, 159 Pac. 1033.

<sup>4</sup> *Spiller-Beall Co. v. Hirsch*, 18 Ga. App. 450, 89 S. E. 587.

<sup>5</sup> *Rudolph Wurlitzer Co. v. Rossmann*, 196 Mo. App. 78, 190 S. W. 636.

<sup>6</sup> *Hubbard v. First State Bank of Bourbon* (Ind. App.), 114 N. E. 642.

§ 3378. **Provision for attorney's fee and costs of collection.**<sup>7</sup>

§ 3379. **How money designated.**—It has been held that, though an amount appear in figures on the margin of a note, ordinarily there can be no recovery where a blank is left in the body of the instrument for the amount.<sup>8</sup>

§ 3380. **The amount must be certain.**—Evidence of the contract out of which the note grew, although a reference thereto is contained in the body of the instrument, is incompetent if the note is negotiable.<sup>9</sup> It is held that where a note provided that the payee could recover any taxes on the premises mortgaged as security for the note which the payee should pay, such note was nonnegotiable for uncertainty as to the amount payable, as no one could tell what future tax levies would be.<sup>10</sup>

§ 3381. **Time of payment must be certain.**—In Indiana a note is not negotiable under the law merchant where the date of execution is not written on the note if this makes the time of payment uncertain as where it is payable at a certain time after date.<sup>11</sup> Under the Negotiable Instruments Act it is held that a mortgage provision giving the mortgagee authority to declare the debt due for the default of the mortgagor does not render the note nonnegotiable for uncertainty as to time of payment.<sup>12</sup> But

<sup>7</sup> Under Negotiable Instruments Act it did not destroy the negotiability of a note where it was agreed that if any collection fee was incurred or any proceedings begun to collect it, a reasonable sum should be allowed for collection and attorney's fees to be included in the judgment: *Lundean v. Hamilton* (Iowa), 159 N. W. 163; *Colley v. Summers Parrott Hardware Co.*, 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375n. Where one assumes a note providing for attorney fees, he is liable for such fees: *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327. But, where the note provides for attorney's fees, the maker is not liable for such fees in a suit by an indorser against the maker, where the indorser has been compelled to pay the note by previous suit and judgment against the maker and such indorser: *Balkema v. Grolimund*, 92 Wash. 326, 159 Pac. 127.

<sup>8</sup> *Love v. Perry*, 19 Ga. App. 86, 90 S. E. 978.

<sup>9</sup> *Doyle v. Considine*, 195 Ill. App. 311.

<sup>10</sup> *Des Moines Savings Bank v. Arthur*, 163 Iowa 205, 143 N. W. 556, Ann. Cas. 1916C, 498n.

<sup>11</sup> *Hubbard v. First State Bank* (Ind. App.), 114 N. E. 642. Under Negotiable Instruments Act, acceleration clause held not to render series of notes non-negotiable: *White v. Hatcher*, 135 Tenn. 609, 188 S. W. 61. A note containing a provision that obligors authorized an extension of time of payment without impairing liabilities and agreement by sureties to waive notice of such extension held negotiable under Negotiable Instruments Act: *Bank of Whitehouse v. White*, 136 Tenn. 634, 191 S. W. 332.

<sup>12</sup> *Des Moines Saving Bank v. Arthur*, 163 Iowa 205, 143 N. W. 556, Ann. Cas. 1916C, 498n.

the note is nonnegotiable where the mortgage gives the mortgagee authority to declare the debt due without regard to whether the mortgagor is in default.<sup>13</sup>

§ 3388. **Contemporaneous agreements.**—The obligation of an indorser on a secured note was held to be a new agreement, warranting the instrument as thus appearing on its face, and superseding a former agreement to accept a deed of land in satisfaction of the note, under the Negotiable Instruments Act.<sup>14</sup>

§ 3390. **Laws of place of contract govern.**<sup>15</sup>—It was held that where a note was executed and delivered and made payable in Missouri, but was delivered to a payee residing in Illinois, it was a Missouri contract.<sup>16</sup>

§ 3398. **Delivery of instrument.**<sup>17</sup>—It was held that there was no delivery where the maker's president signed and handed a note to the payee as evidence of a commission he was to receive with the understanding that it was to have no effect until signed by the treasurer of the maker.<sup>18</sup> Where a husband executed a note to his wife's sister, to whom he was indebted, and gave it to his wife with direction to take care of it for the sister, it was a sufficient delivery though the wife retained possession until after the husband's death.<sup>19</sup>

<sup>13</sup> Des Moines Savings Bank v. Arthur, 163 Iowa 205, 143 N. W. 556, Ann. Cas. 1916C, 498n.

<sup>14</sup> Fidelity Nat. Bank v. Hosea (Wash.), 160 Pac. 960.

<sup>15</sup> Where a note is payable in Illinois and was given in payment for goods and was contested on special plea of failure of consideration, held that the law of Illinois governs: First Nat. Bank v. John McGrath & Sons Co., 111 Miss. 372, 72 So. 701. Where a note was executed in another state as a contract of that state, and which does not appear to be invalid under the laws of that state, Kirby's Dig. § 513, invalidating notes for a patent right, etc., unless they are executed on a printed form showing the consideration, does not apply: Dodd v. Axle-Nut Sign Co., 126 Ark. 14, 189 S. W. 663.

<sup>16</sup> American Nat. Bank v. Allen, 195 Mo. App. 98, 190 S. W. 947.

<sup>17</sup> A check has no legal inception until it is delivered to the payee:

Empire Trust Co. v. President and Directors of Manhattan Co., 97 Misc. 694, 162 N. Y. S. 629.

<sup>18</sup> In re Continental Engine Co., 234 Fed. 58, 148 C. C. A. 74.

<sup>19</sup> Rule v. Carey (Iowa), 159 N. W. 699. The sureties were liable on the note where a note was delivered by one maker upon apparent authority from all, the holder not knowing signatures of the two makers who did not deliver it, who were sureties for the maker who delivered it, were obtained by fraud, and that the note was delivered by them upon a condition which was not performed: Tischhauser v. Prentice, 30 Cal. App. 699, 159 Pac. 226. As between the original parties, note delivered by the maker has no validity until the conditions upon which the manual tradition thereof was made have been satisfied, and the maker, after giving notice of his election not to purchase the stock for which the note was conditionally given, was entitled to its



§ 3399. **Consideration, necessity for.**<sup>20</sup>—Neither want nor failure of consideration is available in an action on a note by the state superintendent of banks, where it was executed to a bank to meet the requirements of the state superintendent of banks that deficiency of assets be made good to enable the bank to continue business.<sup>21</sup>

§ 3400. **Sufficiency of consideration.**—It was held that the fact that the decedent felt under obligations to pay the claimant because of inadequacy of consideration previously paid was at most a moral obligation, and furnished no consideration for a note.<sup>22</sup>

§ 3401. **Valuable consideration.**—When a bank received and accepted notes as collateral where the parties delivering them owed the bank for money paid out in overdrafts, there was consideration for the transaction under the Negotiable Instruments Law.<sup>23</sup>

return: *Union Inv. Co. v. Epley*, 164 Wis. 438, 160 N. W. 175.

<sup>20</sup> Where the defense of fraud was not sustained, the amount the indorsee paid for the note was immaterial, where a note payable to an investment company for stock of a trust company was valid: *Crawford v. Davis* (Tex. Civ. App.), 188 S. W. 436. There is a failure of consideration where a note is given by a corporation for commissions to be earned by selling its stock, and the payee does nothing: *In re Continental Engine Co.*, 234 Fed. 58, 148 C. C. A. 74.

<sup>21</sup> *State v. Hills* (Ohio), 113 N. E. 1045. It is no defense to an action on the note that the maker received therefor transfer of the payee's business, with covenant that payee would not do business in that neighborhood, which covenant was broken: *Pinto v. Pulidora*, 162 N. Y. S. 736.

<sup>22</sup> *Meginnes v. McChesney* (Iowa), 160 N. W. 50. Either was a sufficient consideration to support mother's note, where lender of money to son, taking note from his mother, waived claim against estate of mother's husband, accommodation maker of son's note given for loan, and discharged debt of son: *Becker v. Noegel*, 165 Wis. 73, 160 N. W. 1055.

There was a valuable consideration where an attorney's note was substituted for note in which he had unwittingly invested client's money, which was forged: *Hyman v. Succession of Parkerson*, 140 La. 249, 72 So. 953, L. R. A. 1917B, 694n. Where one signs his name in blank on back of a note made by another before delivery, the debt for which a note is given is sufficient consideration to support his promise; but a new consideration is necessary if he signs the note after delivery: *American Multigraph Sales Co. v. Grant*, 135 Minn. 208, 160 N. W. 676. Though the construction company to which it is payable is engaged in the construction of the road when the note is given, a note in aid of construction of a railroad is not void for want of consideration: *Purcell Mill & Elevator Co. v. Canadian Valley Const. Co.* (Okla.), 160 Pac. 485.

<sup>23</sup> *Central Bank v. Lyda* (Mo.), 191 S. W. 245. The holder was unaffected by equities of which he did not have notice, where, in the Indian territory, he, prior to statehood, for valuable consideration, took a negotiable instrument as collateral for a pre-existing debt: *Ricks v. Johnson* (Okla.), 162 Pac. 476. The services rendered by the agent in selling, and

§ 3402. **Accommodation paper.**—It is a sufficient consideration for a note that goods are delivered to another.<sup>24</sup> It is held that it is not sufficient consideration to support the note to deliver collateral security to the accommodation maker.<sup>25</sup> An accommodation maker is one who, without consideration and for the purpose of enabling the payee or holder to obtain credit, executes commercial paper.<sup>26</sup> If an accommodation maker is compelled to pay, he may ordinarily recover the amount from the one for whose accommodation the note was made.<sup>27</sup>

§ 3403. **Love and affection.**—Where a note is transferred on consideration of love and affection between relatives, it is good and vests title in the assignee.<sup>28</sup>

§ 3404. **Consideration for extension.**—But it is held that a debtor's promise to pay his obligation as a surety on a note which is due is not a sufficient consideration to the creditor to ex-

the obligations imposed on the owner, constituted valuable consideration for the transfer of the purchase-money notes to the agent where a party agreed to sell land of another, and, if receiving less than \$10,000, to pay the whole to the owner, who agreed that if more was received the agent might retain any surplus: *Miller v. Campbell*, 173 App. Div. 821, 160 N. Y. S. 834. Any consideration sufficient to support a simple contract is value, and an antecedent or pre-existing debt constitutes value and is sufficient to support note: *Fidelity State Bank v. Miller*, 29 Idaho 777, 162 Pac. 244; *Colley v. Summers Parrott Hardware Co.*, 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375n.

<sup>24</sup> *Rudolph Wurlitzer Co. v. Rossman*, 196 Mo. App. 78, 190 S. W. 636.

<sup>25</sup> *First Nat. Bank's Receiver v. Boreing's Admx.*, 173 Ky. 327, 190 S. W. 1106.

<sup>26</sup> *State Bank v. Huffman* (Nebr.), 160 N. W. 115. At any time before the payer advances money thereon, an accommodation maker of a note may withdraw from his engagement evidenced thereby: *First State Bank of Teague v. Hare* (Tex. Civ. App.), 190 S. W. 1113. The maker, in an action by such accommodation holder, may set up failure of consideration

where one makes a note payable to his own order for the accommodation of another and indorsed it to such other: *First Nat. Bank v. Dorvall* (N. J.), 98 Atl. 476. Accommodation indorsers of note in consequence of their increased risk are discharged from liability, where there is a waiver of homestead and concealed usury, but they do not escape all liability if they knew of the usury, but may be relieved of usury upon a proper plea: *Vaughan v. Farmers' & Merchants' Bank*, 146 Ga. 51, 90 S. E. 478. An accommodation maker is liable as maker under the Negotiable Instruments Act: *Schoenwetter v. Schoenwetter*, 164 Wis. 131, 159 N. W. 737. The indorser of a note can not be held until a valid obligation is established against the maker, they being only secondarily liable: *Hackney Mfg. Co. v. Celum* (Tex. Civ. App.), 189 S. W. 988. One indorsing a renewal note without consideration held an indorser for the maker's accommodation and not of the payee: *Nalitzky v. Williams*, 237 Fed. 802.

<sup>27</sup> *Leonard v. State Exchange Bank of Elk City*, 236 Fed. 316, 149 C. C. A. 448.

<sup>28</sup> *Gooch v. Gooch* (Iowa), 160 N. W. 333.

tend payment of another note upon which he was also a surety.<sup>29</sup> It was not a sufficient consideration for the extension, where a holder of a note extended the time for payment and allowed the maker to pay interest without the knowledge of the sureties.<sup>30</sup>

**§ 3405. Validity of consideration.**—It was held by a United States circuit court of appeals that although notes were signed by a bank's officers for the purpose of deceiving the state bank commissioner, the plaintiff, one of such officers, having paid the notes, could enforce them against the bank.<sup>31</sup>

<sup>29</sup> Bank of Chilicothe v. Gunby (Mo. App.), 189 S. W. 412.

<sup>30</sup> Wilcox v. McCain Land & Live Stock Co., 37 S. Dak. 511, 159 N. W. 49. Where a note was given in renewal and extension of a former note on which defendant's name appeared as comaker it was founded on a good consideration: Citizens' Nat. Bank v. Rombauer, 194 Mo. App. 690, 189 S. W. 651. The note was supported by consideration where a note was given to discharge two other notes which were surrendered to the indorser of the note given: Travis v. Unkart (N. J. App.), 99 Atl. 320. Where a note is cancelled it is a good consideration for a new note given in payment of the old: Fidelity State Bank v. Miller, 29 Idaho 777, 162 Pac. 244. Where the time of the payment of a debt was extended and a note given to secure the debt it was a sufficient consideration: Dillworth v. Holmes Furniture & Vehicle Co. (Ala. App.), 73 So. 288; Tischhauser v. Prentice, 30 Cal. App. 699, 159 Pac. 226; Anderson v. Stayton State Bank, 82 Ore. 357, 159 Pac. 1033.

<sup>31</sup> Leonard v. State Exchange Bank of Elk City, 236 Fed. 316, 149 C. C.

A. 448. A note is not illegal or against public policy where it was given to a construction company, made and delivered in Indian Territory, to aid in the construction of a railroad, on condition that it be in operation in a certain town by a specified date: Purcell Mill & Elevator Co. v. Canadian Valley Const. Co. (Okla.), 160 Pac. 485. All notes in furtherance thereof are void, where an act is absolutely prohibited by statute or is contrary to public policy: Williams v. Turnbull (Okla.), 162 Pac. 770. Though effort to create lien on homestead for entire debt was ineffectual because part of debt was for something for which homestead could not be incumbered, the notes were held valid: M. Kangerga & Bro. v. Willard (Tex. Civ. App.), 191 S. W. 195. The sister's contract of indorsement was void for duress, where she indorsed note executed by her mother to plaintiff when informed by him that her brother had committed an offense, and that plaintiff would send him to state's prison if his notes were not taken up: Travis v. Unkart, 89 N. J. L. 571, 99 Atl. 320, Ann. Cas. 1917C, 1031n.

## CHAPTER LXXXVI

### ACCEPTANCE

#### § 3411. Acceptance—Necessity for.<sup>1</sup>

§ 3414. When acceptance implied.—It was held that where a telegram was sent to a bank as follows: "Will honor draft of R, bill of lading attached for stock purchased," that it was an acceptance of all drafts drawn by persons named with bills of lading attached for the current season, and was not merely an acceptance of the first draft.<sup>2</sup> Under a statute providing that if the drawee destroyed a bill of exchange, it would be deemed an acceptance, it was held that an accidental destruction did not constitute an acceptance.<sup>3</sup>

§ 3416. Qualified or conditional acceptance.—Where one desires to make his acceptance conditional he should be careful to express the condition and not use terms that are too general.<sup>4</sup> An acceptance payable out of the proceeds of a certain contract when available has been held not to be so conditional or qualified as to entitle the acceptor to apply part of the proceeds to the drawer's indebtedness to the acceptor so as to give such past indebtedness priority over the acceptance.<sup>5</sup> But a similar acceptance was held conditional in another recent case.<sup>6</sup>

§ 3418. Effect of acceptance.—There was a primary contract between the drawer and the owner of the drafts, and the

<sup>1</sup> The payor is not justified in refusing to accept the bill, where it is presented by a daughter of the payee acting for him, at a time when a third person under an agreement with the payee has selected a new piano for his own use at the regular selling price, where a due bill states on its face that it "is neither transferable nor negotiable, and is only payable by an allowance of the amount hereof on the leasing or purchase by the payee of a new piano at regular selling price," and that it must be presented at the time of selection of new instrument, nor can the payor impose as a condition of

the acceptance that the new piano should be bought on the instalment plan: *Marbach v. F. A. North Co.*, 63 Pa. Super. Ct. 20.

<sup>2</sup> *James River Nat. Bank v. Thuet*, 135 Minn. 30, 159 N. W. 1093.

<sup>3</sup> *Bailey v. Southwestern Veneer Co.*, 126 Ark. 257, 190 S. W. 430.

<sup>4</sup> *Schwabacher Hardware Co. v. Miller Sawmill Co.*, 90 Wash. 193, 155 Pac. 767, Ann. Cas. 1918A, 940n.

<sup>5</sup> *Schwabacher Hardware Co. v. Miller Sawmill Co.*, 90 Wash. 193, 155 Pac. 767, Ann. Cas. 1918A, 940.

<sup>6</sup> *Milwaukee Corrugating Co. v. Trayler*, 95 Kans. 562, 148 Pac. 653.

drawee became absolutely liable, regardless of the question of whether or not the payee was alive or dead when they were drawn, where they were presented and accepted.<sup>7</sup>

<sup>7</sup> Bloch v. Rio Grande Valley Bank &c. Co. (Tex. Civ. App.), 190 S. W. 541.

## CHAPTER LXXXVII

### NEGOTIATION AND TRANSFER

§ 3425. **Parties to transfer.**—Where a note is transferred by indorsement the indorser is secondarily liable on the same, the maker being primarily liable.<sup>1</sup>

§ 3427. **Transfer by indorsement.**—Whether made by an individual or a corporation, no particular form of signature or seal is necessary to a valid indorsement of a negotiable instrument.<sup>2</sup> Where a note was indorsed: "Pay to any bank or banker," it is an indorsement for collection, and title is not transferred.<sup>3</sup>

§ 3429. **Transfer by blank indorsement.**<sup>4</sup>

§ 3431. **Transfer by restrictive indorsement.**—The makers are relieved from personal liability, where a mortgage note is assigned before maturity to one of the makers, and indorsed to a new obligee without recourse on the makers individually.<sup>5</sup>

§ 3432. **Transfer by delivery.**<sup>6</sup>

§ 3433. **Transfer by assignment.**<sup>7</sup>—Where the payee of a note assigned the note and mortgage, he was held an indorser and

<sup>1</sup> Everding v. Toft, 82 Ore. 1, 150 Pac. 757, 160 Pac. 1160; post § 3535.

<sup>2</sup> La Hatté v. Metropolitan Trust Co., 18 Ga. App. 764, 90 S. E. 725. Where there was substantial testimony that such indorsement was ratified by the officers of the corporation, in view of § 10160, defining "written" as printed, under the statute the indorsement of the corporation's name on the back of a note by means of a rubber stamp was a sufficient "written indorsement": American Union Trust Co. v. Never Broak Range Co., 196 Mo. App. 206, 190 S. W. 1045.

<sup>3</sup> Citizens' Trust Co. v. Ward, 195 Mo. App. 223, 190 S. W. 361. Compare National Bank of Commerce v. Bossemeyer (Nebr.), 162 N. W. 503, L. R. A. 1917E, 374.

<sup>4</sup> Where an executor indorsed in blank a check payable to him as ex-

ecutor, and covering funds belonging to the estate, it made the check payable to any one who might become the bearer and available to such bearer for bank deposit by his indorsement of it: Hale v. Windsor Sav. Bank, 90 Vt. 487, 98 Atl. 993. See also Mangold & Co. Bank v. Utterback (Okla.), 160 Pac. 713, L. R. A. 1917B, 364.

<sup>5</sup> Security State Bank v. Clarke, 99 Kans. 18, 160 Pac. 1149. See generally as to restrictive indorsement: Hammond Lumber Co. v. Kearsley (Cal.), 172 Pac. 404; Copeland v. Burke (Okla.), 158 Pac. 1162, L. R. A. 1917A, 1165 and other cases there reviewed in note on pp. 1167-1169.

<sup>6</sup> Title to a note payable to bearer passes by delivery: Sivley v. Williamson, 112 Miss. 276, 72 So. 1008.

<sup>7</sup> Where a note is incomplete be-

not a maker.<sup>8</sup> Where a negotiable instrument is payable to order and the payee or holder transfers it without indorsement, the transferee takes only the title and right of his transferor, and does not become a holder in due course, and does not have the legal title, but only an equitable title.<sup>9</sup>

§ 3434. **Effect of transfer upon equities.**<sup>10</sup>—The maker of a nonnegotiable note may urge any defense against an assignee that he could set up against the payee.<sup>11</sup>

§ 3435. **Liability of transferor by indorsement.**—Under the Negotiable Instruments Law, the president of a corporation does not become a joint maker but an indorser by writing his name upon the back of the company's note.<sup>12</sup> An indorser is secondarily liable, the maker being liable primarily.<sup>13</sup>

cause of absence of date of execution and name of payee, it is an instrument in writing given for payment of money, and negotiable under Burns' Ann. Stat. 1914, §§ 9071, 9072, so as to vest the property in an assignee for value: *Hubbard v. First State Bank of Bourbon* (Ind. App.), 114 N. E. 642.

<sup>8</sup> *Trafton v. Garnsey* (N. H.), 99 Atl. 290.

<sup>9</sup> *Emerson-Brantingham Co. v. Brennan*, 35 N. Dak. 94, 159 N. W. 710; *Capitol Hill State Bank v. Rawlins Nat. Bank*, 24 Wyo. 423, 160 Pac. 1171. Where damages might have been recouped by the maker of a note in an action by the original payee, they may be recouped against a mere assignee: *Emerson-Brantingham Co. v. Brennan*, 35 N. Dak. 94, 159 N. W. 710. Maker of a note, sued by alleged transferee, may avail himself of defense that alleged transfer was not genuine under Civ. Code 1910, § 4290: *Carter v. Haralson*, 146 Ga. 282, 91 S. E. 88.

<sup>10</sup> The relation of stranger or third party to commercial paper when he purchases and acquires possession of it is one of intent, to be ascertained

from all facts and circumstances and condition of the parties surrounding transaction: *Citizens' Trust Co. v. Ward*, 195 Mo. App. 223; 190 S. W. 364.

<sup>11</sup> *Copp v. Guaranty Oil Co.*, 31 Cal. App. 543, 161 Pac. 18; *Emerson-Brantingham Co. v. Brennan*, 35 N. Dak. 94, 159 N. W. 710.

<sup>12</sup> *Mechanic v. Elgie Iron Works*, 98 Misc. 620, 163 N. Y. S. 97; *Colley v. Summers Parrott Hardware Co.*, 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375n. There being nothing to indicate that they were liable in any other capacity, under the Ohio Negotiable Instruments Act (Gen. Code Ohio, § 8168), held, that directors, who indorsed a note given by the president to raise funds to pay for a subscription to stock newly issued, were liable only as indorsers: *Murray v. Third Nat. Bank*, 234 Fed. 481, 148 C. C. A. 247.

<sup>13</sup> *Farmers' & Drovers' Bank v. Bashor*, 98 Kans. 729, 160 Pac. 208; *Mangold & Glandt Bank v. Utterback* (Okla.), 160 Pac. 713; *Everding v. Toft*, 82 Ore. 1, 150 Pac. 757, 160 Pac. 1160.

## CHAPTER LXXXVIII

### MATURITY, GRACE, EXTENSION AND RENEWAL

§ 3445. **Maturity of paper payable at a fixed time.**—The maker has till the expiration of banking hours to pay a note where it is payable on a day certain at a bank.<sup>1</sup>

§ 3447. **Maturity of paper payable on or after demand.**—A note is payable on demand where it is payable generally “after date,” and does not express the time for payment.<sup>2</sup>

§ 3449. **Effect of extension or renewal as between parties.**—Any defense that would be good against an original note is equally good against a note taken in renewal without additional consideration, as between the parties.<sup>3</sup>

§ 3450. **Effect of extension or renewal as discharge of other parties.**—Under the Negotiable Instruments Law it is held that where one signed a note as a maker, but was shown to be an accommodation maker, he was primarily liable, and was not discharged by an agreement between the holder and makers for an extension of the time of payment.<sup>4</sup>

<sup>1</sup>Williams v. Cumberland Fertilizer Co., 18 Ga. App. 558, 89 S. E. 1091. Where a note read, “One year after date I promise to pay” a certain sum, but stated also, “It is understood and agreed that this note is to be paid whenever” certain land of the maker should be sold, it was payable not in one year after date, but in the contingency stated, in view of a statement in the collateral deed of trust that the note was not payable until such sale: Hughes v. McEwen, 112 Miss. 35, 72 So. 848, L. R. A. 1917B, 1048n. “Maturity,” as applied to commercial paper, means the time when the paper becomes due and demandable and when an action can be maintained thereon to enforce payment: Ardmore State Bank v. Lee (Okla.), 159 Pac. 903.

<sup>2</sup>Love v. Perry, 19 Ga. App. 86, 90 S. E. 978. As to where a note payable at the happening of a certain event, or at a fixed time but not until

the happening of a specified event, is due, see: Hughes v. McEwen, 112 Miss. 35, 72 So. 848, L. R. A. 1917B, 1048n, 1050n.

<sup>3</sup>Dodd v. Axle-Nut Sign Co., 126 Ark. 14, 189 S. W. 663. In the absence of any agreement that one should be principal and the other surety, where joint principals on a joint note gave a renewal note in lieu thereof, without any additional consideration, they were joint principals on the renewal note: Doby v. Almand, 146 Ga. 263, 91 S. E. 21. Where user has knowledge of the partial failure of consideration for the original note and gives a renewal note, he is estopped to set up the defense of failure of consideration in action on the renewal note: Dodd v. Axle-Nut Sign Co., 126 Ark. 14, 189 S. W. 663. See also Muschelwicz v. Tidrick (S. Dak.), 167 N. W. 499.

<sup>4</sup>Graham v. Shephard, 136 Tenn.



**§ 3451. What constitutes an extension or renewal.<sup>5</sup>—**

Where there was an agreement that a corporation's note with individual sureties might be renewed on conditions, the holder was not required to accept a renewal note unless signed by all the parties to the original note.<sup>6</sup>

418, 189 S. W. 867. Under Negotiable Instruments Law an accommodation indorser is not released by an agreement that, if the maker of a past-due note would pay part of it, the holder would wait for the balance, it being without consideration: *Nalitzky v. Williams*, 237 Fed. 802, 151 C. C. A. 44. Extension of time agreed to by all parties, without anything to fix the period of extension may render a note non-negotiable: *Cedar Rapids Nat. Bank v. Weber* (Iowa), 164 N. W. 233, L. R. A. 1918A, 432.

<sup>5</sup> There is a contract to extend the time of payment during that period, where a creditor without inadvertence or mistake receives a payment of interest in advance on the note of the debtor, and does not expressly reserve the right to sue before the expiration of the period for which in-

terest is taken: *Ardmore State Bank v. Lee* (Okla.), 159 Pac. 903. A "renewal" of a note is the giving of a new note in the place of a former one, and a contract for renewal contemplates that a new note shall be given to which the parties are the same, but is not an agreement for an extension: *Wilcox v. McCain Land & Live Stock Co.*, 37 S. Dak. 511, 159 N. W. 49.

<sup>6</sup> *Wilcox v. McCain Land & Live Stock Co.*, 37 S. Dak. 511, 159 N. W. 49. That plaintiff held new note and collateral subject to performance of condition was held not to constitute acceptance of the new note, where the payment of other notes and furnishing of collateral were conditions precedent to acceptance of renewal of a note on which defendant was surety: *Bank of Chillicothe v. Gumby* (Mo. App.), 189 S. W. 412.

## CHAPTER LXXXIX

### PRESENTMENT, PROTEST, PAYMENT AND DISCHARGE

§ 3460. **Meaning of bona fide holder.**—It is held that a person taking a note has notice of an infirmity or defect in the title if he had actual knowledge of such infirmity or defect or knowledge of such facts that his taking the instrument amounted to bad faith.<sup>1</sup> Where it is shown that a note grew out of a fraudulent transaction, the burden is on the owner to prove that he is, or some person under whom he claims was, a holder in due course.<sup>2</sup> The plaintiff is not an innocent purchaser or indorsee for value of a note where plaintiff corporation became the owner of a note by virtue of consideration with the holder corporation.<sup>3</sup>

<sup>1</sup> Willis v. Reed (Mo. App.), 190 S. W. 377; Everding v. Toft, 82 Ore. 1, 150 Pac. 757, 160 Pac. 1160.

<sup>2</sup> Everding v. Toft, 82 Ore. 1, 150 Pac. 757, 160 Pac. 1160.

<sup>3</sup> Tidewater Southern R. Co. v. Harney, 32 Cal. App. 253, 162 Pac. 664. Because the president was a director of the payee, a bank can not be held to have taken a note from the payee with knowledge of facts making its action bad faith, constituting notice of defect, preventing it being a holder in due course, under Gen. Stat. 1902, §§ 4222, 4226: First Nat. Bank v. Fairfield Auto Co. (Conn.), 99 Atl. 577. Where he admitted having known where the payee got it and what it was for, the transferee of a note was held to have taken it with notice: In re Continental Engine Co., 234 Fed. 58, 148 C. C. A. 74. Where one sold land for another and received purchase-money notes from such other, in view of the contract between himself and the landowner, and the power of attorney given him, he was held to have been a principal, having a joint interest, and so not a holder in due course: Miller v. Campbell, 173 App. Div. 821, 160 N. Y. S. 834. Holder's standing as a bona fide purchaser is not affected by notice of defects in notes acquired after pur-

chase in good faith without notice: Landon v. Wm. E. Huston Drug Co. (Tex. Civ. App.), 190 S. W. 534. Though it might put the purchaser on inquiry, purchaser of notes at a large discount does not alone constitute bad faith: Moore v. Burling, 93 Wash. 217, 160 Pac. 420. An assignee bank before maturity of a note for value, where it was signed by one as maker, and by another to enable first maker to borrow money to apply on his debt to bank, and which gave first maker credit for amount of note on delivery: Helper State Bank v. Jackson, 48 Utah 430, 160 Pac. 287. As a defense against a bona fide holder a defendant could plead against a bona fide purchaser: (1) non est factum; (2) gambling, illegal, or immoral consideration; or (3) fraud in its procurement: Spiller-Beall Co. v. Hirsch, 18 Ga. App. 450, 89 S. E. 587. Where one with another signs a joint and several note, which shows that each of makers is liable as a principal, he can not defeat an action by a holder in due course on ground that he is only a surety: Critser v. Steeley (Okla.), 162 Pac. 795. Where the action is brought by an innocent holder for value before maturity, evidence of transactions between the maker and payee of a promissory

§ 3461. **What is usual course of business.**—A note payable on demand is due immediately and so a purchaser takes it subject to the equities existing between the original parties and is not a purchaser in due course.<sup>4</sup>

§ 3462. **Holder without notice.**—Although the purchaser of an instrument did not know of the exact fraud committed in its inception but did in fact know of a defect therein, he is not a purchaser without notice.<sup>5</sup>

§ 3463. **Necessity for presentment for payment and demand.**—Neither presentment for payment nor notice of dishonor is necessary to charge the maker with liability under the

note which relates to the inception of the note is incompetent as evidence in defense: *Kent v. Thelin*, 195 Ill. App. 440; *Morey v. Simpson*, 197 Ill. App. 55; *Critser v. Steeley* (Okla.), 162 Pac. 795; *Landon v. Wm. E. Huston Drug Co.* (Tex. Civ. App.), 190 S. W. 534.

<sup>4</sup> *Exchange Bank of Oakfield v. Odum*, 19 Ga. App. 52, 90 S. E. 977. One taking a note payable "on demand next after date" takes it subject to existing equities: *Exchange Bank of Oakfield v. Odum*, 19 Ga. App. 52, 90 S. E. 977.

<sup>5</sup> *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830. A purchaser of negotiable paper, fair on its face, does not owe active duty of inquiry to the maker, to avoid imputation of bad faith, which does not arise from mere failure to take precautions of a prudent man or from negligence: *Citizens' Bank & Trust Co. v. Limp-right*, 93 Wash. 361, 160 Pac. 1046. Where one purchased demand notes seven months or more old, for less than a third of their face, without making inquiry, knowing the maker had its office and place of business where he lived, he is not a bona fide holder in due course: *Stanley v. Franco-American Ferment Co.*, 97 Misc. 401, 161 N. Y. S. 365. The Negotiable Instruments Law provides that to constitute notice, party receiving instrument must have actual knowledge of infirmity or defect, or knowledge of such facts that his action in taking instrument amounts to bad faith: *Central Bank v. Lyda*

(Mo. App.), 191 S. W. 245; *Spiller-Beall Co. v. Hirsch*, 18 Ga. App. 450, 89 S. E. 587; *Everding v. Toft*, 82 Ore. 1, 150 Pac. 757, 160 Pac. 1160. Negligence and bad faith are not synonymous, yet where a person takes a note under suspicious circumstances and, having means of knowledge, wilfully abstains from making inquiries, his intentional ignorance may result in bad faith: *Everding v. Toft*, 82 Ore. 1, 150 Pac. 757, 160 Pac. 1160. The bank may assume the signatures of the payee and indorsers are genuine, where negotiable paper is taken by it before maturity in the usual course of business: *Farmers' & Mechanics' Bank v. Whitehead*, 105 S. Car. 100, 89 S. E. 657. It would not be notice that his action was unauthorized that the president of corporation negotiated note for his own benefit to one who knew he was such president, nor would it put one on inquiry as to legality of president's conduct: *Spiller-Beall Co. v. Hirsch*, 18 Ga. App. 450, 89 S. E. 587. It is insufficient to give a purchaser notice of a failure of consideration in that the stock was worthless, where a memorandum on a note recited that it was for the price of corporate stock, and that dividends were guaranteed: *Hardin v. Bank of Harlem*, 145 Ga. 494, 89 S. E. 613. That the edge of notes showed perforations, indicating that they might have been attached to other paper, is not sufficient to show notice of defects to put a purchaser on inquiry: *Landon v. Wm.*

Negotiable Instruments Law.<sup>6</sup> No demand on the note is necessary, where rent notes were made payable at the office of the lessor.<sup>7</sup>

§ 3464. **Time for presentment or demand.**—That a demand note bears interest does not change its character as being payable on demand, but this may be considered for the purpose of determining whether the parties expected an immediate or early demand.<sup>8</sup>

§ 3465. **Place of presentment or demand.**—Under the Negotiable Instruments Act, there was no legal presentment, and no waiver being pleaded or claimed, the indorser could not be held, where notes, when due, were not at the place provided for payment, and could not have been surrendered had payment been tendered at due dates.<sup>9</sup>

*E. Huston Drug Co. (Tex. Civ. App.), 190 S. W. 534.* A purchaser takes with notice where the note was executed in name of a corporation without consideration, by one of its officers, and payable to him individually: *Luden v. Enterprise Lumber Co., 146 Ga. 284, 91 S. E. 102, L. R. A. 1917C, 485.* An indorsement on a check, "To be applied on paper held by (mortgagee) if found correct," is notice, and assignees are not bona fide purchasers: *Slimmer v. State Bank of Halstad, 134 Minn. 349, 159 N. W. 795.* The manufacturing company took note given the selling company with notice of infirmities caused by breach of such warranty, where it was fully aware, by its contract with selling company, that all notes taken upon sales were based on transaction containing warranty: *Mount v. Neighbors Implement & Vehicle Co., 195 Mo. App. 21, 189 S. W. 614.* President of a corporation held chargeable with knowledge of failure of consideration, where he knew that its stocks were practically valueless, and that note indorsed to him as collateral had been given for such stocks, even if he took it before maturity: *Hamilton v. Mihills, 92 Wash. 675, 159 Pac. 887.* All of the equities between the parties are open against the transferee of notes, who was in fact a principal with his trans-

feror in the sale of land for which they were given: *Miller v. Campbell, 173 App. Div. 821, 160 N. Y. S. 834.*

<sup>6</sup> *Schoenwetter v. Schoenwetter, 164 Wis. 131, 159 N. W. 737.* See also *United States Nat. Bank v. Shupak (Mont.), 172 Pac. 324.*

<sup>7</sup> *Champion Shoe Machinery Co. v. Landman, 97 Misc. 642, 162 N. Y. S. 346.* Under the Ohio Negotiable Instruments Act they were held not primarily liable, and so not entitled to presentment for payment, the note not being one for their accommodation, where directors of a bank signed a note to enable the president to subscribe for shares of unsubscribed stock to insure an issue of new stock: *Murray v. Third Nat. Bank of St. Louis, 234 Fed. 481, 148 C. C. A. 247.* See generally as to necessity for presentment and notice of a law: *Houser v. Fayssoux, 168 N. Car. 1, 83 S. E. 692, Ann. Cas. 1917B, 835n, 836n; Rusmisset v. White Oak Stave Co. (W. Va.), 92 S. E. 672, L. R. A. 1917F, 453.*

<sup>8</sup> *Murray v. Third Nat. Bank of St. Louis, 234 Fed. 481, 148 C. C. A. 247.* A demand note must be presented for payment within a reasonable time: *Hussey v. Sutton, 96 Misc. 552, 160 N. Y. S. 934.*

<sup>9</sup> *Greco v. Lo Monte, 162 N. Y. S. 982.*

§ 3466. **Manner of presentment or demand.**<sup>10</sup>

§ 3467. **To whom presentment should be made.**<sup>11</sup>

§ 3468. **By whom presentment may be made.**—Any joint obligee has a right to collect a note executed to himself and others, and his receipt is binding on all of the others.<sup>12</sup>

§ 3469. **Waiver of presentment or demand.**—A maker of a demand note waived its actual presentment upon a demand for payment by not asking for it and by refusing payment by saying that he did not have the money and that he needed the amount for his family's support.

§ 3470. **Excuses for delay in presentment and demand.**—Where a drawer has the bank certify his check and then delivers it, and the holder neglects to present it in due course, the drawer is discharged to the extent that he suffers because of the delay under the Missouri statute requiring presentment within a reasonable time.<sup>14</sup>

§ 3471. **Discharge by payment.**—The drawer is relieved from liability, even though the drawee is insolvent, as the giving of credit on deposit will be treated as payment, where the payee of a check indorsed it to his bank for collection, and the bank deposited it in the bank upon which it was drawn, instead of cashing it.<sup>15</sup> If so intending, the giving of a note in payment of an existing note is payment.<sup>16</sup> Where the instrument is not in the

<sup>10</sup> Any reasonable request to pay a demand note providing for attorney's fees is sufficient to put maker in default under the Negotiable Instruments Act: *Hodges v. Blaylock*, 82 Ore. 179, 161 Pac. 396.

<sup>11</sup> Where a note specified no place of payment, and the makers were not partners, presentment for payment on all the makers was a condition precedent to recovery from the indorser: *Prior v. Simonson* (Colo.), 160 Pac. 1035.

<sup>12</sup> *Ethington v. Rigg*, 173 Ky. 355, 191 S. W. 98.

<sup>13</sup> *Hodges v. Blaylock*, 82 Ore. 179, 161 Pac. 396.

<sup>14</sup> *Brunswick v. People's Savings Bank*, 194 Mo. App. 360, 190 S. W. 60.

<sup>15</sup> *Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631.

But see *United States Nat. Bank v. Shupak* (Mont.), 172 Pac. 324. Payment will be held to have been made at that time where a banker has, on special deposit, money belonging to the maker of a note sufficient to pay the note and also holds the note for collection, and on demanding payment is directed to take the amount out of the special deposit, and says "your note is paid": *Belk v. Capital Fire Ins. Co.*, 100 Nebr. 260, 159 N. W. 405.

<sup>16</sup> *Fidelity State Bank v. Miller*, 29 Idaho 777, 162 Pac. 244. It must appear that the person receiving the payment had either possession of the note or express or implied authority from the holder to receive such payment in order to bind the holder by a payment made to another than the

possession of the person to whom payment is made, payment is made at the risk of the payer.<sup>17</sup>

**§ 3475. Discharge by alteration.**—A holder in due course, not a party to the alteration, is entitled to enforce it against the original makers, where a note was altered by changing the purported maker.<sup>18</sup> An innocent purchaser may recover according to its original tenor, but one who is not an innocent purchaser can have no recovery, where a note is altered after execution and delivery.<sup>19</sup>

**§ 3476. Discharge of persons secondarily liable.**—The indorser of a note is discharged when he is not notified of its dishonor.<sup>20</sup> It is held that where a volunteer paid the amount of the note and took possession of it, he either purchased it or paid the debt; if he was a purchaser, the indorser was not discharged; if he paid the debt the indorser was relieved of liability.<sup>21</sup>

**§ 3478. Notice of dishonor.**<sup>22</sup>

holder: *Griffin v. Halbert*, 196 Ill. App. 601.

<sup>17</sup> *Griffin v. Halbert*, 196 Ill. App. 601; *Sivley v. Williamson*, 112 Miss. 276, 72 So. 1008.

<sup>18</sup> *Public Bank of New York City v. Knox-Burchard Mercantile Co.*, 135 Minn. 171, 160 N. W. 667.

<sup>19</sup> *Zehr v. Champlin (Okla.)*, 159 Pac. 1185. A material alteration of note by payee, without consent of maker, avoided it against the maker even in the hands of a holder in due course before the adoption of Negotiable Instruments Law: *Wayne County Nat. Bank v. Kneeland (Okla.)*, 161 Pac. 193.

<sup>20</sup> *Trafton v. Garnsey (N. H.)*, 99 Atl. 290; *Codd v. Von Der Ahe*, 92 Wash. 529, 159 Pac. 686. The payee was discharged as indorser where the maker of a note indorsed by the payee for accommodation, induced a third person to pay note on maturity to a bank which had discounted it and payee was not a party to transaction: *McKenzie v. Smith*, 18 Ga. App. 626, 89 S. E. 1097.

<sup>21</sup> *McKenzie v. Smith*, 18 Ga. App. 626, 89 S. E. 1097. The liability of the indorser was not discharged by an assignment by the maker of notes to an indorsee to protect creditors un-

der a composition agreement, the proceeds of which were turned over to the maker's attorneys after bankruptcy proceedings: *Silverman v. Rubenstein*, 162 N. Y. S. 733. Unless with such person's assent, or unless recourse is expressly reserved, under Negotiable Instruments Act, § 127, a person secondarily liable is discharged by any agreement binding on the holder to extend time of payment: *Farmers' & Drovers' Bank v. Bashor*, 98 Kans. 729, 160 Pac. 208. Under Negotiable Instruments Law, indorsers of note were not discharged by holder bank's agreement with third party to extend time of payment: *Brosemer v. Brosemer*, 99 Misc. 101, 162 N. Y. S. 1067. L. O. I., § 5953, subd. 3, which declares a person secondarily liable discharged by the discharge of a prior party, applies only to discharge of act of creditors, and not by operation of law or where note is destroyed because of vice inherent in the transaction: *Everding v. Toft*, 82 Ore. 1, 150 Pac. 757, 160 Pac. 1160.

<sup>22</sup> Notice of dishonor properly addressed and deposited in the mails is deemed to have been given whether it was received or not, under Negotiable Instruments Act,

§ 3480. **To whom notice of dishonor given.**—Under Negotiable Instruments Law, where a note was in the hands of the original obligees at maturity, a maker and original obligor was not entitled to notice of dishonor or nonpayment.<sup>23</sup>

§ 105: First Nat. Bank v. Delone, 254 Pa. 409, 98 Atl. 1042. Telling the indorser's son the day before the note was due that it would not be paid and the indorser would be held liable is not a good notice of dishonor, and the general rule is that notice before maturity and in mere anticipation of default is a nullity: Horton v. Wilson (N. Car.), 95 S. E. 904.

<sup>23</sup> Sim v. Citizens' Bank, 173 Ky. 799, 191 S. W. 489. Defendant be-

came the maker of the note and chief obligor, and was not entitled to notice of dishonor, by specific provision of Rev. Stat. 1909, § 10084, where maker of note sold his business to defendant, who signed the note with consent of payee, who under Bulk Sales Law could have prevented the sale: Boand v. Stewart, 193 Mo. App. 715, 188 S. W. 317. Surety is not entitled to notice of dishonor but indorser is: Horton v. Wilson (N. Car.), 95 S. E. 904.

## CHAPTER XC

### BONDS IN GENERAL

§ 3491. **General nature and essentials of bonds.**<sup>1</sup>—A contract of indemnity or bond executed by competent parties upon sufficient consideration and not prohibited by law will be valid at common law, though not authorized by statute.<sup>1a</sup> But it is held where a bond is executed in pursuance of and solely because of a statute and such statute is ineffectual to require the giving of a bond, such bond is without consideration and void.<sup>2</sup>

§ 3493. **Form and contents in general.**—Official and statutory bonds are not as a general rule invalid where they do not conform entirely with the statute.<sup>3</sup> And while the proper place for the signature of the obligor is at the foot of an instrument, the manner and form of the signature, if the signer intended by such act to obligate himself to comply with the terms and conditions of the bond, is immaterial.<sup>4</sup>

§ 3494. **Designation of parties.**—Where one signs a bond it is not necessary to charge him as obligor that his name should appear in the body of the instrument provided it is shown that he intended to become bound.<sup>5</sup> It is held that a materialman can not recover on a contractor's bond which does not purport to be made for the benefit of materialmen.<sup>6</sup>

§ 3495. **Execution in general.**—A judicial bond is not different from any other contract and where the distinction between sealed and unsealed instruments has been done away with, it may be executed or ratified in the same manner as any other

<sup>1</sup> [Main section cited in *Harris v. Taylor County* (Tex.), 173 S. W. 921, 922.]

<sup>1a</sup> *Bowen v. Lovewell*, 119 Ark. 64, 177 S. W. 929; *Robertson & Co. Contracting Co. v. Aetna Accident & Co.*, 91 Conn. 129, 99 Atl. 557.

<sup>2</sup> *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15; *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 159 Pac. 600.

<sup>3</sup> *Miles v. Baley*, 170 Cal. 151, 149 Pac. 45; *Robertson & Co. Contracting Co. v. Aetna Accident & Co.*, 91 Conn. 129, 99 Atl. 557.

<sup>4</sup> *Craig v. Spencer* (Okla.), 156 Pac. 172.

<sup>5</sup> *Craig v. Spencer* (Okla.), 156 Pac. 172.

<sup>6</sup> *Blyth-Fargo Co. v. Free*, 46 Utah 233, 148 Pac. 427. But see post §§ 3545, 3802.



contract notwithstanding a seal was required at common law.<sup>7</sup> As a general rule an official bond takes effect from the time of its delivery.<sup>8</sup> A municipal corporation will be estopped from denying recitals in bonds issued under its seal and signed by its mayor and clerk,<sup>9</sup> or to dispute delivery where it permitted such bonds to be placed on the market by another.<sup>10</sup>

§ 3497. **Filling blanks.**—Where a maker places a blank bond in the hands of a third person and such third person fills the blanks and delivers the bond to an innocent obligee the maker is estopped to deny the execution of the instrument.<sup>11</sup>

§ 3500. **Consideration.**—A bond executed pursuant to a statute which is without force is not supported by sufficient consideration and is void.<sup>12</sup>

§ 3502. **Statutory bonds and their validity.**—As a rule statutory bonds should conform to all the requirements of the statute under which they are given; but it is held where there is a substantial compliance the bond is valid and binding.<sup>13</sup> It is not necessary that the bond should expressly refer to the statute in order to constitute it a statutory bond.<sup>14</sup> Although a bond may be insufficient under the statute because of noncompliance with its requirements yet it may be good as a common-law bond.<sup>15</sup>

§ 3503. **Common-law bonds and their validity.**—A bond in a form not prohibited by law or contrary to public policy when

<sup>7</sup> Where the agent of a corporation gave an attachment bond and after an adverse judgment the corporation was consulted as to appeal and the matter was referred to the general counsel and he authorized an appeal the act of the agent was ratified: *State v. Parke-Davis & Co.*, 191 Mo. App. 219, 177 S. W. 1070. An undertaking executed by a foreign security company need not be executed in the state: *Thompson v. Meredian Life Ins. Co. &c.*, 36 S. Dak. 175, 153 N. W. 993.

<sup>8</sup> *Thayer v. Erie County &c.*, 160 App. Div. 300, 145 N. Y. S. 808.

<sup>9</sup> *Newbern v. National Bank &c.*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019.

<sup>10</sup> *Newbern v. National Bank &c.*,

234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019.

<sup>11</sup> *Gronvold v. Federal Union Surety Co.*, 212 Fed. 908, 129 C. C. A. 428.

<sup>12</sup> *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 159 Pac. 600. See also *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

<sup>13</sup> *Miles v. Baley*, 170 Cal. 151, 149 Pac. 45; *Robertson &c. Contracting Co. v. Aetna Accident &c. Co.*, 91 Conn. 129, 99 Atl. 557.

<sup>14</sup> *Miles v. Baley*, 170 Cal. 151, 149 Pac. 45.

<sup>15</sup> *Ewing v. Board of Comrs. of Ellis County (Okla.)*, 156 Pac. 229; *Peck v. Curlee Clothing Co. (Okla.)*, 162 Pac. 735. See also *Union Bank &c. v. American Bonding Co. &c.*, 174 App. Div. 542, 161 N. Y. S. 655.

supported by sufficient consideration, intended for a lawful purpose and executed by competent parties is a valid obligation at common law.<sup>16</sup>

**§ 3504. Construction—General rules.**—A bond must be construed as a whole and that construction given which will give effect to the intention of the parties expressed therein.<sup>17</sup> The rules of strict construction applicable to bonds privately given are not to be applied to a statutory bond to the public.<sup>18</sup> A distinction is made between an accommodation surety and a surety company which becomes surety for profit. It is held the rule of strict instruction does not apply to the latter and where there is room for construction the contract is to be construed most strongly against the surety and in favor of the indemnity.<sup>19</sup> In general it is held that a contractor's bond should receive a liberal construction to accomplish its purpose.<sup>20</sup> An instrument may be enforceable although there are apparent omissions if from the whole instrument the terms of the obligation can be ascertained.<sup>21</sup>

**§ 3506. Construction with respect to liability.**—It is held in an action on a bond given to support another that personal liability is limited by the penal sum of the bond.<sup>22</sup> In case a bond does not contain conditions as broad as the statute the statutory

<sup>16</sup> *Bowen v. Lovewell*, 119 Ark. 64, 177 S. W. 929; *Emanuel v. McNeil*, 87 N. J. L. 499, 94 Atl. 616; *Peck v. Curlee Clothing Co. (Okla.)*, 162 Pac. 735. Where surety company gave a bond for a warehouseman in securing a license to conduct a public grain elevator it was held valid as a common-law obligation notwithstanding the statute under which it was given was invalid since the bond covered the common-law obligation as well as the statutory obligation: *State v. Cochrane*, 264 Mo. 581, 175 S. W. 599; *Robertson & Co. Contracting Co. v. Aetna Accident & Co. Co.*, 91 Conn. 129, 99 Atl. 557. See also *Bowen v. Lovewell*, 119 Ark. 64, 177 S. W. 929.

<sup>17</sup> *Blythe Fargo Co. v. Free*, 46 Utah 233, 148 Pac. 427; *United States & Co. Guaranty Co. v. Iowa Tel. Co.*, 174 Iowa 476, 156 N. W. 727. Where

a bond given without statutory authority is severable and contains some legal and some illegal conditions the legal conditions should be enforced and the others disregarded: *Gillespie v. Frisbie*, 46 Okla. 438, 148 Pac. 991.

<sup>18</sup> *Hauth v. Sambo*, 100 Nebr. 160, 158 N. W. 1036 (bond given to compel observance of law).

<sup>19</sup> *United States Fidelity & Co. v. Poetker*, 180 Ind. 255, 102 N. E. 372, L. R. A. 1917B, 984. See also *United Surety Co. v. Meenan*, 211 N. Y. 39, 105 N. E. 106.

<sup>20</sup> *National Surety Co. v. United States*, 228 Fed. 577, 143 C. C. A. 99, L. R. A. 1917A, 336.

<sup>21</sup> *Bridgeton v. Fidelity & Deposit Co. of Maryland*, 88 N. J. L. 645, 96 Atl. 918.

<sup>22</sup> *Eugley v. Sproul*, 115 Maine 463, 99 Atl. 443.

conditions will usually be read into it and the obligor will be bound to the performance of such conditions.<sup>23</sup>

§ 3511. **Interest or title passing by transfer.**—The pledge of bonds payable to bearer by one in possession thereof and representing himself to be the owner passes title to the pledgee free from any claim of the owner.<sup>24</sup>

§ 3513. **Rights of assignee or transferee.**—The owner of bonds which have been stolen and transferred by forged indorsement may recover them from the transferee although new securities have been issued to the transferee.<sup>25</sup> The purchaser of a bond having unpaid interest coupons attached is not thereby charged with notice of defense, but it is a circumstance on the question of notice.<sup>26</sup>

§ 3514. **Bona fide purchasers in general.**—One who obtains the bonds of a corporation without consideration is not a bona fide holder.<sup>27</sup>

<sup>23</sup> United States Fidelity &c. Co. v. Poetker, 180 Ind. 255, 102 N. E. 372, L. R. A. 1917B, 984.

<sup>24</sup> Interboro Brewing Co. v. Doyle, 165 App. Div. 646, 151 N. Y. S. 325.

<sup>25</sup> Chester County &c. Co. v. Se-

curities Co., 165 App. Div. 329, 150 N. Y. S. 1010.

<sup>26</sup> Georgia &c. R. Co. v. Miller, 144 Ga. 665, 87 S. E. 897.

<sup>27</sup> In re Progressive Wall Paper Co., 229 Fed. 489, 143 C. C. A. 557, L. R. A. 1916E, 563.

## CHAPTER XCI

### BONDS IN LEGAL PROCEEDINGS

§ 3525. **Bonds given in legal proceedings—Attachment bonds.**—Slight irregularities in the execution of attachment bonds do not render them invalid.<sup>1</sup> Where a bond is required by statute the cause of action is not complete without it.<sup>2</sup>

§ 3526. **Bonds given in legal proceedings—Attachment bonds—Amount.**—The amount of the bond must not be less than that fixed by the statute.<sup>3</sup> And where a bond is insufficient in amount such defect can not be cured by a subsequent remittitur of plaintiff's claim.<sup>4</sup> The liability of a surety company on bond to release an attachment is fixed by the bond and can not be extended to other actions against the same defendant either by subsequent agreement or by action of court.<sup>5</sup>

§ 3527. **Bonds given in legal proceedings—Attachment bonds—Approval.**—The bond is generally approved by the court issuing the writ. But there may be an implied approval where after the filing of affidavit and bond the court orders a writ of attachment to issue.<sup>6</sup> It is the duty of a court to inquire into the authority of a person executing a corporate attachment bond, before issuing a warrant of attachment.<sup>7</sup> But where the officers of a corporation apply for warrant of attachment it is not necessary that their authority to file the bond should accompany

<sup>1</sup> A bond to a defendant with a plural name instead of the individual defendant's is not fatal to an attachment: *Lowenberg v. L. Jacobson's Sons*, 25 Cal. App. 790, 145 Pac. 734. See also *Miller v. Alaska-Canadian &c. Coal Co.*, 4 Alaska 439.

<sup>2</sup> In an action to recover a debt not due by attachment on real estate the bond required by statute is necessary to complete the cause of action: *I. L. Lamm Co. v. Peaks*, 162 Wis. 289, 156 N. W. 194.

<sup>3</sup> *Red Cross Lumber Co. v. Frank I. Abbott Lumber Co.*, 138 La. 1082, 71 So. 191. Cost and attorney's fees need not be taken into account in fix-

ing the penalty of a bond for attachment except in those cases where they are fixed and definite: *Miller v. Alaska-Canadian &c. Coal Co.*, 4 Alaska 439; *Rhodes v. Bowling Green &c. Co.*, 43 App. D. C. 298.

<sup>4</sup> The rule de minimis held not to apply to an attachment bond: *Red Cross Lumber Co. v. Frank I. Abbott Lumber Co.*, 138 La. 1082, 71 So. 191.

<sup>5</sup> *McCargar v. Moore (Ore.)*, 157 Pac. 1107.

<sup>6</sup> *First National Bank v. Griffith*, 192 Mo. App. 443, 182 S. W. 805.

<sup>7</sup> *J. W. Copeland Co. v. Brown*, 103 S. Car. 177, 87 S. E. 1002.

it, and it is sufficient where proof of such authority is made on the hearing of motion to vacate.<sup>8</sup> A partner can not become surety on an attachment bond in which the partnership is principal.<sup>9</sup> The filing of a plea in abatement to a writ of attachment is a waiver of any defect in its approval,<sup>10</sup> and an attachment bond void for want of a proper surety can not be amended.<sup>11</sup>

**§ 3530. Bonds given in legal proceedings—Appeal bonds.**—In the absence of a statute to the contrary the obligation in an appeal bond should run in favor of the parties adversely interested in the proceeding.<sup>12</sup> As a general rule where several defendants appeal and a bond is executed by one only it is fatally defective.<sup>13</sup> An apparent exception to the general rule exists where an appeal is taken by a husband and wife from a judgment against both. In such case it is held a bond executed for the husband alone is valid.<sup>14</sup> That one of the parties is a married woman and could not legally sign a bond does not affect its validity.<sup>15</sup> It is not essential that the bond be signed by the appellant.<sup>16</sup> Where it is discovered that a bond has been signed without authority leave may be obtained to file a proper one.<sup>17</sup> Where the statute requires a bond to be made payable to the state a bond otherwise sufficient will not be invalid for such defect.<sup>18</sup> Among those usually exempt from giving an appeal bond are public officers,<sup>19</sup> municipalities,<sup>20</sup> administrators<sup>21</sup> and the state.<sup>22</sup>

<sup>8</sup> *J. W. Copeland Co. v. Brown*, 103 S. Car. 177, 87 S. E. 1002.

<sup>9</sup> *H. C. Copeland & Co. v. Monroe*, 16 Ga. App. 586, 85 S. E. 789.

<sup>10</sup> *First National Bank v. Griffith*, 192 Mo. App. 443, 182 S. W. 805.

<sup>11</sup> *H. C. Copeland & Co. v. Monroe*, 16 Ga. App. 586, 85 S. E. 789.

<sup>12</sup> *State v. Dayton Lumber Co.* (Tex. Civ. App.), 164 S. W. 48.

<sup>13</sup> *Title Insurance & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723; *Beer v. Strode*, 195 Ill. App. 309.

<sup>14</sup> *Jacoby v. Hollada*, 78 Wash. 88, 138 Pac. 558.

<sup>15</sup> *Duller v. McNeill* (Tex. Civ. App.), 161 S. W. 45.

<sup>16</sup> *O'Connor v. Towey*, 70 Ore. 399, 140 Pac. 625.

<sup>17</sup> *Thomson v. Meridian Life Ins. Co.*, 36 S. Dak. 175, 153 N. W. 993.

<sup>18</sup> *In re Barnes' Estate*, 47 Okla. 117, 147 Pac. 504; *Barnett v. Black-*

*stone Coal & Co. (Okla.)*, 158 Pac. 588; *Metzler-Hegsted Lumber Co. v. Farmers' Union & Co.*, 78 Ore. 551, 153 Pac. 56.

<sup>19</sup> *McLendon v. Empire Mining Co. (Ala.)*, 74 So. 937 (county tax officers); *Crittenberger v. State Sav. & Co. (Ind. App.)*, 114 N. E. 225 (auditor of state); *State v. Board of Examiners*, 52 Mont. 91, 156 Pac. 124 (board of examiners for nurses).

<sup>20</sup> Statute permitting municipalities to appeal without giving bond was held to apply to interlocutory orders: *McCarthy v. Chicago*, 197 Ill. App. 564.

<sup>21</sup> *In re Dovey's Estate*, 99 Nebr. 744, 157 N. W. 915.

<sup>22</sup> The state has such interest in an appeal by the Industrial Accident Commission as not to require an appeal bond: *Miller v. State Industrial Accident Comm.*, 84 Ore. 507, 159 Pac. 1150.

§ 3531. **Bonds given in legal proceedings—Appeal bonds—Amount.**—The amount of the penalty to be named in an appeal bond varies in the different states, but where it is fixed by statute and a bond is given providing a less amount it may be insufficient.<sup>23</sup> The bond should describe the particular judgment appealed from.<sup>24</sup> The liability of a principal on an appeal bond may be distinct from that of the surety.<sup>25</sup> The failure of the clerk to indorse his approval on the bond will not release the sureties.<sup>26</sup>

§ 3532. **Bonds given in legal proceedings—Bail bonds in civil actions.**—When bail is given a principal is regarded as delivered to the custody of his sureties under the common-law rule.<sup>27</sup> Persons who become bail are favored by law.<sup>28</sup>

§ 3533. **Bonds given in legal proceedings—Bail bonds in criminal actions.**—The liability of a surety on a bail bond is measured by the terms of his undertaking which liability can not be enlarged,<sup>29</sup> and the bond should designate the amount in which the obligors are bound.<sup>30</sup> Admitting an accused to bail is not a step in a trial in the sense that the accused must be present when the bond is accepted.<sup>31</sup> To make a bond effective it must be entered of record. The mere filing is not sufficient.<sup>32</sup> It is generally necessary that the bond describe the offense, but such description need not be with particularity.<sup>33</sup> Where the statute requires the punishment itself to be stated in the bond such defect will render

<sup>23</sup> Sutton v. Sutton, 78 Ore. 9, 150 Pac. 1025, 152 Pac. 271.

<sup>24</sup> Wilder v. Bush (Ala.), 75 So. 143; Strain v. Irwin (Ala.), 75 So. 151. Under statute the signature of appellant is not indispensable: Frankel v. Morse Timber Co., 140 La. 448, 73 So. 263.

<sup>25</sup> Under a bond providing the surety should pay all costs and damages rendered against defendant on appeal it is not liable for costs in the trial below: Erdle v. Bassett, 94 Misc. 666, 158 N. Y. S. 598.

<sup>26</sup> Leach v. Altus State Bank (Okla.), 155 Pac. 875.

<sup>27</sup> Pickelsimer v. Glazener, 173 N. Car. 630, 92 S. E. 700.

<sup>28</sup> Pickelsimer v. Glazener, 173 N. Car. 630, 92 S. E. 700.

<sup>29</sup> Ewing v. State, 240 Fed. 241, 153 C. C. A. 167.

<sup>30</sup> Boozer v. Atlanta, 18 Ga. App. 732, 90 S. E. 492.

<sup>31</sup> Ewing v. State, 240 Fed. 241, 153 C. C. A. 167.

<sup>32</sup> Bennett v. State (Tex. Cr.), 194 S. W. 145.

<sup>33</sup> The crime of violating the law against lotteries is sufficiently indicated in undertaking by reference to particular section of statute violated: St. Lawrence County v. Goldberg, 175 App. Div. 88, 161 N. Y. S. 641. Where accused was arrested for keeping blind tiger and released on a bail bond, describing the offenses as retailing liquor without a license, the misdescription does not invalidate the bond: State v. Tambera, 140 La. 412, 73 So. 250; Allen v. State, 110 Miss. 384, 70 So. 362.

the bond invalid.<sup>34</sup> Proper officials may designate the amount of bail and a bond not conforming to that amount is void.<sup>35</sup> After a release of a defendant has been obtained by means of an undertaking every reasonable intendment should be in favor of its sufficiency and against the surety.<sup>36</sup>

**§ 3534. Bonds given in legal proceedings—Injunction.—**It has been held that a restraining order may issue without bond although the statute requires a bond in case of temporary injunction.<sup>37</sup> The absence of a bond unless expressly dispensed with is fatal to an injunction.<sup>38</sup>

**§ 3535. Bonds given in legal proceedings—Administration bonds.—**A will may direct that no sureties be required of the executor but such provision is not binding on the court.<sup>39</sup>

**§ 3537. Bonds given in legal proceedings — Guardians' bonds.—**A guardian's bond is valid if it substantially complies with the statute.<sup>40</sup> An additional bond may be required when necessary to protect the estate.<sup>41</sup>

<sup>34</sup> *Todd v. State*, 78 Tex. Cr. 221, 180 S. W. 116; *Robertson v. State*, 77 Tex. Cr. 536, 179 S. W. 106.

<sup>35</sup> *Boozar v. Atlanta*, 18 Ga. App. 732, 90 S. E. 492.

<sup>36</sup> *St. Lawrence Co. v. Goldberg*, 175 App. Div. 88, 161 N. Y. S. 641.

<sup>37</sup> *State v. McQuillan*, 260 Mo. 164, 168 S. W. 924.

<sup>38</sup> *Smith v. Frohlich*, 135 La. 733, 66 So. 163.

<sup>39</sup> *Cunninghame v. Herring*, 195

Ala. 469, 70 So. 148; *Chamberlain v. Husel*, 178 Mich. 1, 144 N. W. 549; *McAdams v. Wilson* (Tex. Civ. App.), 164 S. W. 59.

<sup>40</sup> A bond given by a guardian made payable to the state instead of the county judge is not invalid: *Rice v. Theimer*, 45 Okla. 618, 146 Pac. 702; *Hickman v. Jackson* (Okla.), 164 Pac. 979.

<sup>41</sup> *Clymer v. State*, 59 Ind. App. 364, 109 N. E. 431.

## CHAPTER XCII

### PRIVATE INDEMNITY BONDS

§ 3540. **Private indemnity bonds—In general.**—Contracts of indemnity should be fairly construed.<sup>1</sup> Such contracts must be supported by a consideration and where entered into subsequently to the incurring of the principal obligation they must be supported by an independent consideration.<sup>2</sup> Indemnity bonds partake of the nature of insurance contracts and are usually subject to the rules of construction applicable to insurance contracts.<sup>3</sup> A contract of indemnity is distinguishable from guaranty and suretyship in that it undertakes to save another from loss on some obligation to a third person and is not a promise to one to whom another is answerable.<sup>4</sup>

§ 3541. **Private indemnity bonds—Agents' bonds.**—A material change in the conduct of the obligee's business, such as relieving the agent of his obligation to render monthly statements is sufficient to release the sureties on his bond.<sup>5</sup> But it is otherwise where the change is minor in character.<sup>6</sup>

§ 3542. **Private indemnity bonds—Contractors' bonds.**—The liability of a surety on such bonds is determined by the conditions of the bond and is neither to be extended by construction nor restricted by implication.<sup>7</sup> The sureties are entitled to have

<sup>1</sup> Mack Manufacturing Co. v. Massachusetts Bonding &c. Co., 103 S. Car. 55, 87 S. E. 439.

<sup>2</sup> A bond given after the completion and acceptance of the principal work to keep a certain portion in repair is without consideration: Village v. Botsch, 86 Misc. 481, 149 N. Y. S. 320. But see Hensley v. School Dist. &c., 97 Kans. 56, 154 Pac. 253.

<sup>3</sup> Green v. United States Fidelity &c. Co., 135 Tenn. 117, 185 S. W. 726.

<sup>4</sup> Hall v. Equitable Surety Co., 126 Ark. 535, 191 S. W. 32. A guarantor undertakes by separate, independent agreement that another shall perform a duty to a third person and a surety joins with another in agreeing with

him that he will perform his duty and all the parties are directly and primarily held for performance: Ricketson v. Lizotte, 90 Vt. 386, 98 Atl. 801.

<sup>5</sup> Alabama Fidelity & Casualty Co. v. Alabama Fuel &c. Co., 190 Ala. 397, 67 So. 318.

<sup>6</sup> Hartford Fire Ins. Co. v. Casey (Mo.), 191 S. W. 1072.

<sup>7</sup> Hay v. Hassett, 174 Iowa 601, 156 N. W. 734; Mann v. Mann, 119 Va. 630, 89 S. E. 897. The intent of the parties must be gathered from the nature of the instrument when read in the light of all the circumstances attending its execution: Hay v. Hassett, 174 Iowa 601, 156 N. W. 734.



the contract strictly adhered to.<sup>8</sup> As a rule sureties will be released from the bond of a building contract by making payments not authorized by the contract.<sup>9</sup> But the surety can not complain of the time and manner in which the payments were made unless the departure from the contract and bond has resulted in material damage.<sup>10</sup> Overpayment to the contractor based on erroneous estimates of architect will not release the surety from liability on the bond but he will not be liable for the overpayments.<sup>11</sup> Where the surety is not prejudiced he will not be released by premature payments.<sup>12</sup>

**§ 3543. Private indemnity bonds—Contractors' bonds for city and other work.**—A guaranty may be required by a city from a contractor to secure the payment for material furnished and labor performed.<sup>13</sup> But the surety on a bond given for municipal work providing that the contractor should furnish and deliver all material and perform all work and labor is not liable to materialmen.<sup>14</sup> That a city is named obligee in a bond instead of the state will not invalidate the bond.<sup>15</sup> The surety on bond of a

<sup>8</sup> Tide Water Oil Co. v. Globe Indemnity Co., 238 Fed. 157, 151 C. C. A. 233; Lowndes Alliance Warehouse Co. v. Greene, 17 Ga. App. 542, 87 S. E. 826.

<sup>9</sup> Justice v. Empire State Surety Co., 218 Fed. 802, 134 C. C. A. 490; Equitable Surety Co. v. Board of Comm. of Tippah County, 231 Fed. 33, 145 C. C. A. 221; Lowndes Alliance Warehouse Co. v. Greene, 17 Ga. App. 542, 87 S. E. 826; Kelsay Lumber Co. v. Rotsky (Tex. Civ. App.), 178 S. W. 837; Lloyd Inv. Co. v. Illinois Surety Co., 164 Wis. 282, 160 N. W. 58. The owner of a building making payments to the contractor beyond the amount authorized by the contract, and failing to require affidavits provided for released the sureties on the contractor's bond as their liability could not be extended: Blackburn v. Morel, 13 Ga. App. 516, 79 S. E. 492; Morgan v. Salmon, 18 N. Mex. 72, 135 Pac. 553, L. R. A. 1915B, 407n. Surety not released: Trustees of First Presbyterian Church v. United States Fidelity & Guaranty Co., 133 Minn. 429, 158 N. W. 709; Fitger Brewing Co. v. Amer-

ican Bonding Co., 127 Minn. 330, 149 N. W. 539.

<sup>10</sup> School Dist. of Ford County v. De Lano, 96 Kans. 499, 152 Pac. 668.

<sup>11</sup> Southern Real Estate & Financial Co. v. Banker's Surety Co. (Mo.), 184 S. W. 1030; Dunne Inv. Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 Pac. 405, 411; Barton v. Title Guaranty & Surety Co., 192 Mo. App. 561, 183 S. W. 694.

<sup>12</sup> Standard Asphalt & Rubber Co. v. Texas Bldg. Co., 99 Kans. 567, 162 Pac. 299, L. R. A. 1917C, 490; Barton v. Title, Guaranty & Surety Co., 192 Mo. App. 561, 183 S. W. 694; National Surety Co. v. Lincoln County Mont., 238 Fed. 705, 151 C. C. A. 555; Lloyd Inv. Co. v. Illinois Surety Co., 164 Wis. 282, 160 N. W. 58.

<sup>13</sup> National Surety Co. v. Louisville, 165 Ky. 38, 176 S. W. 364; United States Fidelity & Guaranty Co. v. Star Brick Co. (Okla.), 153 Pac. 1122.

<sup>14</sup> Staples-Hilderbrand Co. v. Metal Concrete Chimney Co. (Ind. App.), 112 N. E. 832.

<sup>15</sup> Dolese Bros. Co. v. Chaney, 44 Okla. 745, 145 Pac. 1119.

public contractor having abandoned the contract can not complain of a new contract made by the owner with a third person for different work, and the surety is not released.<sup>16</sup> The surety on a building contract completing the work on failure of contractor is entitled to recover from the owner payments made in violation of the contract.<sup>17</sup>

**§ 3544. Private indemnity bonds—Contractors' bonds for county and municipal work.**—The county board is in some jurisdictions required to take a bond as conditioned by statute.<sup>18</sup> But it is held that a county may without express authority require a bond from contractors for public work conditioned to pay for all labor and materials furnished for such work.<sup>19</sup>

**§ 3545. Private indemnity bonds—Contractors' bonds—Third parties.**—Where a statute makes the benefit of a bond given by a contractor inure to materialmen and laborers, any contract or bond is to be construed with reference thereto.<sup>20</sup> But where the bond provides for the benefit of all persons entitled to liens one failing to give notice of lien can not sue on the bond.<sup>21</sup> A bond conditioned that the contractor and his sureties would pay for all materials used in the building and preserve the building from liens is intended for the benefit of the owner of the property and not for materialmen.<sup>22</sup> However, where a bond is given to secure the faithful performance of a contract the bond and contract are to be construed together<sup>23</sup> and materialmen and

<sup>16</sup> *United States v. United States Fidelity & Co.*, 236 U. S. 512, 35 Sup. Ct. 298, 59 L. ed. —. See also *Winter v. Hazen-Latimer Co.*, 42 App. D. C. 469.

<sup>17</sup> *Fidelity & Deposit Co. v. Merchants' & Farmers' Bank*, 120 Ark. 519, 179 S. W. 1019.

<sup>18</sup> *Concrete Steel Co. v. Rowles Co. (Nebr.)*, 163 N. W. 323.

<sup>19</sup> *Columbia County v. Consolidated Contract Co.*, 83 Ore. 251, 163 Pac. 438. See also *Title Guaranty & Surety Co. v. State*, 61 Ind. App. 268, 109 N. E. 237, 111 N. E. 19.

<sup>20</sup> *American Indemnity Co. v. Burrows Hardware Co. (Tex. Civ. App.)*, 191 S. W. 574.

<sup>21</sup> *Wilkerson v. McMurtry (Tex. Civ. App.)*, 167 S. W. 275; *Buell Planing Mill Corp. v. Bullard (Tex.*

*Civ. App.)*, 189 S. W. 776. A bond conditioned to satisfy all claims and demands incurred for the same, indemnifying the owner and repay him expenses incurred may be sued upon by a materialman: *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543. But see *Bullard v. Norton*, 107 Tex. 571, 182 S. W. 668.

<sup>22</sup> *Staples-Hilderbrand Co. v. Metal Concrete Chimney Co. (Ind. App.)*, 112 N. E. 832; *Uhrich v. Globe Surety Co. of Kansas City (Mo.)*, 166 S. W. 845.

<sup>23</sup> *Bristol & Plainville Tramway Co. v. Eveline*, 89 Conn. 382, 94 Atl. 290; *Hoosier Brick Co. v. Floyd County Bank (Ind.)*, 116 N. E. 87; *Blyth Fargo Co. v. Free*, 46 Utah 233, 148 Pac. 427.

laborers may obtain a right under the contract for their benefit which they may enforce against the surety on a bond.<sup>24</sup> But a bond the form of which is prescribed by statute can not be extended so as to include laborers and materialmen where the bond was not so conditioned.<sup>25</sup> Materialmen supplying subcontractors with material under a contract secured by bond of principal contractors can not recover on bond of subcontractor.<sup>26</sup> It is not necessary that a materialman be named in the bond in order to sue thereon.<sup>27</sup>

**§ 3546. Private indemnity bonds—Extent of contractors' bonds.**—The liability of a surety company must be determined under the ordinary rules of law and is not to be extended beyond the terms of his contract.<sup>28</sup> The strict rule as to release of surety by the acts of the indemnitee applies only to voluntary sureties and not paid sureties.<sup>29</sup> But a building contract and bond if clear and unambiguous must be enforced according to their plain meaning and intention.<sup>30</sup> A stipulation in a building contractor's bond for withholding payment to contractor until after claimants are paid does not authorize the payment of invalid claims.<sup>31</sup> Freight charges on material used in construction do not fall within the term "material furnished" as used in statute.<sup>32</sup>

**§ 3547. Private indemnity bonds—Contractors' bonds—Right of surety.**—Any material deviation from or change in the contract made without the consent of the surety unless authorized by the terms of the contract will discharge the surety.<sup>33</sup>

<sup>24</sup> *W. P. Fuller & Co. v. Alturas School Dist.*, 28 Cal. App. 609, 153 Pac. 743; *Wilson v. Nelson* (Okla.), 153 Pac. 1179; *Yawkey-Crowley Lumber Co. v. De Longe*, 157 Wis. 390, 147 N. W. 334.

<sup>25</sup> *Babcock v. American Surety & Co.*, 236 Fed. 340, 149 C. C. A. 472.

<sup>26</sup> *Spokane Merchants' Assn. v. Pacific Surety Co.*, 86 Wash. 489, 150 Pac. 1054.

<sup>27</sup> *Fellows v. Kreutz*, 189 Mo. App. 547, 176 S. W. 1080. See also *Griffith v. Stucker*, 91 Kans. 47, 136 Pac. 937.

<sup>28</sup> *Pacific County v. Illinois Surety Co.*, 234 Fed. 97.

<sup>29</sup> *Equitable Surety Co. v. Bank of Hazen*, 121 Ark. 630, 181 S. W. 279, 1200; *Pond Creek Coal Co. v. Citizens' Trust & Co.*, 170 Ky. 601, 186 S. W. 494; *Ladies of Modern Mac-*

*cabees v. Illinois Surety Co.* (Mich.), 163 N. W. 7. A surety for profit may not demand a release for every variance in terms or performance of the principal contract; *Hileman & Gindt v. Faus* (Iowa), 158 N. W. 597.

<sup>30</sup> *United States Fidelity & Guaranty Co. v. Citizens' Building & Co.* (Colo.), 163 Pac. 281.

<sup>31</sup> *Texas Fidelity & Co. v. Brown* (Tex. Civ. App.), 179 S. W. 1125.

<sup>32</sup> *Wisconsin Brick Co. v. National Surety Co.*, 164 Wis. 585, 160 N. W. 1044, L. R. A. 1917C, 912.

<sup>33</sup> *Neuwirth v. Moydell*, 188 Mo. App. 467, 174 S. W. 206; *Alabama Fidelity & Casualty Co. v. Alabama Fuel & Co.*, 190 Ala. 397, 67 So. 318. A contract providing for changes in structure does not authorize a change in method of payment without con-

The failure to exercise a right given by the contract is not a change of contract.<sup>34</sup> And the surety is not released where the owners loaned the contractor money independent of the contract.<sup>35</sup> But where payments were made without requiring receipts as stipulated in contract it was held the surety was discharged.<sup>36</sup>

§ 3548. **Private indemnity bonds—Contractors' bonds—Against liens.**—A surety or guarantor on the bond of a building contractor stipulating against the filing of liens can not enforce a lien against the property for material furnished by him to the contractor.<sup>37</sup> A bond by a contractor to save the owner harmless against liens only protects against liens of materialmen or subcontractors and not from a lien in favor of such contractor.<sup>38</sup> Where the owner is only secured against claims and liens of persons who may become entitled to liens and nothing more they are not liable to a third person unless he was entitled to a lien and had filed notice of such claim.<sup>39</sup>

§ 3550. **Private indemnity bonds—Liquor dealers' bonds.**—The obligation of a liquor license bond must be construed in connection with the law regulating the liquor traffic, the primary purpose being not indemnity to private persons, but for the benefit of the public.<sup>40</sup> The surety on such a bond is estopped to question the validity of an ordinance under which the license was issued after liability attaches.<sup>41</sup> While the bond is primarily an obligation to the state it inures to the benefit of individuals injured by its violations.<sup>42</sup> However, it is the duty of the board to

sent of surety: *Blackburn v. Morel*, 13 Ga. App. 516, 79 S. E. 492; *Chicago v. Agnew*, 264 Ill. 288, 106 N. E. 252. Changes in the specifications for work to be done which are minor in character and which do not add to the expense or delay the work will not release the surety on a contractor's bond: *Bankers' Surety Co. v. Elkhorn River Drainage Dist.*, 214 Fed. 342, 130 C. C. A. 650.

<sup>34</sup> *Meyer v. Bichow*, 133 La. 975, 63 So. 487.

<sup>35</sup> *Meyer v. Bichow*, 133 La. 975, 63 So. 487.

<sup>36</sup> *United States Fidelity & Co. v. Citizens Bldg. & Co. (Colo.)*, 163 Pac. 281.

<sup>37</sup> *Hoosier Brick Co. v. Floyd*

*County Bank (Ind.)*, 116 N. E. 87; *Rounds & Co. v. Thompson (Okla.)*, 153 Pac. 648; *Schade v. Muller*, 75 Ore. 225, 146 Pac. 144.

<sup>38</sup> *Ward v. Nolde*, 259 Mo. 285, 168 S. W. 596.

<sup>39</sup> *Wilkerson v. McMurry (Tex. Civ. App.)*, 167 S. W. 275; *Rodgers v. Fidelity & Deposit Co. of Maryland*, 89 Wash. 316, 154 Pac. 444. But see *Buell Planing Mill Corp. v. Bullard (Tex. Civ. App.)*, 189 S. W. 776; *Bullard v. Norton*, 107 Tex. 571, 182 S. W. 668.

<sup>40</sup> *Hauth v. Sambo*, 100 Nebr. 160, 158 N. W. 1036.

<sup>41</sup> *Bulger v. Prenica*, 93 Nebr. 697, 142 N. W. 117.

<sup>42</sup> *Juckett v. Brennaman*, 99 Nebr.

act fairly and not arbitrarily in the approval of such bonds.<sup>43</sup> A bond may be rejected for failure to describe the premises.<sup>44</sup> Both the principal and surety on the bond are liable for damages proximately caused by any violations of its terms,<sup>45</sup> but if the liability is joint and several the surety may be sued alone.<sup>46</sup>

**§ 3551. Private indemnity bonds—Employes' bonds.**—Where a bond given to secure money due from an employé to his employer does not name any particular place or time of employment it is a general bond, but it is to be construed with the contract it is given to secure.<sup>47</sup> The parties, however, may agree that the bond shall cover employment at a certain place and it will be so limited.<sup>48</sup> As a rule a general surety bond executed for the protection of an employer as to funds in hands of employé continues only as long as the character of the employment does not change.<sup>49</sup> Where an employé's fidelity bond requires the signature of the employé such provision must be complied with unless waived.<sup>50</sup>

**§ 3552. Private indemnity bonds—Employes' bonds—Duty of employer.**—The retention of an employé by his employer after he discovers dishonesty without notice to the surety on his bond will release the surety for subsequent defaults.<sup>51</sup> Mere delay, however, in notifying the sureties will not discharge them where they do not lose any means of securing themselves against loss.<sup>52</sup>

755, 157 N. W. 925. Thus one suffering injury on account of his own voluntary intoxication has a right of action on the bond of the saloon keeper from whom the liquor was procured: *Henkel v. Boudreau*, 94 Nebr. 338, 143 N. W. 236.

<sup>43</sup> *Gable v. Township Board of Three Oaks*, 182 Mich. 659, 148 N. W. 710; *Price v. Township Board of Oakfield Tp.*, 182 Mich. 216, 148 N. W. 438.

<sup>44</sup> *Gable v. Township Board of Three Oaks*, 182 Mich. 659, 148 N. W. 710.

<sup>45</sup> *Lynch v. Brennan*, 131 Minn. 136, 154 N. W. 795.

<sup>46</sup> *Posch v. Lion &c. Surety Co.* (Mich.), 163 N. W. 131.

<sup>47</sup> *Jewel Tea Co. v. Shepard*, 172 Iowa 480, 154 N. W. 755.

<sup>48</sup> *Jewel Tea Co. v. Shepard*, 172 Iowa 480, 154 N. W. 755.

<sup>49</sup> *Jewel Tea Co. v. Shepard*, 172 Iowa 480, 154 N. W. 755.

<sup>50</sup> Where a bonding company does not learn of the failure of the employe to sign the bond in accordance with its terms until after default it may return the premiums and set up such failure as a defense: *National Surety Co. v. Rieves*, 112 Miss. 747, 73 So. 732.

<sup>51</sup> *Alabama Fidelity & Casualty Co. v. Alabama Fuel &c. Co.*, 190 Ala. 397, 67 So. 318.

<sup>52</sup> *Peerless Casualty Co. v. Howard*, 77 N. H. 355, 92 Atl. 165.

§ 3555. **Private indemnity bonds—Bank officers' bonds.**—Bank directors are bound by statements made regarding cashier's conduct for the purpose of securing renewal of indemnity bond.<sup>53</sup> Where the acts of a bank officer were not such as ordinary business men would have deemed unworthy of confidence the surety on his bond would not be released because not notified of such acts.<sup>54</sup>

<sup>53</sup> Eland State Bank v. Massachusetts Bonding &c. Ins. Co., 165 Wis. 493, 162 N. W. 662.

<sup>54</sup> Farmers' Bank of Deepwater v. Ogden, 192 Mo. App. 243, 182 S. W. 501, 188 S. W. 201.

## CHAPTER XCIII

### MUNICIPAL BONDS

§ 3561. **Municipal bonds—Power to issue.**—A statute authorizing a town or county to issue bonds must be strictly observed and the conditions imposed must be substantially followed.<sup>1</sup> Thus bonds may be refused register where all the conditions of the law have not been complied with.<sup>2</sup> Such right is not political or governmental but is a private corporate power granted for local purposes and in its exercise the municipality acts as a private corporation.<sup>3</sup> In order that a county may issue bonds such power must be specifically conferred or it must be necessarily implied from the law governing power.<sup>4</sup> The power to issue bonds is restricted to a public purpose.<sup>5</sup> Bonds issued without authority and without election are invalid and can not be cured by statute.<sup>6</sup> No right is conferred upon the holder by a bond issued without authority.<sup>7</sup>

§ 3562. **Municipal bonds—Form and mode of execution.**—It is usually provided that the notice of proposed issue of bonds must indicate the purpose to which such issue is to be devoted.<sup>8</sup> It is usual to make certain recitals in the bond, but recitals not authorized by ordinance do not invalidate the bonds.<sup>9</sup> The validity of a bond issue is not subject to collateral attack.<sup>10</sup> Where it was provided by statute that school bonds be examined by the attorney general, who, if satisfied of their validity, should

<sup>1</sup> *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393. Conditions precedent to issue of bonds are generally held as mandatory but bonds issued without objection are not invalid: *Walmsley v. Franklin County*, 133 Tenn. 579, 182 S. W. 599; *Richter v. Chatham County*, 146 Ga. 218, 91 S. E. 35.

<sup>2</sup> *State v. Gordon*, 268 Mo. 713, 188 S. W. 160.

<sup>3</sup> *Blount v. MacDonald*, 18 Ariz. 1, 155 Pac. 736.

<sup>4</sup> *Board of Supervisors v. Hawkins*, 16 Ariz. 16, 140 Pac. 821.

<sup>5</sup> *State v. Gordon*, 268 Mo. 321, 188 S. W. 88.

<sup>6</sup> *Pascagoula v. Delmas*, 108 Miss. 91, 66 So. 329.

<sup>7</sup> *Burlingham v. New Bern*, 213 Fed. 1014.

<sup>8</sup> *Rhodes v. Robinson*, 109 Miss. 114, 67 So. 899, 68 So. 145.

<sup>9</sup> *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019.

<sup>10</sup> *Howard v. Luke*, 18 Ariz. 563, 164 Pac. 439.

certify them, his approval rendered their validity unimpeachable.<sup>11</sup>

§ 3563. **Municipal bonds—Prescribed mode must be followed in execution of power.**—All conditions precedent to the issue of bonds required by the statute authorizing their issue must be substantially followed.<sup>12</sup> It is usually provided that the question of a bond issue be submitted to vote at an election held for that purpose, but such elections do not fall within general election laws.<sup>13</sup> A substantial compliance with the statute providing for election is generally sufficient,<sup>14</sup> and slight irregularities will not as a rule invalidate the bonds.<sup>15</sup>

§ 3564. **Municipal bonds—Execution — Signature.** — The validity of bonds bearing the official signatures of municipal officers and city seal is prima facie established by such signatures and seal.<sup>16</sup> The validation of bonds can not be withheld merely because a city may intend to use the money for an unlawful purpose.<sup>17</sup>

§ 3566. **Municipal bonds—Execution—Date.**—Municipal bonds are issued when sent out, delivered or put into circulation.<sup>18</sup> They become effective only on delivery and bear interest from that date and not from date of issue.<sup>19</sup>

§ 3569. **Municipal bonds—Execution—Time of payment.**—Where a city charter provides no date for the maturity of

<sup>11</sup> Walling v. Malone Independent School Dist. (Tex. Civ. App.), 195 S. W. 671.

<sup>12</sup> Cooper v. Middletown, 56 Ind. App. 374, 105 N. E. 393.

<sup>13</sup> Abrahams v. School Dist. No. 33, 97 Kans. 325, 155 Pac. 16; Burwell v. Lillington, 171 N. Car. 94, 87 S. E. 970. On the ground that they are necessary expense bonds may be issued for the construction and repair of public roads without vote of people: Hargrave v. Board of Comm. of Davidson County, 168 N. Car. 626, 84 S. E. 1044; Albright v. Ballard, 164 Ky. 747, 176 S. W. 185; Clark v. Board of Trustees, 164 Ky. 210, 175 S. W. 359.

<sup>14</sup> Phillips Inv. Co. v. School Dist. No. 5, 26 Colo. App. 362, 144 Pac. 1129; Casey v. Dare County, 168 N. Car. 285, 84 S. E. 268.

<sup>15</sup> Dent v. Eufaula (Ala.), 74 So. 369; Howard v. Luke, 18 Ariz. 563, 164 Pac. 439; Chambers v. Board of Directors, 172 Iowa 340, 154 N. W. 581; Denton v. Pulaski County, 170 Ky. 33, 185 S. W. 481; Barry v. New Haven, 162 Ky. 60, 171 S. W. 1012; Clark v. Hood River County, 73 Ore. 336, 143 Pac. 897; Hartzler v. Goodland, 97 Kans. 129, 154 Pac. 265; McCarthy v. McElvaney (Tex. Civ. App.), 182 S. W. 1181.

<sup>16</sup> Newbern v. National Bank, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019.

<sup>17</sup> Venice v. Lawrence, 24 Cal. App. 350, 141 Pac. 406; Gracen v. Savannah, 142 Ga. 141, 82 S. E. 453.

<sup>18</sup> Steinbruck v. Milford Tp., 100 Kans. 93, 163 Pac. 647.

<sup>19</sup> Venice v. Lawrence, 24 Cal. App. 350, 141 Pac. 406.



bonds the council may provide that they mature serially.<sup>20</sup> If the statute provides the length of time the bonds are allowed to run, such provision is a limitation upon the grant of power and bonds issued in disregard of such provision are invalid.<sup>21</sup>

**§ 3570. Municipal bonds—Execution—Denomination and amount payable.**—Where the statute specifically fixes the denomination of the bonds to be issued the issuance of bonds in a different denomination will render them invalid.<sup>22</sup> It is also provided as a rule that an issue of bonds shall not exceed a certain amount.<sup>23</sup> In determining whether an issue would exceed the limit of indebtedness fixed by law reference must be had to the property valuation of the year when the contract was made.<sup>24</sup> It is also held that where a city is authorized to issue bonds in a certain amount it can not afterward limit the issue and meet the additional expense from general fund.<sup>25</sup>

**§ 3571. Municipal bonds—Delivery.**—A municipality can not ordinarily question the delivery of a bond in the hands of a bona fide holder.<sup>26</sup>

**§ 3573. Municipal bonds — Negotiability.** — Municipal bonds are negotiable instruments,<sup>27</sup> capable of assignment, and succeeding owners may found action thereon.<sup>28</sup> Where a vendee of municipal bonds resold them to a bona fide purchaser without paying the purchase-price to the municipality such bonds are valid in the hand of the bona fide holder.<sup>29</sup> As a rule the right to question irregularities in the issuance of bonds ends with their negotiation.<sup>30</sup>

**§ 3574. Municipal bonds—Transfer and sale.**—A purchaser of bonds under contract is bound by the terms of the act securing the payment of interest and is charged with knowledge

<sup>20</sup> *Shorts v. Seattle*, 95 Wash. 531, 164 Pac. 239.

<sup>21</sup> *McAndrew v. Dunmore*, 245 Pa. 101, 91 Atl. 237.

<sup>22</sup> *State v. Gordon*, 268 Mo. 713, 188 S. W. 160.

<sup>23</sup> *Board of Sup'rs of Yavapai County v. Hawkins*, 16 Ariz. 16, 140 Pac. 821.

<sup>24</sup> *Chanley v. Zimmer*, 183 Ind. 222, 108 N. E. 769.

<sup>25</sup> *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998.

<sup>26</sup> *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019.

<sup>27</sup> *Citizens' Trust & Guaranty Co. v. Hays*, 167 Ky. 560, 180 S. W. 811.

<sup>28</sup> *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448.

<sup>29</sup> *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917B, 1019.

<sup>30</sup> *State v. Gordon*, 268 Mo. 321, 188 S. W. 88; *Laredo v. Frismuth* (Tex. Civ. App.), 196 S. W. 190.

of the provisions thereof,<sup>31</sup> and where a bond is signed by a person other than the party authorized by the enabling statute he must examine the record of the appointment to obtain assurance that such persons have been appointed for the purpose.<sup>32</sup> The purchase by a bank of an entire issue of bonds for a certain price is a sale and not an agency notwithstanding they were all resold to its customers.<sup>33</sup> Where coupons for accrued interest are wrongfully delivered to a purchaser the city is not estopped to deny liability to a holder with notice.<sup>34</sup> A municipality will not be permitted to sell bonds below par so as to produce a greater rate of interest where the rate of interest is fixed at a certain amount.<sup>35</sup> A statute requiring that bond be sold at not less than par and accrued interest must be substantially followed.<sup>36</sup> The city is usually estopped to question a bond in the hands of a bona fide holder and reciting a compliance with the statute.<sup>37</sup> The rights of a bona fide holder can not be impaired by restrictions placed upon his power of disposal.<sup>38</sup>

<sup>31</sup> *Gastonia v. Citizens' Nat. Bank*, 165 N. Car. 507, 81 S. E. 755; *Highway Comm. of Franklin Tp. v. Malone & Co.*, 166 N. Car. 1, 81 S. E. 1009.

<sup>32</sup> *Weil v. Newbern*, 126 Tenn. 223, 148 S. W. 680, L. R. A. 1915A, 1009n, Ann. Cas. 1913E, 25n.

<sup>33</sup> *Bay City v. Lumberman's State Bank*, 193 Mich. 533, 160 N. W. 425.

<sup>34</sup> *State v. Sapulpa* (Okla.), 160 Pac. 489.

<sup>35</sup> *Spear v. Bremerton*, 90 Wash. 507, 156 Pac. 825.

<sup>36</sup> *Ogg v. Dies* (Tex. Civ. App.), 176 S. W. 638; *McCarthy v. McElvaney* (Tex. Civ. App.), 182 S. W. 1181.

<sup>37</sup> *Hayden v. Aurora*, 57 Colo. 389, 142 Pac. 183.

<sup>38</sup> *Ham v. Grapeland &c. Dist.*, 172 Cal. 611, 158 Pac. 207.

## CHAPTER XCIV

### CORPORATE BONDS

§ 3580. **Corporate bonds—General nature.**—That an instrument is called a bond is not conclusive of its character. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money with stated interest.<sup>1</sup> The statutes in many states prohibit corporations from issuing bonds except for money paid, labor done or property actually received.<sup>2</sup> Under such statutes the bond of a corporation can not be pledged for payment of pre-existing debt.<sup>3</sup>

§ 3581. **Corporate bonds—Formalities in preparation and issue.**—A corporate bond does not become binding on the corporation until there is a disposition of some interest therein or the creation of a lien thereon.<sup>4</sup> Corporate bonds are to be construed so as to render them valid when possible.<sup>5</sup>

§ 3585. **Corporate bonds — Negotiability.** — There are many expressions in court opinions to the effect that bonds are now generally treated as negotiable instruments. When payable to bearer, holder or order they are held to be negotiable instruments, but when they contain special stipulations and their pay-

<sup>1</sup> In *re* Fechheimer-Fishel Co., 212 Fed. 357, 129 C. C. A. 33 (form of debenture bond held preferred stock).

<sup>2</sup> In *re* De Soto Mining & Development Co., 218 Fed. 892; *Kemmerer v. St. Louis Blast Furnace Co.*, 212 Fed. 63. Thus the approval of the issuance of refunding mortgage bonds by an insolvent street railroad company may be withheld until shown that securities to be refunded represent actual investments for its capital account: *People v. Public Service Commission*, 167 App. Div. 286, 153 N. Y. S. 344; In *re* Progressive Wall Paper Corp., 229 Fed. 489, 143 C. C. A. 557; *Mudge v. Black Sheridan & Wilson*, 224 Fed. 919, 140 C. C. A. 397. The purpose of statutory provisions for public supervision of the propriety and necessity of the

issuance of securities by quasi public corporations is to regulate and supervise such issues so as to protect the public against overcapitalization or excessive indebtedness and to prevent watering or financial exploitation of such corporation: *Bulkeley v. New York & C. R. Co.*, 216 Mass. 432, 103 N. E. 1033.

<sup>3</sup> *Lyon v. Bleeg*, 240 Fed. 405, 153 C. C. A. 331; In *re* Progressive Wall Paper Corp., 229 Fed. 489, 143 C. C. A. 557. See also *Pacific Coast Pipe Co. v. Conrad City Water Co.*, 237 Fed. 673.

<sup>4</sup> *Equitable Trust Co. v. Great Shoshone & Twin Falls Water Power Co.*, 228 Fed. 516.

<sup>5</sup> *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019.

ment is subject to contingencies not within the control of the holder they lose their character as negotiable instruments and are subject to defenses existing between original parties to contract.<sup>6</sup>

§ 3586. **Corporate bonds—Purchasers and bona fide holders.**—A purchaser of a corporate bond is bound to take notice of all recitals therein.<sup>7</sup> And one purchasing a bond without its being approved as required by law has constructive notice of its invalidity.<sup>8</sup> Directors of a corporation in selling bonds act in a fiduciary capacity and therefore their dealings must be free from fraud or suspicion.<sup>9</sup> One who receives bonds of a corporation from a third person in pledge to secure a note is not a bona fide purchaser.<sup>10</sup> Where the trustees in a corporate mortgage securing bonds fail to record it promptly bona fide holders of the bonds may assert a lien after it is recorded.<sup>11</sup> The ordinary remedies for breach of contract of sale apply to the sale of corporate bonds.<sup>12</sup> Bonds assigned by way of pledge without interest coupons transfers to the assignee no right to interest due but not paid.<sup>13</sup>

§ 3587. **Corporate bonds—Coupons.**—A purchaser of a corporate bond with past due interest coupons takes such coupons subject to all outstanding equities but as to the bond itself and subsequent coupons he may be a purchaser for value without notice.<sup>14</sup>

<sup>6</sup> Bonds payable to bearer are negotiable by delivery and where the purchasers paid full value to the person whom the company intrusted with the possession and sale of the bonds they were under no obligation to look to the application of the proceeds. *Atkinson v. Colorado Title & Co.*, 59 Colo. 528, 151 Pac. 457; *Kohn v. Sacramento Electric, Gas & R. Co.*, 168 Cal. 1, 141 Pac. 626.

<sup>7</sup> *Kohn v. Sacramento Electric, Gas & R. Co.*, 168 Cal. 1, 141 Pac. 626.

<sup>8</sup> *Davis v. Watertown Nat. Bank* (Tex. Civ. App.), 178 S. W. 593.

<sup>9</sup> *Idaho-Oregon Light & Power Co. v. State Bank*, 224 Fed. 39, 139 C. C.

A. 503. See also *Carter v. First Nat. Bank*, 128 Md. 581, 98 Atl. 77.

<sup>10</sup> *Mayfield Water & Light Co. v. Graves County Banking & Trust Co.*, 170 Ky. 56, 185 S. W. 485. See also *In re Progressive Wall Paper Corp.*, 229 Fed. 489, 143 C. C. A. 557.

<sup>11</sup> *Davis v. Hanover Savings Fund Soc.*, 210 Fed. 768, 127 C. C. A. 318.

<sup>12</sup> *Busch v. Stromberg-Carlson Tel. Mfg. Co.*, 226 Fed. 200, 141 C. C. A. 130.

<sup>13</sup> *Federal Cement Co. v. Shaffer*, 238 Fed. 245.

<sup>14</sup> *Worth v. Marshall Field & Co.*, 240 Fed. 395, 153 C. C. A. 321.

## CHAPTER XCV

### OFFICIAL BONDS

§ 3595. **Official bonds—In general.**—As a general rule sureties on an official bond are liable only for compensatory damages.<sup>1</sup> The renewal of a bond does not cover defaults occurring before its execution in the absence of special provision therefor.<sup>2</sup> Under statutes providing that actions on official bond payable to the state shall be brought in its name on the relation of the parties interested, the relator is the real party in interest and the state is a nominal party only.<sup>3</sup> A change in law so as to place an officer on a salary instead of on a fee basis or by requiring him to perform other duties is held not to discharge the surety on his bond.<sup>4</sup>

§ 3597. **Official bonds—Effect of irregularities in execution of bond.**—It is held that the failure of the principal to sign his bond does not render it invalid against the sureties.<sup>5</sup> The liability of the surety on an official bond is measured by the provisions of the statute rather than the language of the bond, and if founded upon good consideration the bond will be held valid although it differs from the form prescribed in the statute.<sup>6</sup> And where a statute provides that no official bond shall be avoided for want of form or substance bonds taken pursuant to a requirement of the public statutes are governed thereby.<sup>7</sup>

§ 3600. **Official bonds—Liability of sureties limited to the term.**—Where the officer is elected or appointed for a definite term the liability of a surety on his official bond is limited to acts done or defaults occurring during the term.<sup>8</sup> The liability

<sup>1</sup> *Lizana v. State*, 109 Miss. 464, 69 So. 292.

<sup>2</sup> *Raleigh County Court v. Cottle* (W. Va.), 92 S. E. 110.

<sup>3</sup> *State v. Stevens* (Ind. App.), 114 N. E. 873.

<sup>4</sup> *Hughes v. Board of Comm. of Oklahoma County* (Okla.), 150 Pac. 1029; *Marshall v. Brainerd*, 253 Pa. 35, 97 Atl. 1057.

<sup>5</sup> *Inhabitants of Boothbay Harbor*

*v. Marson*, 112 Maine 505, 92 Atl. 623.

<sup>6</sup> *American Bonding Co. v. New York & Co.*, 11 Ala. App. 578, 66 So. 847; *Trustees of Village of Bath v. McBride*, 81 Misc. 618, 142 N. Y. S. 1014.

<sup>7</sup> *United States Fidelity & Co. v. Poetker*, 180 Ind. 255, 102 N. E. 372.

<sup>8</sup> *Commonwealth v. Columbia Trust Co.*, 162 Ky. 825, 173 S. W. 386.

of the surety extends to an abuse of authority by the officer or his deputy acting in an official capacity and within the scope of his authority.<sup>9</sup> But unless a breach of an official duty is affirmatively shown there can be no recovery on his official bond.<sup>10</sup>

§ 3602. **Official bonds—Liability of sureties for acts outside official duty.**—It is well settled that the sureties on the bond of a public officer can not be held for the wrongful acts of such officer wholly outside the line of his official duty as defined by law.<sup>11</sup> Some courts hold the sureties on an official bond are liable for trespass committed by an officer within the scope of his authority and while purporting to act in his official capacity,<sup>12</sup> while others hold that in order to constitute color of office rendering an officer's sureties liable for his wrongful acts something more must be shown than that in doing the act complained of the officer claimed to be acting in an official capacity.<sup>13</sup> However, a surety on an official bond is not discharged because of subsequent laws changing the duties of the office where the imposed duties are fairly germane to the office.<sup>14</sup>

<sup>9</sup> Deason v. Gray, 189 Ala. 672, 66 So. 646; Myers v. Colquitt (Tex. Civ. App.), 173 S. W. 993.

<sup>10</sup> State v. Bleeke (Ind. App.), 116 N. E. 2.

<sup>11</sup> People v. Sowell, 186 Ill. App. 617; State v. Reichard, 50 Ind. App. 338, 109 N. E. 438; Mower County v. American Bonding Co., 133 Minn. 274, 158 N. W. 394; Hughes v. Board of Comm. of Oklahoma County, 50

Okla. 410, 150 Pac. 1029; Board of County Comm. v. Vaughn, 51 Okla. 609, 152 Pac. 115.

<sup>12</sup> Mower County v. American Bonding Co., 133 Minn. 274, 158 N. W. 394; Davis v. Hall, 72 Ore. 220, 143 Pac. 893, Ann. Cas. 1916D, 922n.

<sup>13</sup> Hughes v. Board of Comm., 50 Okla. 410, 150 Pac. 1029.

<sup>14</sup> People v. Harms, 187 Ill. App. 140.

## CHAPTER XCVI

### BUILDING CONTRACTS, ARCHITECTS, ENGINEERS AND SUPERINTENDENTS

§ 3612. **The plans and drawings.**—The contractor may recover for the construction of the wall, when the plans for a building furnished by the owner's architect were defective so that a wall fell, although the work done and material furnished were as required.<sup>1</sup> The architect substantially complied with the contract where he was employed to draw plans for a building estimated to cost \$70,000 and drew plans which would have cost \$75,000.<sup>2</sup>

§ 3615. **Power of architect.**—Where a subcontractor having a contract to construct concrete forms furnished unfit material, the architect had authority to reject such material.<sup>3</sup>

§ 3616. **Liability of architect.**—Architects owe their employers the duty of exercising and applying skill, judgment and taste reasonably and without neglect and are liable for damages equal in amount to the difference between the value of the building as designed and constructed and its value as it would have been if it had been properly designed and constructed, where such damage is caused by their negligence and lack of skill in preparing the plans and specifications.<sup>4</sup>

<sup>1</sup> Pine Bluff Hotel Co. v. Monk, 122 Ark. 308, 183 S. W. 761.      Engineering Co. (Wash.), 170 Pac. 573.

<sup>2</sup> Vaky v. Phelps (Tex. Civ. App.), 194 S. W. 601.      <sup>4</sup> Bayshore Development Co. v. Bonfoey (Fla.), 78 So. 507.

<sup>3</sup> Stimson Mill Co. v. Feigenson

## CHAPTER XCVII

### SPECIFICATIONS OF BUILDINGS, BILLS OF QUANTITIES AND TENDERS

§ 3620. **Specifications.**—As elsewhere shown, plans and specifications referred to or annexed to a contract are usually to be construed with it as a part thereof.<sup>1</sup> It has been held, however, that the “plans” of a building are not, in the same sense, to be considered a part of the contract as are the “specifications,” and that the office of the former is to illustrate and explain what is to be done.<sup>2</sup> And a stipulation in a subcontract that the work should be done in accordance with the plans and specifications of the original contract has been held not to incorporate into such subcontract a provision of the original contract that the owner might take charge of the work, if not satisfactory, and complete it, so as to authorize the original contractor to assume charge of the work let to the subcontractor.<sup>3</sup> But where a contract between a building contractor and a materialman requires the latter to conform to the original specifications they are to be regarded as part of the contract between such contractor and materialman.<sup>4</sup>

<sup>1</sup> Ante §§ 1522, 1524. See as to effect of defective or insufficient plans and specifications on rights and liabilities of contractors and subcontractors, note in L. R. A. 1915C, 671-678.

<sup>2</sup> Hartley-Zeigler Co. v. Bacon, 251 Pa. 87, 96 Atl. 257.

<sup>3</sup> Meredith v. Roman, 49 Mont. 204, 141 Pac. 643. See also Guerini Stone Co. v. P. J. Carlin Const. Co., 240 U. S. 264, 36 Sup. Ct. 300, 60 L. ed. 636.

<sup>4</sup> Berger Manufacturing Co. v. Crites, 178 Mo. App. 218, 165 S. W. 1163.



## CHAPTER XCVIII

### CREATION OF BUILDING, CONSTRUCTION, AND WORKING CONTRACTS

§ 3633. **Mutuality of contract.**—A mistake by a bidder or contractor in making an estimate as to the cost of work will not ordinarily entitle him to avoid the contract or receive additional compensation.<sup>1</sup>

§ 3634. **Contracts with corporations.**<sup>2</sup>

§ 3636. **Request for bids and acceptance of bids.**—If the owner knows of the mistake and the bidder's ignorance of the same, where a mistake in the price is made in a written bid following an oral estimate and bid, he can not create a contract by acceptance.<sup>3</sup>

§ 3642. **Architects' and superintendents' certificates.**—In the absence of fraud or mistake, an architect's certification is conclusive upon all parties.<sup>4</sup> But although a construction contract provided that the judgment or approval of the city engineer should be final, his determination of amount of work done under

<sup>1</sup> *American Water &c. Co. v. United States*, 50 Ct. Cl. (U. S.) 209; *Southbridge Roofing Co. v. Providence Cornice Co.* (R. I.), 97 Atl. 210. Compare on the general subject *Bowser v. Marks*, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429n, Ann. Cas. 1912B, 357n, with *Estey Organ Co. v. Lehman*, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254n, 122 Ann. St. 951; *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N. W. 500, and see also notes in 15 L. R. A. (N. S.) 368, and 23 L. R. A. (N. S.) 1109. "Where a mistake in the price is made in a written bid following an oral estimate and bid, the person to whom the bid is offered can not create a contract by acceptance, if he knows of the mistake, and the bidder's ignorance thereof": *Tyra v. Cheney*, 129 Minn. 428, 152 N. W. 835.

<sup>2</sup> See generally and especially as to what is necessary to constitute such a contract with a municipality: *Jersey City v. Harrison*, 72 N. J. L. 185, 62 Atl. 765, 65 Atl. 507. A valid statute or ordinance prescribing condition of such work, such as what shall be done and the manner of doing it, enters into the contract and one who undertakes to do the work must do it according to the requirements of the law: *Long v. Owen*, 21 Idaho 243, 121 Pac. 99, Ann. Cas. 1913D, 465n and note. As to construction of such contracts, see notes in Ann. Cas. 1913C, 224; 1913D, 629; 1913E, 963.

<sup>3</sup> *Tyra v. Cheney*, 129 Minn. 428, 152 N. W. 835.

<sup>4</sup> *Catanzano v. Jackson* (Ala.), 73 So. 510; *Southern Real Estate & Financial Co. v. Bankers' Surety Co.* (Mo.), 184 S. W. 1030.

such contract was disregarded, where it was so manifestly erroneous as to evidence arbitrary and capricious action.<sup>5</sup> The obtaining of the architect's certificate was a condition precedent to any right of action, where a contractor's right to recover any balance due depended upon obtaining such certificate showing the amount due.<sup>6</sup> But, where the contract does not provide that the contractor shall procure a certificate showing that certain money is due before it shall be paid, the obtaining of a certificate is not a condition precedent.<sup>7</sup>

§ 3643. **Part performance certificate.**—It is held that the owner is not estopped from objecting to the charges because of the architect's certificates, where neither he nor the architect knew that certain charges of the contractor had been allowed in the architect's monthly certificates.<sup>8</sup>

<sup>5</sup> State v. Seattle, 93 Wash. 478, 161 Pac. 478.

<sup>6</sup> Errant v. Columbia Western Mills, 195 Ill. App. 14.

<sup>7</sup> American Heating &c. Corp. v. Salomon, 195 Ill. App. 297.

<sup>8</sup> Meulenbergh v. Coe, 160 N. Y. S. 581.

## CHAPTER XCIX

### ARBITRATION OF BUILDING DISPUTES

§ 3655. **Agreement to submit to arbitration.**—The general subject of arbitration and award has already been fully treated elsewhere.<sup>1</sup> It is sufficient, therefore, at this place, to merely call attention to certain recent cases relating specifically to arbitration of differences under building contracts. Parties in difference in regard to whether work under a building contract has been properly performed, and as to extras, may agree orally to submit their controversy to certain arbitrators.<sup>2</sup> In an action to foreclose a subcontractor's lien for materials, it was held that the parties agreed upon to determine upon the amount of materials used also had authority to fix the price, where it was also agreed that the price of the materials should be estimated at the market price thereof at the time the house was built.<sup>3</sup> So, where it was agreed to abide by the award in full settlement of "contract extras and payment of claims arising from the same," the submission was held to cover the building contract as well as extras, it appearing that such was the intent of the parties, though no comma followed the word "contract."<sup>4</sup> And it has also been held that the arbitrators could determine whether the owner was entitled to damages for delay, notwithstanding the construction contract provided only for arbitration in case of disagreement as to the decision of the architect as to changes in plans.<sup>5</sup> But where a building contract provided for arbitration of failure to agree on matters of payment, a refusal to make payment on demand was held not within the contract.<sup>6</sup>

§ 3656. **Architect as arbitrator.**—A construction contract providing that the owner's engineer shall have the right to inspect the building does not make him an arbiter as to compliance

<sup>1</sup> Ante, Chap. LXVI. See also elaborate note in 47 L. R. A. (N. S.) 337-447.

<sup>2</sup> Johnsen v. Wineman, 34 N. Dak. 116, 157 N. W. 679. See also note in 47 L. R. A. (N. S.) 346.

<sup>3</sup> Ft. Dodge Lumber Co. v. Rogosch, 175 Iowa 475, 157 N. W. 189.

<sup>4</sup> Johnsen v. Wineman, 34 N. Dak. 116, 157 N. W. 679.

<sup>5</sup> Early v. Tussing, 182 Mich. 314, 148 N. W. 678.

<sup>6</sup> Clark v. Mt. Gilead Baptist Church, 156 N. Y. S. 305. See also Russell v. Yesler's Estate, 89 Wash. 260, 154 Pac. 188.

with specifications so as to render his acceptance or failure to object binding upon the owner.<sup>7</sup>

§ 3657. **Refusal to submit to arbitration.**—The contractor is no more bound than is the owner to show an offer to arbitrate where a building contract provides for arbitration of differences concerning payments, and it has been held that the owner who seeks, on the ground of such stipulation, to defeat an action for payment provided for in the contract, must show an offer to arbitrate.<sup>8</sup> An arbitration, unless requested, was not a condition precedent to the maintenance of an action, where a contract for labor and material provided that disputed questions should be arbitrated, but did not provide that arbitration should precede an action thereon.<sup>9</sup>

§ 3659. **Distinction between award by arbitration and certificate stipulated for in the contract.**—Where the contract provided that the work should be done to the satisfaction of the owner under the supervision of an architect and that when the material furnished and the work done was according to contract the final payment should be made after the contractor secured the architect's final certificate, the certificate of the architect that the contractor was entitled to his money was held not binding on the owner as he was held not to be the representative of the owner to determine whether the work was done according to the owner's satisfaction, and the contract provision as to the certificate does not apply to the quality or sufficiency of the materials.<sup>10</sup>

<sup>7</sup> *Rogue River Fruit & Produce Assn. v. Gillen-Chambers Co.*, 85 Ore. 113, 151 Pac. 728, 165 Pac. 679, 1183.

<sup>8</sup> *Clark v. Mt. Gilead Baptist Church*, 156 N. Y. S. 305.

<sup>9</sup> *Quast v. Guetzkow*, 164 Wis. 197, 159 N. W. 810.

<sup>10</sup> *Gerisch v. Herold*, 82 N. J. L. 605, 83 Atl. 892, Ann. Cas. 1913D, 627n.

## CHAPTER C

### CONSTRUCTION OF BUILDING AND WORKING CONTRACTS

§ 3666. **Construction of particular words and phrases.**—The term “millwork,” as used in a building contract and applied to window sash, includes glass properly set into the sash and ready to be put in the building.<sup>1</sup> A contract under which the contractor is to furnish all material and perform all necessary work requires him to furnish the necessary tools, machinery and equipment at his own expense.<sup>2</sup> A subcontract for certain cut stone work on a building requiring steps to be of granite and stone does not require the contractor to furnish cut stone buttresses.<sup>3</sup> Although defendant’s existing sewer was seven feet above ground, plumbing specifications requiring the plaintiff to connect in a certain manner “as shown on plan,” and that anything on the plans should be done without extra charge, required underground sewer connections where the plans so indicated.<sup>4</sup> Where one contracted to furnish “tools and appliances” for an excavation, this did not include cars on which to load the dirt.<sup>5</sup>

§ 3667. **Entire and divisible contracts.**—Though there is a division of opinion, the better rule seems to be that where the contract is entire, the party who partly performs and abandons his contract can not recover on the quantum meruit for the services performed before abandonment.<sup>6</sup> A contract to drive piling, and make an excavation, remove an embankment, and provide a

<sup>1</sup> Foltmer v. First Methodist & Co. Church, 127 Minn. 129, 148 N. W. 1077.

<sup>2</sup> Stewart v. Spalding, 71 Ore. 310, 141 Pac. 1127.

<sup>3</sup> Washington Monumental & Co. v. Murphy, 81 Wash. 266, 142 Pac. 665.

<sup>4</sup> Woodruff v. Lunbeck & Co. Eagle Brewing Co., 164 N. Y. S. 594.

<sup>5</sup> Magnolia Warehouse Storage Co. v. Davis (Tex.), 195 S. W. 184. Construction of contract as to the “reasonable value” of used plant and machinery which was to be determined on completion of construction work

on railroad: Hengst v. John B. Carter Co., 235 Fed. 982. For construction of building contract for payment on certificate of architect and waiving of “final payment,” see: Young Men’s Christian Assn. v. Ritter, 90 Kans. 332, 133 Pac. 894, L. R. A. 1915C, 170. See also Rosenthal v. Turner, 192 Ill. App. 9; Dreyfus v. American Bonding Co., 136 La. 491, 67 So. 342.

<sup>6</sup> Tukotte v. Jervis Inlet L. Co., 18 West. L. Rep. (Can.) 336; Larkin v. Buck, 11 Ohio St. 561, note in L. R. A. 1916E, 805.

pump, at separate stipulated prices, is separable rather than entire.<sup>7</sup>

§ 3669. **Dependent and independent stipulations.**—Provisions definitely giving such option will be given preference over a contrary provision of a general nature, where the specifications are conflicting as to whether reinforced bars or fabric should be used in the floors and roofs.<sup>8</sup>

<sup>7</sup> Parkersburg & Marietta Sand Co. v. Smith, 76 W. Va. 246, 85 S. E. 516.      <sup>8</sup> Soule v. Northern Const. Co., 33 Cal. App. 300, 165 Pac. 21.

## CHAPTER CI

### MODIFICATIONS AND ALTERATIONS OF BUILDING CONTRACTS

§§ 3675, 3676. **Right to alter or modify plans and specifications—Effect of deviations and modifications.**—Where a principal contractor sublet a portion of the work it was held that he and the subcontractor could modify their contract by mutual agreement without any new consideration.<sup>1</sup> And a modification of a contract by a subsequent agreement so as to give the subcontractor special compensation for work included in the original contract has also been held valid and enforceable.<sup>2</sup> Where a contractor does work not within the scope of the contract and the owner knows thereof, and assents and receives the benefit, the court is warranted in allowing a recovery for such work even though the owner may have thought it was included in the contract.<sup>3</sup> One who is employed to superintend the construction of a building may recover reasonable compensation for extra services therein, not included in the contract and performed at the owner's instance.<sup>4</sup> Questions as to what constitute extra work and the effect of provisions requiring written authority for such work or for alterations and what constitutes a waiver of such provisions are considered elsewhere.<sup>5</sup>

§ 3677. **Compensation—Allowances and deductions from.**—Where the contract contains no provision as to the completion of the building in case the contractor fails to complete it, the owner can complete it on the contractor abandoning the work, and charge the reasonable expense to the contractor.<sup>6</sup> The ac-

<sup>1</sup> *Foley v. Marsch*, 162 Wis. 25, 154 N. W. 982.

<sup>2</sup> *Bradley v. McDonald*, 218 N. Y. 351, 113 N. E. 340. See as to modification in case of municipal contracts: *Atlantic City v. Warren Bros. Co.*, 226 Fed. 372, 141 C. C. A. 202; *Maysville v. Davis*, 166 Ky. 555, 179 S. W. 463; *Stott v. Salt Lake City*, 47 Utah 113, 151 Pac. 988.

<sup>3</sup> *Howard v. Harvard Congregational Soc.*, 223 Mass. 562, 112 N. E. 233.

<sup>4</sup> *Shear v. Bruyere* (Tex. Civ. App.), 187 S. W. 243.

<sup>5</sup> See Chap. CV; also *Pittsburgh Filter Mfg. Co. v. Smith*, 176 Ky. 554, 196 S. W. 150; *National Bank v. Watervliet*, 164 N. Y. S. 1103; *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810; *Archer v. Franklin Co. School Dist.*, 78 Wash. 20, 138 Pac. 299.

<sup>6</sup> *Schmidt Bros. Const. Co. v. Raymond Y. M. C. A.* (Iowa), 163 N. W. 458. See also *Fulton Nat. Bank v.*

ceptance by the contractor of vouchers for the contract price is not necessarily conclusive against his claim for greater compensation.<sup>7</sup>

Fulton County, 144 Ga. 691, 87 S. E. 1023; Martin v. Oberle, 85 Misc. 35, 147 N. Y. S. 60. And compare Coppola v. Grande, 88 N. J. L. 324, 96 Atl. 67.

<sup>7</sup> Stark Elec. R. Co. v. McGinty Contr. Co., 238 Fed. 657, 151 C. C. A. 507. See also Thomas v. Hill Top &c. Union (Pa.), 103 Atl. 504.



## CHAPTER CII

### RIGHT TO RESCIND AND TERMINATE BUILDING CONTRACT

§ 3680. **Right to rescind in general.**—The minds of the parties must meet before there can be a rescission of a contract by agreement of parties.<sup>1</sup> It is held that a party will not be permitted to rescind a contract for a slight or casual breach, but only for such breaches as are substantial and fundamental and defeat the object of the contract.<sup>2</sup>

§ 3681. **Right on failure to perform.**—The irrigation company had a right to rescind the contract, where the plant furnished by the manufacturing company was insufficient to perform its contract to clean out an irrigation ditch.<sup>3</sup> It is a substantial breach of the contract to fail to pay an instalment of the contract price when due, and it gives the contractor the right to consider the contract at an end and to recover the value of the work already performed.<sup>4</sup> Where the contractors wrote that they would prefer not to do the work if the limit was insisted on it was held not to be a refusal to perform and did not justify a rescission by the other party.<sup>5</sup> The right to rescind rests only with the party who has not defaulted the contract.<sup>6</sup>

§ 3682. **Contract provisions for termination or rescission.**—The resolatory right must be expressly reserved in the contract as it will not be implied.<sup>7</sup>

§ 3683. **Waiver of right to rescind or annul the contract.**—As a general rule where an executory contract fixes the time

<sup>1</sup> White Pine Lumber Co. v. Manufacturers' Lumber Co., 191 Mich. 390, 158 N. W. 124; Taylor v. Wentworth (Tex. Civ. App.), 193 S. W. 158.

<sup>2</sup> Mettler v. Vance, 30 Cal. App. 499, 158 Pac. 1044; Fossum v. Requa, 218 N. Y. 339, 113 N. E. 330. Where the general contractor failed to pay according to his agreement, the subcontractor was justified in rescinding his contract: P. J. Carlin Const. Co. v. Guerini Stone Co., 241 Fed. 545, 154 C. C. A. 321.

<sup>3</sup> Stearns-Rogers Mfg. Co. v. Jack-

son Lake &c. Irrigation Co., 61 Colo. 403, 158 Pac. 137.

<sup>4</sup> American-Hawaiian Engineering &c. Co. v. Butler, 165 Cal. 497, 133 Pac. 280, 1916C, 44n; Ann. Cas. 1916C, 45, 54n.

<sup>5</sup> Hoggson Bros. v. First Nat. Bank, 231 Fed. 869, 146 C. C. A. 65..

<sup>6</sup> Schmidt Bros. Const. Co. v. Raymond Y. M. C. A. (Iowa), 163 N. W. 458.

<sup>7</sup> Watson v. Feibel, 139 La. 375, 71 So. 585.

for performance and performance within such time is waived, neither party can thereafter rescind for delay without notice to the other stating that there must be performance within a reasonable time specified therein or the contract will be abrogated; and, where a contract to lease certain land, and a building to be constructed, contained no provision as to the time within which the building should be constructed and the plaintiff gave no such notice it was held that he could not rescind for delay of the defendant in completing the building.<sup>8</sup>

<sup>8</sup> Taylor v. Goelet, 208 N. Y. 253, 26 Ct. Cl. (U. S.) 132; McClellan v. 101 N. E. 867, Ann. Cas. 1914D, 284n. McLemore (Tex. Civ. App.), 70 S. See also Williams v. United States, W. 224.

## CHAPTER CIII

### PERFORMANCE OR BREACH OF BUILDING CONTRACT

§ 3690. **General statement.**—The contractor is liable for damages for his failure to reconstruct, when a building falls, without any fault on the part of the owner, before it is completed.<sup>1</sup>

§ 3691. **Contracts to sink wells.**—Where the defendant already had such a well, and the plaintiff continued his well 700 feet after securing enough water for such purposes, a contract to dig a well satisfactory to the defendant is not satisfied by securing water for ordinary domestic purposes.<sup>2</sup>

§ 3693. **Substantial performance of the contract—Generally.**—Whether or not there is a substantial performance is usually a question of fact.<sup>3</sup> Where the defects are such that they can be readily remedied by a reasonable expenditure so that the owners will then have the building for which they contracted, there is a substantial compliance with the contract.<sup>4</sup> Where a contract to build a gas plant provided that it should be constructed of common brick “picked for evenness of color,” absolute uniformity of color is not required, but only as near an even color as possible with common brick.<sup>5</sup> Though there may be some deviations from the strict letter of the contract and some defects in workmanship and materials, yet if the contractor has in good faith substantially performed his contract, he may recover.<sup>6</sup>

<sup>1</sup> *Da Moth v. Hillsboro Independent School Dist.* (Tex. Civ. App.), 186 S. W. 437.

<sup>2</sup> *Janssen v. Muller*, 38 S. Dak. 611, 162 N. W. 393. See generally as to construction of contracts to sink wells, and whether there is any warranty as to quality or quantity of water: *Skalsky v. Johnson* (Minn.), 164 N. W. 978, L. R. A. 1918A, 1084 and note on pages 1085-1088, reviewing other cases.

<sup>3</sup> *Brown v. Hall*, 121 Minn. 61, 140 N. W. 128; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52n.

<sup>4</sup> *Snider v. Peters Home Bldg. Co.* (Minn.), 167 N. W. 108; *Toepfer v. Sterr*, 156 Wis. 226, 145 N. W. 970. The contractor had not substantially complied with his contract though his shortcomings were less than 10 per cent. of the contract price: *Witt v. Gilmour*, 172 App. Div. 110, 158 N. Y. S. 41. See also *Symms-Powers Co. v. Kennedy*, 33 S. Dak. 355, 146 N. W. 570.

<sup>5</sup> *Birdsall v. Perry Gas Works* (Iowa), 161 N. W. 304.

<sup>6</sup> *Morris v. Hohosona*, 26 Colo. App. 251, 143 Pac. 826; *Haentze v. Brown*, 193 Ill. App. 288; *Henry v.*

§ 3694. **Substantial performance—Recoupment and deductions.**—Where deviations and omissions are not due to bad faith and do not impair the structure as a whole, and can be conveniently remedied and paid for by deductions, it is held that they do not constitute noncompliance with the contract.<sup>7</sup>

§ 3995. **Substantial performance—Question of fact—General rule and tests.**—In a recent New York case it was held that a building contractor is not now held to a complete and specific performance of his contract in each and every detail, but that the rule is more equitable.<sup>8</sup>

§ 3696. **Substantial performance—Illustrative cases.**—The contractor's failure to put in a plaster partition enclosing stairs in the basement, under a contract for alteration and repair of buildings, held of such slight and unsubstantial character as not to affect the right of the contractor to recover.<sup>9</sup>

§ 3699. **Part performance and recovery on the quantum meruit.**—Plaintiffs could recover on the quantum meruit for work done, within the limit of the contract price, although the architect refused his certificate, where plaintiffs contracted to plaster a building in a good workmanlike manner and replace any defective work in two years, and did replace some which was accepted.<sup>10</sup> The owner was held liable for the reasonable value of the work already done, where the work was partially done and the owner sold the land on which it was to be performed, rendering completion impossible.<sup>11</sup>

§ 3700. **Part performance—Illustrative cases.**—Where a party to a contract faces an inevitable breach by the other party, a breach vital to the performance of the contract, he is not required to proceed with the work and thereby increase his dam-

Jons, 164 Iowa 364, 145 N. W. 909; Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748n; Beyer v. Mountz, 60 Pa. Super. Ct. 22; Otis Elevator Co. v. Flanders Realty Co., 244 Pa. 186, 90 Atl. 624.

<sup>7</sup> Stewart v. Breckenridge (Colo.), 169 Pac. 543. The recovery is subject, however, to deduction for the omissions or defects: Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036.

<sup>8</sup> Brainard v. Ten Eyck, 168 N. Y. S. 116. It is usually a question of fact as to whether there has been substantial performance: Brown v. Hall, 121 Minn. 61, 140 N. W. 128.

<sup>9</sup> Meulenbergh v. Coe, 160 N. Y. S. 581.

<sup>10</sup> Craig v. McNichols Furniture Co. (Mo. App.), 187 S. W. 793.

<sup>11</sup> McDaniels v. Harrington, 80 Ore. 628, 157 Pac. 1068.

ages, which, by ordinary foresight and prudence he can foresee and prevent.<sup>12</sup>

**§ 3702. Performance prevented by destruction of building.**—If the building is burned before completion, the contractor must stand the loss and rebuild to be entitled to payment, unless the contract provides otherwise.<sup>13</sup> But it has been held that where performance is rendered impossible because of the destruction of the premises the party agreeing to perform is excused.<sup>14</sup> The general and prevailing rule is that where the contract is entire to erect a building, or the like, and the subject of the contract is destroyed before the work is completed through no fault of the owner, the contractor must bear the loss.<sup>15</sup> But, where the work is severable and the contract price is payable in instalments as a certain portion of the work is finished, and after an instalment has been earned, the building is destroyed, there may be a recovery of such instalment by the contractor.<sup>16</sup>

**§ 3703. Performance becoming impossible.**—Where a contractor agreed to build a mill, he will not be excused from performance by the fact that it was impossible to operate the mill profitably without a vacation of the streets.<sup>17</sup> If a party agrees to do a thing possible of performance, he must complete his contract, unless performance is rendered impossible by the act of God, the law, or the other party, and unforeseen difficulties will not excuse him.<sup>18</sup>

<sup>12</sup> William Cramp &c. Engine Bldg. Co. v. United States, 50 Ct. Cl. (U. S.) 179.

<sup>13</sup> Ahlgren v. Walsh, 158 Cal. 27, 158 Pac. 748.

<sup>14</sup> Perlee v. Jeffcott, 89 N. J. L. 34, 97 Atl. 789. And there are many cases where a recovery may be had for the reasonable value of work done or materials furnished for an existing building, and by which the other party has benefited, although it has been destroyed without fault of either party: Keeling v. Schastey, 18 Cal. App. 764, 124 Pac. 445; Carroll v. Bowersock, 100 Kans. 270, 164 Pac. 143, L. R. A. 1917D, 1006n; Dame v. Wood, 75 N. H. 38, 70 Atl. 1081; note in Ann. Cas. 1913A, 458, 459.

<sup>15</sup> Keeling v. Schastey, 18 Cal. App.

764, 124 Pac. 445; Taulby v. McCarty, 144 Ky. 199, 137 S. W. 1045, 36 L. R. A. (N. S.) 43, Ann. Cas. 1913A, 456n; Jones-Gray Constr. Co. v. Stephens, 167 Ky. 765, 181 S. W. 659. See also Carroll v. Bowersock, 100 Kans. 270, 164 Pac. 143, L. R. A. 1917D, 1006n.

<sup>16</sup> Peck-Hammond & Co. v. Miller, 164 Ky. 206, 175 S. W. 347.

<sup>17</sup> Learned v. Holbrock (Ore.), 170 Pac. 530.

<sup>18</sup> Stagg v. Spray Water Power &c. Co., 171 N. Car. 583, 89 S. E. 47. See also Ford v. Shepard Co., 36 R. I. 497, 90 Atl. 805. But compare William Miller & Sons Co. v. Homeopathic Medical &c. Hospital & Dispensary, 243 Pa. 502, 90 Atl. 394. Destruction of a building to be repaired may render the contract impossible

§ 3704. **Illegal contracts.**—Where the law intervenes to prevent the performance of the contract, the contractor is not liable.<sup>19</sup>

§ 3706. **Acceptance and waiver of defective performance.**—It is generally held that occupancy and use of a building by the owner do not constitute an acceptance of the work as complying with the contract, nor amount to a waiver of defects therein.<sup>20</sup>

§ 3707. **Performance to satisfaction of architect or engineers.**—Where the contract provides that the work shall be done satisfactory to the architect his judgment is conclusive if made in good faith.<sup>21</sup>

§ 3708. **Performance to satisfaction of architect—Illustrative cases.**—Where the architect is given authority by the contract to construe the drawings and specifications, he has the power to decide which shall govern in case of conflict.<sup>22</sup>

§ 3709. **Performance to satisfaction of architect—Necessity, binding effect, and waiver of certificate.**—Where the contract provides that the architect shall have authority to interpret the plans and that his decision shall be conclusive, his decision is binding on the parties.<sup>23</sup> Where the owner discharges the architect and thus makes it impossible for the contractor to secure a final certificate, he waives the production of such certificate and the contractor may recover.<sup>24</sup>

§ 3710. **Performance to satisfaction of owner.**<sup>25</sup>—A contract provision that the work shall be done to the satisfaction of

of performance and constitute an excuse, as a condition is generally implied in such a case that the building shall remain in existence. See authorities cited in note 14, *supra*; also notes in Ann. Cas. 1913A, 458, 459, L. R. A. 1916F, 10, and L. R. A. 1917D, 1006, 1012. See also on the general subject, ante §§ 1908, 1910.

<sup>19</sup> Northern Irrigation Co. v. Watkins (Tex. Civ. App.), 183 S. W. 431.

<sup>20</sup> Leonard v. Home Builders, 174 Cal. 65, 161 Pac. 1151, L. R. A. 1917C, 324n; Japes v. Harmon, 176 Mich. 1, 141 N. W. 595; Walter v. Huggins, 164 Mo. App. 69, 148 S. W. 148; National Surety Co. v. Board of Education (Okla.), 162 Pac. 1108; Chris-

tensen v. Hamilton Realty Co., 42 Utah 70, 129 Pac. 412. But compare Dean v. Connecticut & Co., 88 Conn. 619, 92 Atl. 408; Foster v. Swanson, 189 Ill. App. 344; Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748n.

<sup>21</sup> Berger Manufacturing Co. v. Huggins, 242 Fed. 853.

<sup>22</sup> Stewart v. Breckenridge (Colo.), 169 Pac. 543.

<sup>23</sup> Garrett v. Dodson (Tex. Civ. App.), 199 S. W. 675.

<sup>24</sup> Catanzano v. Jackson (Ala.), 73 So. 510.

<sup>25</sup> [Main section cited in Erickson v. Ward, 266 Ill. 259, 107 N. E. 593, Ann. Cas. 1916B, 497n, 499.]

the owner is valid, and the fact that the contract further provides for the certificate of the architect on completion does not render the architect's judgment binding on the owner.<sup>26</sup> Where a painter agreed to paint a house to the satisfaction of the owner, it was held that he was only required to perform the work in such a way as would satisfy a reasonable man.<sup>27</sup> But an agreement that it shall be satisfactory to the owner necessarily makes him the sole judge, where the subject of the contract involves personal taste or feeling,<sup>28</sup> and, as already shown, the prevailing rule is that so long as the owner acts in good faith his determination as to whether the work under a building contract is satisfactory is conclusive under such a provision.

§ 3712. **Time of performance in general.**—The contractor is entitled to recover damages proximately resulting from the delay, where he is delayed in his work by the failure of the owner to furnish material as agreed.<sup>29</sup> At law, provisions as to time are generally regarded as of the essence of a contract and required to be complied with, especially where it appears that time is of such importance that the parties would not have contracted without such a provision.<sup>30</sup> In computing time from a designated

<sup>26</sup> *Gerisch v. Herold*, 82 N. J. L. 605, 83 Atl. 892, Ann. Cas. 1913D, 627n.

<sup>27</sup> *Miller v. Phillips*, 39 R. I. 416, 98 Atl. 59. The holding of some courts is that a recovery can not be defeated by arbitrarily or unreasonably stating that the work is not done to the satisfaction of the promisor, and that if he ought in reason to be satisfied a recovery may be had: *McCartney v. Badovinac* (Colo.), 160 Pac. 190, L. R. A. 1917A, 1146; *Hanaford v. Stevens*, 39 R. I. 416, 98 Atl. 209. See also post § 1881. The weight of authority, however, is to the effect that if the contract requires the work to be done to the satisfaction or approval of the owner without any limitation or qualification, he has the right to determine that matter, and as long as he acts with honesty and good faith, his determination is conclusive: *Waldt v. Goodwin Mfg. Co.*, 165 App. Div. 244, 150 N. Y. S. 831; *Kramer v. Wien*, 92 Misc. 159, 155 N. Y. S. 193; *Diggle v. Ogston Motor*

*Co.*, 112 L. T. (N. S.) 1029, 84 L. J. (1915) K. B. (N. S.) 2165. See also cases cited in note to § 1603 ante and § 3710.

<sup>28</sup> *Hanaford v. Stevens*, 39 R. I. 182, 98 Atl. 209.

<sup>29</sup> *Chickasha v. Hollingsworth* (Okla.), 155 Pac. 859.

<sup>30</sup> *Watson v. Feibel*, 139 La. 375, 71 So. 585. See also *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. ed. 920. Time will be presumed to be of the essence where both parties know that the ultimate purpose of the contract could not be accomplished without strict performance at such time, but it is not of the essence of the contract to furnish and erect steel construction for a building, where the contractor was required to await the progress of others on the building, and the convenience of the architect in correcting discrepancies in the plans or in the work of others: *Ottumwa Bridge Co. v. Corrigan*, 251 Mo. 667, 158 S. W. 39.

day or event, the general rule is to exclude the first day and include the last day of the specified period.<sup>31</sup>

§ 3713. **Time of performance—Reasonable time.**—Where no time of performance is specified, a reasonable time is presumed or implied.<sup>32</sup> It is generally for the jury, under all the circumstances of the particular case, to determine what is a reasonable time.<sup>33</sup> But where the facts are undisputed and but one

<sup>31</sup> *Gault v. Dunlap* (Tex. Civ. App.), 188 S. W. 1020. But see *Meridian Life Ins. Co. v. Milam*, 172 Ky. 75, 188 S. W. 879, L. R. A. 1917B, 103n. Fractions of a day are not usually considered: *Meridian Life Ins. Co. v. Milam*, 172 Ky. 75, 188 S. W. 879, L. R. A. 1917B, 103n; *Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866. Ordinarily a provision in a building contract specifying a definite time within which the building must be completed refers to the building proper and does not include a sidewalk in front of it. *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371. So, such a provision does not ordinarily apply to extra work, even though the possibility that it may be required is recognized and a price fixed for it: *Raymond Concrete Pile Co. v. Hartman Furniture & Co.*, 187 Ill. App. 426. See also *New York State Nat. Bank v. Whitehall Power Co.*, 161 App. Div. 304, 146 N. Y. S. 769. Where a contract for building material did not specify any time of payment, it was held not due and payable until delivery and acceptance of the material: *In re Hellams*, 223 Fed. 460. Where a building contract specifies no time for payment, payment not required, usually, until performance is completed: *Rosen v. Bonagur*, 143 N. Y. S. 1059; *Empire Lighting Fixture Co. v. Browning*, 93 Misc. 489, 157 N. Y. S. 284.

<sup>32</sup> *R. Guastavino Co. v. United States*, 50 Ct. Cl. (U. S.) 115; *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 219 Fed. 477, 135 C. C. A. 189; *In re Hellams*, 223 Fed. 460; *Farrow v. Sturdivant Bank*, 184 Ala. 208, 63 So. 973; *Pratt Consolidated Coal Co. v. Short*, 191 Ala. 378, 68 So. 63; *Alford v. Creagh*, 7 Ala. App. 358, 62 So. 254; *Brookings Lumber*

& Box Co. v. Manufacturers' Automatic Sprinkler Co., 173 Cal. 679, 161 Pac. 266; *Giberson v. Fink*, 28 Cal. App. 25, 151 Pac. 371; *Roush v. Illinois Oil Co.*, 180 Ill. App. 346; *Raymond Concrete Pile Co. v. Hartman Furniture & Carpet Co.*, 187 Ill. App. 426; *Weber Chimney Co. v. Brunswick-Balke-Collender Co.*, 195 Ill. App. 9; *Ryan v. Litchfield*, 162 Iowa 609, 144 N. W. 313; *Western Securities Co. v. Atlee*, 168 Iowa 650, 151 N. W. 56; *Knipe v. Troika*, 92 Kans. 549, 141 Pac. 557; *Greenstreet v. Cheatum*, 99 Kans. 290, 161 Pac. 596; *Reinforced Concrete Pipe Co. v. Boyes*, 180 Mich. 609, 147 N. W. 577; *McCall v. Atchley*, 256 Mo. 39, 164 S. W. 593; *Simon v. Etgen*, 213 N. Y. 589, 107 N. E. 1066; *Northrup v. Scott*, 85 Misc. 515, 148 N. Y. S. 846; *Mitchell v. Heinrich Aeroplane Co.*, 95 Misc. 222, 158 N. Y. S. 728; *Wimpie Electric Co. v. Columbus Circle Const. Corp.*, 98 Misc. 242, 162 N. Y. S. 969; *Fayou v. Jekyl*, 157 N. Y. S. 880; *Holden v. Royall*, 169 N. Car. 676, 86 S. E. 583; *Leeper Bros. Lumber Co. v. Gunter* (Okla.), 160 Pac. 606; *Ehinger v. John Baizley Ironworks*, 248 Pa. 309, 93 Atl. 1074; *Markley v. Godfrey*, 245 Pa. 99, 98 Atl. 785; *Johnson v. Mansfield* (Tex. Civ. App.), 166 S. W. 927; *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen* (Tex. Civ. App.), 172 S. W. 739; *Boesen v. Potter County* (Tex. Civ. App.), 173 S. W. 462; *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163.

<sup>33</sup> *Harty & Co. v. Carden-Callahan Co.*, 192 Ill. App. 281; *George J. Wanstrath Real Estate Co. v. Wenz*, 185 Mo. App. 162, 170 S. W. 345; *Holden v. Royall*, 169 N. Car. 676, 86 S. E. 583. See also *Potter County v. Boesen* (Tex. Civ. App.), 191 S. W. 787.



reasonable inference can be drawn, the question is one of law.<sup>34</sup>

§ 3714. **Extension of time of performance.**—Neither party to a joint contract can extend the time of performance without the consent of the other party.<sup>35</sup> Where the time of performance has been extended but no definite time has been agreed upon, a reasonable time will be presumed.<sup>36</sup>

§ 3715. **Waiver of time limit.**—The one for whose benefit a time limit is made is held to waive it where he recognizes the contract as still in force after the time for performance is past.<sup>37</sup> Even though the time limit in a subcontract for the furnishing of materials is waived, it is the duty of the subcontractor to complete his contract within a reasonable time.<sup>38</sup>

§ 3719. **Effect of extras and alterations as to time.**—Where delay is caused by extra work, the contractor is not responsible.<sup>39</sup>

§ 3720. **Other excuses for delays.**—Where delay is caused by the owner's acts and defaults, he can not avail himself of a provision for penalty for failure of contractor to complete the work on a fixed day.<sup>40</sup> Delay is not excused because it results from extraordinary weather conditions.<sup>41</sup>

§ 3721. **Abandonment of work by contractor.**—A rendition of a defective judgment by the arbitrator or architect does not justify abandonment by the contractor, where the parties select an arbitrator, as architect, to decide whether the work is in accordance with the specifications.<sup>42</sup> The contractor was not justified in abandoning the contract unless there was fraud or collusion between the architect and the building committee of a church as to architect's ordering the removal of a brick wall as

<sup>34</sup> Farrow v. Sturdivant Bank, 184 Ala. 208, 63 So. 973; Alford v. Creagh, 7 Ala. App. 358, 62 So. 254; York v. Sun Ins. Office (Ind. App.), 113 N. E. 1021, 1023; Reinforced Concrete Pipe Co. v. Boyes, 180 Mich. 609, 147 N. W. 577; Kiser v. Denney, 99 Nebr. 3, 154 N. W. 835; Markley v. Godfrey, 254 Pa. 99, 98 Atl. 785. See also Potter County v. Boesen (Tex. Civ. App.), 191 S. W. 787.

<sup>35</sup> Short v. Rogue River Irrigation &c. Co., 82 Ore. 662, 162 Pac. 845.

<sup>36</sup> Security National Bank v. Pulver, 131 Minn. 454, 155 N. W. 641.

<sup>37</sup> Lowry v. Rosengrant, 196 Ala. 337, 71 So. 439.

<sup>38</sup> Harty Bros. & Harty Co. v. Carden-Callahan Co., 192 Ill. App. 281.

<sup>39</sup> Foye v. Lilley Coal & Coke Co., 251 Pa. 409, 96 Atl. 987.

<sup>40</sup> Humphrey v. Flaherty, 98 Kans. 634, 158 Pac. 1112.

<sup>41</sup> Stevens v. Lewis-Wilson-Hicks Co., 170 Ky. 238, 185 S. W. 873.

<sup>42</sup> Garrett v. Dodson (Tex. Civ. App.), 199 S. W. 675.

not conforming to specifications.<sup>43</sup> The contractor may treat the contract as abandoned and excuse nonperformance, where the owner prevents the contractor from performing or repudiates his obligations, communicating such repudiation to the contractor.<sup>44</sup> It is held that damages for delay are not waived by mutual abandonment after delay of a contract to dig a well for irrigation purposes.<sup>45</sup>

**§ 3722. Completion of structure or work by owner.**<sup>46</sup>—Where the owner of a partially-completed apartment house sold it and agreed to complete it for a price, the vendor was held liable for the necessary expense of the vendee in completing the work according to the contract.<sup>47</sup>

<sup>43</sup> Garrett v. Dodson (Tex. Civ. App.), 199 S. W. 675.

<sup>44</sup> Ferber v. Cona, 89 N. J. L. 135, 97 Atl. 720.

<sup>45</sup> Foos Gas Engine Co. v. Fairview &c. Cattle Co. (Tex. Civ. App.), 185 S. W. 382. Conduct may amount to abandonment: Mark v. Stuart-Howland Co., 226 Mass. 35, 115 N. E. 42.

<sup>46</sup> See generally as to right of owner to complete work where contractor abandons it: Schmidt Bros. Constr. Co. v. Raymond Y. M. C. A. (Iowa), 163 N. W. 458; Borup v.

Von Kokeritz, 162 App. Div. 394, 147 N. Y. S. 832. Where the contractor agreed that in certain contingencies the owner might terminate the employment and take possession of all the materials on the premises for the purpose of completing the work, it was held that by so taking possession pursuant to the contract, where the contingency had happened, the landowner thus acquired title to such materials: Wildwood Board of Education v. Bright (N. J.), 103 Atl. 422.

<sup>47</sup> Mason v. Griffith (Ill.), 118 N. E. 18.

## CHAPTER CIV

### PAYMENT ON BUILDING CONTRACTS AND PROVISIONS RELATING THERE TO

§ 3730. **Certificate a condition precedent.**—The certificate is necessary to make the instalment payable under the owner's agreement to pay the contractor an instalment when certain work in the building was finished, provided that a certificate should be obtained from the architect.<sup>1</sup> It was held that failure to furnish the owner a certificate can not be excused by a showing that two months after the work was finished the property owner refused to permit an inspection to be made, where the plaintiff contracted to do plumbing "according to the ordinances of the city of Chicago," which required that an official inspection certificate should be furnished the property owner as soon as the work was completed.<sup>2</sup>

§ 3731. **Where final certificate not required.**—Where the architect's refusal of a final certificate is unreasonable, its non-production is excused as a condition precedent to recovery.<sup>3</sup>

§ 3732. **Waiver of architect's certificate.**—Where the owner makes payments without the architect's certificates and accepts the work on completion, the provision for payments on architect's certificates is waived.<sup>4</sup> Where the final certificate is fraudulently withheld or is waived, recovery may be had in its absence.<sup>5</sup>

§ 3734. **Liability for compensation.**—The plaintiff can not recover for the unperformed parts of his contract which had not been waived.<sup>6</sup>

<sup>1</sup> Ahlgren v. Walsh, 173 Cal. 27, 158 Pac. 748.

<sup>2</sup> Levin v. Strumpler, 194 Ill. App. 299.

<sup>3</sup> Mulenbergh v. Coe, 160 N. Y. S. 581.

<sup>4</sup> Humphrey v. Flaherty, 98 Kans. 634, 158 Pac. 1112.

<sup>5</sup> Bradley v. McDonald, 218 N. Y. 351, 113 N. E. 340.

<sup>6</sup> Otstott v. Merryman, 71 Fla. 352, 71 So. 278.

## CHAPTER CV

### LIABILITY FOR EXTRAS ON BUILDINGS

§ 3740. **General statement.**—The plaintiff could not include the expense of doing over his own negligent work in his estimated cost, but might include the cost of doing it right originally, under a contract for construction and furnishing a house, whereby defendant was to receive rebate of difference between stipulated amount and cost to plaintiff, plus 10 per cent. profit.<sup>1</sup>

§ 3741. **What constitutes extras.**—Where, on account of depth of cuts, stumps will be removed as part of excavation, or, on account of fills only the top need be sawed, there was no “grubbing” within a contract for work in constructing a railroad.<sup>2</sup> It was held “extra work,” and not an “alteration” and that the contractor could recover therefor without the written order of the architect where additional stucco on a foundation wall was made necessary by additional exposure of the foundation wall because of the manner of grading around the house.<sup>3</sup>

§ 3748. **Authority of architect or engineer to order extras.**—Where a contract expressly provides that no alterations are to be made except on written order of the architect such provision must be strictly complied with,<sup>4</sup> and an alteration can not be construed as “extra work” in order to defeat such provision.<sup>5</sup>

§ 3749. **Liability for extras.**—Although the owner erroneously believes the work is covered by the contract, he is liable

<sup>1</sup> Hoggson Bros. v. Spiekerman, 175 App. Div. 144, 161 N. Y. S. 930.

<sup>2</sup> Cervien v. Erickson Const. Co., 94 Wash. 500, 162 Pac. 567.

<sup>3</sup> Fetterolf v. S. & L. Const. Co., 175 App. Div. 177, 161 N. Y. S. 549.

<sup>4</sup> A set of special working sketches furnished by the architect for an alteration was not an “order” under a building contract providing that “no alteration shall be made in the work, except upon written order of the architect,” etc.: Fetterolf v. S. & L. Const. Co., 175 App. Div. 177, 161 N. Y. S. 549. The architect can

not bind the owner by an oral order, where a contract provides that no extra work shall be allowed, unless a written order therefor shall be given by the architect: National Bank of Commerce v. Watervliet, 97 Misc. 121, 160 N. Y. S. 1072.

<sup>5</sup> It was held that a change in the roof, raising the attic three feet, was an alteration and that the owner was not liable for the same in the absence of written order of the architect: Fetterolf v. S. & L. Const. Co., 175 App. Div. 177, 161 N. Y. S. 549.

for the extra work, where the contractor does work which is not within the scope of his contract, and the owner knows that the work is being done and assents thereto, and receives the benefits.<sup>6</sup>

§ 3751. **Compensation for extra service.**—Where one is employed to superintend the construction of a building, he may recover reasonable compensation for extra services performed at the instance of the owner, if such extra services were not provided for by his contract.<sup>7</sup>

<sup>6</sup> Howard v. Harvard Congregational Soc., 223 Mass. 562, 112 N. E. 233.

<sup>7</sup> Shear v. Bruyere (Tex. Civ. App.), 187 S. W. 243.

## CHAPTER CVI

### SPECIFIC PERFORMANCE OF BUILDING CONTRACT

§ 3755. **General considerations.**—The general subject of specific performance has already been treated, and, under the general rules there laid down, specific performance of a contract to build or repair can seldom be enforced.<sup>1</sup>

§§ 3757, 3758. **Specific performance sometimes granted—Building contracts not usually so enforced.**—There is no method by which a decree for the specific performance of an executory building or construction contract can practically and satisfactorily be enforced under ordinary circumstances, and, for this reason, the general rule is that specific performance of such contracts will not be granted by the courts.<sup>2</sup> But there are exceptions to this general rule, which have been stated as follows: “(1) Where the work to be done is defined; (2) where the plaintiff has a substantial interest in its execution which can not be adequately compensated for by damages; and (3) where the defendant has by the contract obtained for the plaintiff possession of the land upon which the work is to be done.”<sup>3</sup> And it has been held that while the general rule justifies a court in refusing to grant a decree for specific performance which it can not enforce, it does not prevent the court from granting specific performance as incidental to other relief in exceptional cases and so far as it can enforce the decree.<sup>4</sup> So, where a street railway company agreed with a municipality, in consideration of a right of way in a street, to repair the pavement and lay an additional track, it was held that such agreement would be specifically enforced where it also appeared that the company had entered upon and occupied the street under such agreement.<sup>5</sup>

<sup>1</sup> See ante Chap. LI.

<sup>2</sup> *La Hogue Drainage Dist. v. Watts*, 179 Fed. 690, 103 C. C. A. 236; *Braithwaite v. Henneberry*, 124 Ill. App. 407; *Ward v. Newbold*, 115 Md. 689, 81 Atl. 793, Ann. Cas. 1913A, 919n; *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459; *Rushbrooke v. O'Sullivan* (1908), 1 Irish Rep. 232.

<sup>3</sup> *Ward v. Newbold*, 115 Md. 639, 81 Atl. 793, Ann. Cas. 1913A, 918, 922. See also *Wolverhampton v. Emmons* (1901), 1 K. B. 515.

<sup>4</sup> *Williams v. Lowe*, 79 N. J. Eq. 173, 81 Atl. 760.

<sup>5</sup> *Patton Twp. v. Monongahela St. R. Co.*, 226 Pa. 372, 75 Atl. 589.

## CHAPTER CVII

### LIQUIDATED DAMAGES, PENALTIES AND FORFEITURES ON BUILDING CONTRACTS

§ 3765. **Penalties generally.**—The law as well as equity abhors a forfeiture, and, where the rights of one of the parties will be injured in declaring it, the courts will seize any reasonable opportunity to prevent it.<sup>1</sup>

§ 3768. **Forfeitures generally.**—Forfeitures not being favored in law, one desiring to avail himself of the forfeiture must act promptly and fairly with the other party.<sup>2</sup>

§ 3770. **Instances of liquidated damages.**—The contractor was held not liable for delay caused by extra work, under a provision of the contract for payment by the contractor of \$40 for each day the completion of the work was delayed beyond a fixed day.<sup>3</sup>

§ 3772. **Enforcement on breach of contract.**—Where the owner's acts and defaults cause delay in completion of the building, the owner can not collect the penalty provided by the contract.<sup>4</sup>

§ 3773. **Notice.**—It was held that after three days written notice the owner could supply the labor, where a building contractor failed to furnish satisfactory labor.<sup>5</sup> Where the notice to the contractor required by the contract is not given after failure to perform, the contractor may recover on the quantum meruit for the material used by the owner and belonging to the contractor.<sup>6</sup>

§ 3774. **Measure of damages.**—The act of a contractor in leaving a hole uncovered in a roof, through which it rained, does

<sup>1</sup> Sheaffer v. Eichenberg, 62 Pa. Super. Ct. 510.

<sup>2</sup> O'Connor v. Knights and Ladies of Security (Iowa), 158 N. W. 761.

<sup>3</sup> Foye v. Lilley &c. Coke Co., 251 Pa. 409, 96 Atl. 987.

<sup>4</sup> Humphrey v. Flaherty, 98 Kans. 634, 158 Pac. 1113.

<sup>5</sup> Ackroyd v. Proctor, 173 App. Div. 413, 159 N. Y. S. 1038.

<sup>6</sup> Ackroyd v. Proctor, 173 App. Div. 413, 159 N. Y. S. 1038.

not entitle the owner to recover for loss of profits.<sup>7</sup> Where there is a substantial but not a strict performance of the contract and the defects can be cured by a reasonable expenditure, the measure of damages is the reasonable cost of remedying such defects and not the difference in value between the structure as it is and as it should have been.<sup>8</sup> On breach of a contract by a plasterer to plaster a building in a good workmanlike manner and make good any defective work, it is the duty of the other party to repair defects and thus lessen his damages.<sup>9</sup> When a contractor put a felt or asphalt paper roof on a house instead of a tar and gravel roof contracted for, the owner was entitled to an allowance for the expense of putting on a new gravel roof.<sup>10</sup>

<sup>7</sup> Welch v. Evans Bros. Constr. Co., (Maine), 167 N. W. 108; Graves v. 189 Ala. 548, 66 So. 517. Allert, 105 Tex. 614, 142 S. W. 869,

<sup>8</sup> Trunk v. Clark, 163 Iowa 626, 145 39 L. R. A. (N. S.) 591n.  
<sup>9</sup> Craig v. McNichols Furniture Co. 92 Kans. 576, 141 Pac. 255; Gutov v. (Mo. App.), 187 S. W. 793.  
<sup>10</sup> Buckholz v. Rosenberg, 163 Wis. Clark, 190 Mich. 381, 157 N. W. 49; Snider v. Peters Home Bldg. Co. 312, 156 N. W. 946.



## CHAPTER CX

### BUILDERS' BONDS AND LIABILITY THEREON

§ 3795. **General statement.**—A contractor's bond to protect and save the owner harmless against all liens arising out of the construction of the work, protects him only against liens of materialmen or subcontractors and not from the lien of such contractor.<sup>1</sup>

§ 3796. **Statutes relating to contractors' bonds.**<sup>2</sup>

§§ 3798, 3801. **Rights and liabilities of sureties—Effect of conduct of obligee.**—As a general rule, a materialman who has received a payment from the owner may apply it upon a portion of his claim against the contractor as to which the surety was not liable,<sup>3</sup> and where he furnishes supplies to a contractor which are not covered by the bond, it has been held that he may apply payments received on general account to the discharge of such uncovered items.<sup>4</sup> But there is conflict among the authorities as to the right of a materialman or subcontractor to apply to other claims money received on account of the particular contract

<sup>1</sup> Ward v. Nolde, 259 Mo. 285, 168 S. W. 596. As to what claims are included and the nature of the labor or materials covered and for the furnishing of which an action will lie on the bond, see: National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99, L. R. A. 1917A, 336; Southern Surety Co. v. Municipal Excavator Co. (Okla.), 160 Pac. 617, L. R. A. 1917B, 558; Standard Boiler Works v. National Surety Co., 71 Wash. 28, 127 Pac. 573, 43 L. R. A. (N. S.) 162n; United States Rubber Co. v. American Bonding Co., 86 Wash. 180, 149 Pac. 706, L. R. A. 1915F, 951n; Wisconsin Brick Co. v. National Surety Co., 164 Wis. 585, 160 N. W. 1044, L. R. A. 1917C, 912.

<sup>2</sup> As to bonds, under various statutes, for the benefit of laborers and materialmen, see generally: Hammond Lumber Co. v. Willis, 171 Cal. 565, 153 Pac. 947; Roystone Co. v.

Darling, 171 Cal. 526, 154 Pac. 15; Alfred Hiller Co. v. Hotel Gruenwald Co., 138 La. 305, 70 So. 234; American Indemnity Co. v. Burrows Hardware Co. (Tex. Civ. App.), 191 S. W. 574; Peters v. Killibrew, 24 Wyo. 53, 154 Pac. 996. See also note in L. R. A. 1917B, 1015, as to effect of insertion of unauthorized provisions. The bond provided for by the Federal statute in regard to public work is a substitute for the lien of the mechanics' lien laws: United States v. American Surety Co., 200 U. S. 197, 203, 26 Sup. Ct. 168, 50 L. ed. 437; United States v. Ansonia Brass & Co., 218 U. S. 452, 31 Sup. Ct. 49, 54 L. ed. 1107; Equitable Surety Co. v. United States, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. ed. 1394.

<sup>3</sup> George H. Sampson Co. v. Commonwealth, 208 Mass. 372, 94 N. E. 473.

<sup>4</sup> United States v. Morgan, 111 Fed. 474.

covered,<sup>5</sup> and while most of the cases hold that a paid surety is not released by the application of payments by a materialman or subcontractor of moneys received by him from the contractor to another claim where such materialman had no notice of the source of the money and the contractor made no application,<sup>6</sup> other cases hold generally that payment must be applied to the discharge of the liability of the surety on the contract on which it is received.<sup>7</sup> The surety is usually released, at least as to the owner, by the making of improper payments or the like contrary to the contract.<sup>8</sup>

§ 3802. **Privity between beneficiaries and obligee.**—A building contractor's bond to pay for all materials used in the building, to preserve it from heirs, is for the benefit of the owner and not for the benefit of materialmen, and the latter can not sue on it.<sup>9</sup> But it is generally held that materialmen and laborers may enforce a contractor's bond where it is given for their benefit as well as that of the owner.<sup>10</sup>

§ 3804. **Action on bond.**—As already shown, it is generally held that materialmen or laborers who are made beneficiaries under the bond, by express provision that the contractor and his

<sup>5</sup> *Sioux City Foundry & Co. v. Merten*, 174 Iowa 332, 156 N. W. 367, L. R. A. 1916D, 1247, and note reviewing cases.

<sup>6</sup> *Chicago Lumber Co. v. Douglas*, 89 Kans. 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843; *Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, 158 Pac. 740, L. R. A. 1917C, 630n.

<sup>7</sup> *Columbia Digger Co. v. Sparks*, 227 Fed. 780, 142 C. C. A. 304, and cases cited.

<sup>8</sup> *Morgan v. Salmon*, 18 N. Mex. 72, 135 Pac. 553, L. R. A. 1915B, 407n. See also *O'Neill v. Title Guaranty & Co.*, 191 Fed. 570, 113 C. C. A. 211; *Maine Cent. R. Co. v. National Surety Co.*, 113 Maine 465, 94 Atl. 929, L. R. A. 1916A, 881 (surety released to extent of payments improperly made but no further); *St. Johns College v. Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994 (surety released only to extent of unauthorized payment). But compare *Standard Asphalt & Co. v. Texas Building Co.*, 99 Kans. 567, 162 Pac. 299, L. R. A. 1917C, 490. And see as to this

not affecting the rights of materialmen: *Empire State Surety Co. v. Des Moines*, 152 Iowa 531, 131 N. W. 870, 132 N. W. 837. See also on the general subject, ante § 3542.

<sup>9</sup> *Uhrich v. Globe Surety Co.* (Mo. App.), 166 S. W. 845. See also *Rounds & Co. v. Thompson* (Okla.), 153 Pac. 648; *Cleveland Metal Roofing & Co. v. Gaspard*, 89 Ohio 185, 106 N. E. 9, L. R. A. 1915A, 768n, Ann. Cas. 1916A, 745n; *Wilkinson v. McMurry* (Tex. Civ. App.), 167 S. W. 275. But compare *Texas Glass & Co. v. Crowds* (Tex.), 193 S. W. 1072.

<sup>10</sup> *Aetna Indemnity Co. v. Indianapolis Mortar & Co.*, 178 Ind. 70, 98 N. E. 706; *Algonite Stone Mfg. Co. v. Fidelity & Co.*, 100 Kans. 28, 163 Pac. 1076, L. R. A. 1917D, 722; *Orinoco Supply Co. v. Shaw Bros. Lumber Co.*, 160 N. Car. 428, 76 S. E. 273, 42 L. R. A. (N. S.) 707; *Yawkey & Co. v. De Long*, 157 Wis. 390, 147 N. W. 334; note in L. R. A. 1915A, 769.

sureties shall pay for all labor and material in the construction of the building, may sue on such bond.<sup>11</sup> And an action at law may be brought upon a bond given under the federal statute by a contractor to pay for labor and material for public work.<sup>12</sup>

<sup>11</sup> Ante § 3802.

<sup>12</sup> National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99, L. R. A. 1917A, 336 (but a claim for provisions furnished the contractor to feed his employes is not covered by such a bond).

## CHAPTER CXI

### CAPACITY OF PERSONS TO HOLD AND CONVEY LAND

§ 3810. Disability of infants—Deeds voidable, not void.<sup>1</sup>

§ 3820. Disability of insane person—Presumption and proof regarding insanity.—The grantor must have sufficient mental capacity to enable him to comprehend the nature of the transaction and the effect of his act, and he must be able to exercise his will with reference thereto.<sup>1a</sup> This standard of mental capacity must be possessed by the grantor at the time the conveyance is made.<sup>2</sup> One's faculties may be impaired by disease and old age and yet he may have sufficient capacity to make a valid deed.<sup>3</sup> The burden is on the plaintiff to show want of mental capacity in the grantor in trespass to try title, the defendant being in possession of a deed and of the land.<sup>4</sup>

§ 3824. Disability from drunkenness.<sup>5</sup>—The burden is on the grantor to show his incapacity from intoxication in a suit to cancel a deed.<sup>6</sup>

§ 3825. Disability from duress—In general.—Where the grantor had been unable to sell at a higher price, the grantee was held not guilty of oppression or coercion in urging grantor to convey in accordance with her contract.<sup>7</sup> It is not duress which a husband and wife may set up to invalidate the deed as against such creditors, that a husband deceived his wife and induced her to sign a deed by false statements as to threats made against him by his creditors.<sup>8</sup>

<sup>1</sup> [Main section cited in *Strain v. Hinds*, 115 N. E. 563, 565.]

<sup>1a</sup> *Essary v. Marvel*, 274 Ill. 576, 113 N. E. 859.

<sup>2</sup> *Magness v. Ditmars*, 81 Ore. 598, 160 Pac. 527.

<sup>3</sup> *Essary v. Marvel*, 274 Ill. 576, 113 N. E. 859; *Dalbey v. Hayes*, 267 Ill. 521, 108 N. E. 657.

<sup>4</sup> *Wentzell v. Chester* (Tex. Civ. App.), 189 S. W. 304. Each case must be decided by its own circumstances: *Johnson v. Johnson* (Tex. Civ. App.), 191 S. W. 366. The deed is not invalid on account of monomania or

delusions unless they exert an influence on him in making a deed: *Essary v. Marvel*, 274 Ill. 576, 113 N. E. 859.

<sup>5</sup> It must be shown that the grantor's intoxication incapacitated him from exercising his judgment where drunkenness is relied upon to avoid a conveyance: *Lewis v. Davis* (Ala.), 73 So. 419.

<sup>6</sup> *Lewis v. Davis* (Ala.), 73 So. 419.

<sup>7</sup> *Finlayson v. Cuyuga Coal & Coke Co.*, 173 Ky. 763, 191 S. W. 486.

<sup>8</sup> *Burnett v. Continental State Bank* (Tex. Civ. App.), 191 S. W. 172.

§ 3826. **Disability from duress—Duress renders deed voidable only.**—The deed could be set aside in equity, where a creditor, by making repeated threats to send his debtor to the penitentiary and by finally having him arrested, secured a deed to land by the debtor's mother and brothers and sisters in satisfaction of his debt.<sup>9</sup> The burden of proof is on the one pleading duress.<sup>10</sup>

§ 3827. **Disability from undue influence.**<sup>11</sup>—It was held that the burden of proof was on the husband to show that the arrangement was fair where he secured the wife's property.<sup>12</sup>

§ 3828. **Disability from undue influence—Confidential relation of parties.**<sup>13</sup>—It is unnecessary for the grantee to adduce evidence in support of a deed valid on its face until it is assailed by proof that it was obtained by fraud.<sup>14</sup>

§ 3829. **Disability from undue influence—Relation of parent and child.**—It is strong evidence of a hostile feeling to-

<sup>9</sup> *Rice v. Henderson-Boyd Lumber Co.*, 197 Ala. 579, 73 So. 70. A deed which is obtained solely by threats of prosecution for a felony, and which is executed for purpose of escaping prosecution, is an illegal contract condemned by public policy, and a court of equity will not enforce agreement while executory or set aside the conveyance if the parties are equally at fault: *Woodall v. Peden*, 274 Ill. 301, 113 N. E. 608. The conveyance will be set aside at the wife's suit, where she is induced to convey real estate through medium of third person to her husband, by her husband's threats of a permanent separation, etc.: *Phillips v. Phillips*, 173 Ky. 608, 191 S. W. 482.

<sup>10</sup> *Burnett v. Continental State Bank* (Tex. Civ. App.), 191 S. W. 172.

<sup>11</sup> It does not amount to undue influence where it is acquired by modest persuasion, by arguments and appeals to the affections, not destroying free agency, but excessive importunity, superiority of will or mind destroying free agency avoids the deed, etc., thereby procured: *Beard v. Beard*, 173 Ky. 131, 190 S. W. 703.

<sup>12</sup> *Phillips v. Phillips*, 173 Ky. 608,

191 S. W. 482. The party attacking the conveyance has burden of establishing undue influence, and charge that the burden shifted, because during the trial certain presumptions of fact might arise in aid of other party, was erroneous: *Shaughnessy v. Shaughnessy*, 135 Minn. 262, 160 N. W. 769.

<sup>13</sup> A conveyance by the latter to the former will be set aside as fraudulent, where a relation of confidence and trust exists between two persons by which one exercises such influence over the judgment of the other as to subvert the latter's will: *Brown v. Slaton*, 172 Ky. 787, 189 S. W. 1130. A conveyance by the decedent of all her property to defendant in return for defendant's agreement to care for deceased during her life was not set aside at the suit of decedent's executor because of undue influence in its procurement: *Dohan v. Yearicks*, 253 Pa. 403, 98 Atl. 611.

<sup>14</sup> *Greathouse v. Harrison* (Ind. App.), 114 N. E. 92. A confidential relation being established, equity raises a presumption against the fairness and reasonableness of a conveyance and casts upon the party desiring to uphold it the burden of over-

ward some of the children when a parent makes gifts to them of great inequality.<sup>15</sup>

coming the presumption after the fact is established that a relation of confidence existed: *Mussey v. Shaw*, 274 Ill. 351, 113 N. E. 605. The burden is on the grantee to show that the deed was executed understandingly where a person obtains a deed from another with whom he sustains a confidential relationship: *Brown v. Slaton*, 172 Ky. 787, 189 S. W. 1130.

<sup>15</sup> *Williamson v. Lowe*, 172 Ky. 80, 188 S. W. 1065. The law casts upon the grantee burden of showing that the transaction was fair where conveyances from parent to child are without valuable consideration;

*Shields v. Burge*, 171 Ky. 149, 188 S. W. 321. Such grantee had the burden of proof that the transaction was fair, where grantor advanced to certain children about \$1,500 each, and deeded to three others lands worth \$75,000, \$15,000, and \$15,000, respectively, and the child receiving the \$75,000 piece was constantly in attendance on the grantor, who was partially paralyzed and of weak mentality: *Williamson v. Lowe*, 172 Ky. 80, 188 S. W. 1065. But compare *Rowe v. Freeman (Ore.)*, 172 Pac. 508.

## CHAPTER CXII

### ESTATES IN FEE AND THEIR TRANSFER BY DEED

§ 3840. **Deeds of conveyance—Definitions—Form.**<sup>1</sup>—Unless an exception is made therein, a deed conveying lands conveys all the estate, right, title and interest whatever, both at law and in equity, of the grantor.<sup>2</sup>

§ 3841. **Distinguished from other instruments.**<sup>3</sup>—It was held to be a deed by which all the husband's property was intended to be, and was, conveyed to his wife, where he executed a written instrument in the presence of witnesses and acknowledged it and delivered it to his wife.<sup>4</sup>

§ 3843. **Designation of parties—The grantor.**—Where a deed read, "I, T. M. L., joined by my wife, F. L., \* \* \* do grant," it was held to be sufficient to convey the wife's title.<sup>5</sup>

§ 3844. **Designation of parties—The grantee.**<sup>6</sup>

§ 3846. **Corporations as parties.**—An error in the name of a corporation grantor does not necessarily render a deed invalid.<sup>7</sup>

§ 3848. **Consideration—Necessity for.**<sup>8</sup>—Plaintiffs' deed to defendant will not be canceled because the defendant breached an agreement with the plaintiffs, which agreement was part of the

<sup>1</sup> Regardless of what either party thought about effect of transaction, where the grantor of land at time of executing deed had acquired title by adverse possession her title would pass: *Connor Realty Co. v. Sparlin* (Mo.), 190 S. W. 6.

<sup>2</sup> *Freudenberger Oil Co. v. Simmons* (W. Va.), 90 S. E. 815.

<sup>3</sup> It was held only a contract, and not a conveyance, where an agreement was made between the partners for the sale of land: *Sutherland v. Munsey*, 119 Va. 791, 89 S. E. 882.

<sup>4</sup> *Coltharp v. Coltharp*, 48 Utah 389, 160 Pac. 121.

<sup>5</sup> *Lowery v. Westheimer* (Okla.), 160 Pac. 496.

<sup>6</sup> If the name of the grantee is left

blank, the deed is invalid: *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366. A deed to the heirs of a living person without naming any one describes no one as grantee, as a living person has no heirs, and such a deed is void: *Duffield v. Duffield*, 268 Ill. 29, 108 N. E. 673.

<sup>7</sup> *Chew v. First Presbyterian Church*, 237 Fed. 219.

<sup>8</sup> There was no consideration for the conveyance where a husband deeded property to his wife because of threats of criminal prosecution for an alleged wrong done her granddaughter, for which the grantee had no right of action: *Woodall v. Peden*, 274 Ill. 301, 113 N. E. 608.

consideration, where the parties exchanged lands.<sup>9</sup> The presumption is that the grantor received the real consideration recited in the deed.<sup>10</sup> A deed is presumed to be valid if given for a valuable consideration, however small.<sup>11</sup>

§ 3849. **Consideration—What is a valuable consideration.**—The mutual promises to make deeds to each other were binding where heirs made mutual deeds to property devised, so that each might hold the property given her for life for the lifetime of the others or during the lifetime of the survivor of them with delivery of each of the deeds.<sup>12</sup>

§ 3850. **Consideration—Marriage a valuable consideration.**—An agreement to separate is not a sufficient consideration to support a deed from a husband to a wife.<sup>13</sup>

§ 3851. **Consideration—Antecedent debt as a valuable consideration.**—The discharge of a legal obligation is sufficient consideration to support a deed or contract.<sup>14</sup>

§ 3855. **Description and boundaries—General consideration.**—In identifying land conveyed, the entire description should be considered, and clauses inserted therein should be re-

<sup>9</sup> Moore v. Turner, 146 Ga. 197, 91 S. E. 13. There remained sufficient consideration to sustain the deed as against suit in equity to rescind, where three promises of grantee were not so mutually dependent that his failure to perform one of such promises would not render performance of either of other promises impossible: Shafer v. Shafer (Mo.), 190 S. W. 323. Gross inadequacy of consideration, where the parties are not on equal terms, is regarded as a badge of fraud in a suit to cancel a deed on the ground of fraud: Brown v. Slaton, 172 Ky. 787, 189 S. W. 1130.

<sup>10</sup> Hampton v. Haneline, 125 Ark. 441, 189 S. W. 40; Miller v. Mateer, 172 N. Car. 401, 90 S. E. 435; Jordan v. Jordan (Okla.), 162 Pac. 758.

<sup>11</sup> Poole v. Poole, 129 Md. 387, 99 Atl. 551.

<sup>12</sup> Fleming v. Reheis, 275 Ill. 132, 113 N. E. 923. A deed can not be set aside because of inadequacy of consideration where a widow of son of

deceased owner of realty sold her interest in estate for inadequate consideration because she neglected to learn its value: Nichols v. Roach, 276 Ill. 388, 114 N. E. 914. Adequacy of consideration is wholly unimportant, where no fraud or oppression is charged or shown in procuring a deed: Finlayson v. Cuyuga Coal & Coke Co., 173 Ky. 763, 191 S. W. 486. Held that it will not be set aside because the deed merely recited payment of a nominal consideration of \$1, where a deed was supported by an adequate consideration which the grantor received: Dohan v. Yearicks, 253 Pa. 403, 98 Atl. 611. It is a sufficient consideration to support a conveyance of such land that the grantor was furnished a home and was otherwise maintained during his life: City of Houston v. Ritchie (Tex. Civ. App.), 191 S. W. 362.

<sup>13</sup> Fleck v. Weipert, 195 Ill. App. 57.

<sup>14</sup> Welch v. Ellis (Okla.), 163 Pac. 321, 324.



garded as inserted for a purpose and be given a meaning that will aid description.<sup>15</sup>

§ 3856. **Description—Certainty required.**—A deed is neither vague nor uncertain where it describes land as bounded by lands of named owner and certain described water courses.<sup>16</sup>

§ 3857. **Description—Fatal uncertainty.**<sup>17</sup>—Though there was no land in the county corresponding to the description in the deed as recorded, in view of surrounding circumstances, it was held that the grantor intended to convey those lands in the county which he owned.<sup>18</sup>

§ 3863. **Description—Reference to maps and surveys.**—An ancient deed which referred to land by its entry number, in accordance with custom, held a sufficient description.<sup>19</sup>

<sup>15</sup> *Quelch v. Futch*, 172 N. Car. 316, 90 S. E. 259. All the land inclosed by a fence and known as the "G. farm," was conveyed where the deed described it as "the G. farm," and gave a specific description which did not include all the land in the farm: *Gish v. Roanoke*, 119 Va. 519, 89 S. E. 970. The deed conveys all the land embraced within its lines, though it is more than the amount stated in the deed and intended to be conveyed, where there is nothing to suggest that courses and distances given in a deed are incorrect: *Seureau v. Frazer* (Tex. Civ. App.), 189 S. W. 1003. Though the court will take judicial notice that lots in the county named contained 490 acres, deed of all tract in a certain district of a county named, distinguished as "No. 216, containing 460 acres more or less," is sufficient to convey the whole tract: *Guest v. Guest*, 145 Ga. 592, 80 S. E. 687.

<sup>16</sup> *Morris v. Beckum*, 145 Ga. 562, 89 S. E. 704. As the land might be identified by extrinsic evidence, a deed, to a place "known as the place built by Thos. Davis and lastly occupied by G. N. Breckenridge" was not void for uncertain evidence: *Petty v. Wilkins* (Tex. Civ. App.), 190 S. W. 531. A deed held to sufficiently describe the land, where it described it as the north end of fractional southwest quarter section named, contain-

ing four acres, with house on it: *Harris v. Byers*, 112 Miss. 651, 73 So. 614. It is not void for uncertainty where a conveyance described land as a tract of 700 acres, being part of a tract of 1,000 acres which is likewise described by general location and reputed acreage: *Davis Colliery Co. v. Westfall*, 78 W. Va. 735, 90 S. E. 328. A deed is unambiguous and includes all of the lot north of a line equidistant from the north and south lines of the lot where it describes it as the northern half of a rectangular lot: *McAleer v. Glover*, 146 Ga. 369, 91 S. E. 114.

<sup>17</sup> It was held that, if grantor did not own entire north end, his conveyance would operate to carry four acres off north end of land he owned in such subdivision, where a deed conveyed land described as north end of fractional southwest quarter of section named containing four acres: *Harris v. Byers*, 112 Miss. 651, 73 So. 614.

<sup>18</sup> *Latourell v. Hobart*, 135 Minn. 109, 160 N. W. 259.

<sup>19</sup> *Felder v. Pemberton*, 136 Tenn. 440, 189 S. W. 873. Where two prior deeds were incorporated by reference in description of promisor, the legal effect depends upon intent of parties as ascertained from instrument in view of all the circumstances: *Bail v. Streeter*, 225 Mass. 100, 113 N. E. 1034. General descrip-

§ 3864. **Exceptions and reservations—Terms distinguished.**<sup>20</sup>—Although the grantor actually retains certain beneficial uses in the property conveyed, a deed absolute and expressing a valuable consideration operates as a complete transfer upon execution and delivery.<sup>21</sup>

§ 3865. **Exception and reservation—Particular cases.**—Where the evidence showed that the one in whose favor it was made was the real grantee, a clause in a deed held not void as a reservation to a stranger.<sup>22</sup>

§ 3467. **The habendum—Office and effect.**—Where the terms of a deed were so ambiguous as to leave a doubt as to whether the fee or a less estate was intended to be passed, it was construed to pass the fee.<sup>23</sup> A subsequent provision that the grantees may not sell or mortgage the property during their natural lives, but may devise it, is void because repugnant to the granting clause, where a deed conveys property to the grantees and their heirs forever.<sup>24</sup>

§ 3869. **The habendum—Use of word “heirs” in limiting estates in fee.**<sup>25</sup>—It is held that a deed to B and to the heirs

tion, following warranty, and referring to record of conveyances in grantor's chain of title covering the land involved, would be given effect and considered as a more particular description, where specific description of property did not convey land involved in an action: *Quelch v. Futch*, 172 N. Car. 316, 90 S. E. 259. Such plat and all the particulars shown thereon are as much a part of the deed as though they were recited in it, where a deed refers to a plat or subdivision: *Doran v. Graham*, 195 Ill. App. 65.

<sup>20</sup> Notwithstanding grantor's death in the meantime, a deed to infants, reserving to grantor possession and rents until grantees should reach age of 21, at which time their title should become absolute, vests in grantees fee simple, subject to term of years expiring only upon attainment of their majority: *Daniels v. Bishop* (W. Va.), 90 S. E. 828.

<sup>21</sup> *Poole v. Poole*, 129 Md. 387, 99 Atl. 551. A deed providing that it shall not take effect until death of grantor, vests title at once; its enjoy-

ment only awaiting the grantor's death: *Gideon v. Gideon*, 99 Kans. 332, 161 Pac. 595. Contra, *Shaul v. Shaul* (Iowa), 160 N. W. 36.

<sup>22</sup> *Nield v. Jupiter*, 175 App. Div. 732, 162 N. Y. S. 465.

<sup>23</sup> *Belcher v. Ramey*, 173 Ky. 784, 191 S. W. 520.

<sup>24</sup> *Bonnell v. McLaughlin*, 173 Cal. 213, 159 Pac. 590. But see *Duffield v. Duffield*, 268 Ill. 29, 108 N. E. 673. Though providing, in habendum, that it was understood that the property should revert to the heirs at law of the grantee's husband at her death, deed from husband and wife held to give grantee the fee-simple title: *Land v. Land*, 172 Ky. 145, 189 S. W. 1.

<sup>25</sup> Where a deed stated that the grantee was the grantor's father and mother “and the heirs of her body” it was held to convey either a fee simple under Ky. Stat., § 2342, or a fee tail, which is converted into a fee simple by § 2343, not a life estate with remainder to plaintiffs, under § 2345: *Belcher v. Ramey*, 173 Ky. 784, 191 S. W. 520. Where a deed

of her body conveys a fee tail estate at common law which the statute converts into a fee simple.<sup>26</sup>

**§ 3870. The habendum—The rule in Shelley's case.<sup>27</sup>**

**§ 3871. The habendum—Estates tail.**—They are words of limitation and create an estate tail, unless there is something in the deed to show that they were used in the sense of children, where the words "heirs of the body" and similar expressions are used.<sup>28</sup>

**§ 3872. Conditions precedent and subsequent—How created.<sup>29</sup>**—Where the performance of a condition subsequent would be a violation of law or against public policy, it may be avoided.<sup>30</sup> The presence of a condition subsequent is a pre-

granted title to grantor's daughter "and her bodily heirs and assigns," but used apt words to convey a fee in other clauses, construed, and held to convey a fee simple to daughter: *Tennison v. Walker* (Mo.), 190 S. W. 9. Such words were intended to be synonymous with "children," and were words of purchase and not of limitation, in husband's conveyance, in consideration of love and affection for wife and their children, to her "and her bodily heirs by" S.: *Scott v. Scott*, 172 Ky. 658, 190 S. W. 143. See also *Hickson v. Davenport*, 248 Fed. 319. A conveyance to the grantee "and his bodily heirs, creating an estate tail at common law," would have given to the grantee a life estate and heirs of her body a remainder in fee, under Rev. Stat., § 2872: *Tennison v. Walker* (Mo.), 190 S. W. 9. A. under a deed to her and "her heirs by the body of R." takes a fee simple, under *Revisal* 1905, § 1578, converting a fee tail special into a fee simple: *Revis v. Murphy*, 172 N. Car. 579, 90 S. E. 573. The relationship of the parties and the language of the deed are to be considered, and unless a contrary intent appears the wife will be held to receive a life estate only, in determining whether the conveyance by a husband to his wife and their children passes a joint estate to the wife and children, or a life estate, with remainder to the children: *Scott v. Scott*, 172 Ky. 658, 190 S. W. 143.

<sup>26</sup> *Blake v. Shields*, 172 N. Car. 628, 90 S. E. 764.

<sup>27</sup> Rule in *Shelley's Case* is that when ancestor takes a freehold estate, and in the same conveyance an estate is limited to his heirs, "heirs" is a word of limitation, and not a word of purchase, though, when used with other words, it may be treated as a word of purchase: *Williams v. J. C. Armiger & Bro.*, 129 Md. 222, 98 Atl. 542. See also *Hickson v. Davenport*, 248 Fed. 319. It is held that the Virginia code, which provides that the words "heirs," "heirs of the body," or "issue," or words of like import, shall be regarded as of purchase and not of limitation, does not apply to a limitation to "heirs of her body, begotten by" grantor of a trust deed: *Halsey v. Fulton*, 119 Va. 571, 89 S. E. 912.

<sup>28</sup> *Belcher v. Ramey*, 173 Ky. 784, 191 S. W. 520. A deed will not be construed to create such an estate unless its language forbids any other construction, since Ky. Stat., § 2343, prohibits estates tail: *Belcher v. Ramey*, 173 Ky. 784, 191 S. W. 520.

<sup>29</sup> It was held, despite conflict between granting and habendum clauses, that infant grantees took the land subject to conditions, and the conditions not being performed, the property reverted to grantor: *Martin v. Adams*, 171 Ky. 246, 188 S. W. 318.

<sup>30</sup> *Sherman v. Jefferson*, 274 Ill. 294, 113 N. E. 624. Deed construed

requisite to the granting of relief to the grantor by setting aside and canceling the deed for a breach, where a deed is based on an agreement to support the grantor.<sup>31</sup>

§ 3873. **Conditions precedent or subsequent—Determinable or qualified fee.**—A condition for reverter upon an event which may or may never occur gives rise to a “possibility of reverter” and serves to qualify the fee.<sup>32</sup> Notwithstanding the use of the word “lease,” an instrument was held to convey a qualified fee, not a term at will.<sup>33</sup>

§ 3874. **Conditions precedent and subsequent—Conditions subsequent not favored in law.**<sup>34</sup>

§ 3875. **Conditions—Not implied from the purposes of the grant.**—A condition subsequent in a deed must be created either by express terms or by clear implication and is construed most strongly against the grantor.<sup>35</sup>

§ 3877. **Restrictions as to the use of land in general.**—Building line restrictions in a recorded plat referred to in a deed, if unobjectionable in law, are binding on the grantee.<sup>36</sup>

and held to vest the title to the land in the grantee on delivery, subject to divestiture on exercise of the right of sale or foreclosure of the lien reserved: *Adkins v. Adkins*, 171 Ky. 762, 188 S. W. 843.

<sup>31</sup> *Shafer v. Shafer* (Mo.), 190 S. W. 323. “Home and board” means something reasonably sufficient for a man in his circumstances and situation, in a deed conveying property on condition that the grantees shall furnish the grantor with home and board: *Murphy v. Tweedle*, 176 App. Div. 276, 162 N. Y. S. 874. Obligations of grantors’ son-in-law were held personal to him under deed of lands to him on condition that he pay certain sums and support grantors: *Krahn v. Goodrich*, 164 Wis. 600, 160 N. W. 1072. Conditions and stipulations providing for forfeiture must be strictly construed as forfeiture of estates is not favored: *Huntley v. McBrayer*, 172 N. Car. 642, 90 S. E. 754. The estate conveyed remains defeasible until the condition be performed, destroyed, or barred by limitation, or estoppel, where a condition subsequent is raised by apt and suf-

ficient words: *Ross v. Sanderson* (Okla.), 162 Pac. 709.

<sup>32</sup> *Des Moines City R. Co. v. Des Moines* (Iowa), 159 N. W. 450. Where a qualified or determinable fee is created, the grantor has no present interest in the premises except a possibility of reverter: *Loomis v. Heublein*, 91 Conn. 146, 99 Atl. 483.

<sup>33</sup> *Loomis v. Heublein*, 91 Conn. 146, 99 Atl. 483.

<sup>34</sup> As the effect of breach of a condition subsequent is the forfeiture of a vested estate, such conditions are not favored: *Shafer v. Shafer* (Mo.), 190 S. W. 323.

<sup>35</sup> *Polebitzke v. John Week Lumber Co.*, 157 Wis. 377, 147 N. W. 703, Ann. Cas. 1916B, 604n. See also *Killgore v. Cabell County Ct.* (W. Va.), 92 S. E. 562.

<sup>36</sup> *Doran v. Graham*, 195 Ill. App. 65. It is a valid condition subsequent, where there is a provision in a conveyance to a town that the land be used for town purposes only, and upon ceasing to be so used the conveyance will become void and the land revert to the grantor and his heirs: *Sherman*

§ 3878. Restrictions as to use of land—Particular restrictions.<sup>37</sup>

§ 3879. Restrictions—Who have burden and benefit of restrictions.<sup>38</sup>

§ 3880. Restrictions as to the use of land—When restrictive covenants run with the land.—The provision for maintenance was a charge upon the land, where a wife conveyed land to her future husband for a money payment and her maintenance for her natural life.<sup>39</sup>

§ 3881. Restrictions—Waiver and release of.—The grantor, by joining in a conveyance wherein there is a breach of such restriction, waives his right to exact a forfeiture for breach where he had imposed a valid restriction upon alienation and

v. Jefferson, 274 Ill. 294, 113 N. E. 624. It is not a compliance with the condition that such land be used only by the grantee town that land conveyed to a town to be used only for town purposes is used for public purposes by another municipal corporation with which the town has been consolidated: *Sherman v. Town of Jefferson*, 274 Ill. 294, 113 N. E. 624. A condition subsequent is construed most strongly against the grantor: *Polebitzki v. John W. Weeks Lumber Co.*, 157 Wis. 377, 147 N. W. 703, Ann. Cas. 1916B, 604n.

<sup>37</sup> It was held that restrictions placed upon lots sold from a tract indicated an unmistakable general scheme to create a residential section: *Powers v. Radding*, 225 Mass. 110, 113 N. E. 782. It was held that a restriction in lots sold as part of a general scheme to create a residential section, that "but one dwelling house shall be erected thereon," defined the use of the dwelling, and not to permit of more than one dwelling under a single roof: *Powers v. Radding*, 225 Mass. 110, 113 N. E. 782.

<sup>38</sup> *Johnson v. Robertson*, 156 Iowa 64, 135 N. W. 585, Ann. Cas. 1915B, 137n; *Webber v. Landrigan*, 215 Mass. 221, 102 N. E. 460; *Oliver v. Kalick*, 223 Mass. 252, 111 N. E. 879; *Wright v. Pfrimmer*, 99 Nebr. 447, 156 N. W. 1060, L. R. A. 1917A, 323n, and authorities there reviewed in note; *Korn v. Campbell*, 192 N. Y. 490, 85

N. E. 687, 37 L. R. A. (N. S.) 1n, 127 Am. St. 925 and note. See also *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157, Ann. Cas. 1914A, 1n; *Wiegman v. Kusel*, 270 Ill. 520, 110 N. E. 884; *Velie v. Richardson*, 126 Minn. 334, 148 N. W. 286; *Godley v. Weisman*, 133 Minn. 1, 157 N. W. 711, 158 N. W. 333, L. R. A. 1917A, 333; *Kiley v. Hall (Ohio)*, 117 N. E. 359; *Duester v. Alvin*, 74 Ore. 544, 145 Pac. 660; *Millbourn v. Lyons* (1914), 83 L. J. Ch. (N. S.) 737.

<sup>39</sup> *Bailey v. Bailey*, 172 N. Car. 671, 90 S. E. 803. Conveyance creates lien on land in favor of such third person, where land is conveyed by one person to another by deed, on condition of such other's paying to third person specified sum of money: *Krahn v. Goodrich*, 164 Wis. 600, 160 N. W. 1072. The agreement constitutes a covenant running with each lot of land, where, as tenants in common, A and B own two adjoining lots, and A conveys his interest in one of the lots to B, and B conveys his interest in the other lot to A, and each deed provides that the grantee and his "heirs and assigns" shall "have the right at any time to build a party wall between the property hereby conveyed, \* \* \* the expense of which shall be borne equally by the owners of the contiguous lots, and which party wall shall be built equally on the land of the owners of

had the right to exact a forfeiture for its breach.<sup>40</sup> The right of forfeiture for breach of a condition in a deed is not an estate. It is a mere right of action which may be waived by those entitled to performance of the condition.<sup>41</sup>

**§ 3884. Covenants of title—Covenants for seizin and right to convey.**—It is held in a recent North Carolina case that where a deed contains covenants of seizin and warranty and conveys the grantor's right, title and interest in a parcel of real estate, it does not impose liability upon the grantor if his title proves defective.<sup>42</sup>

said contiguous lots, and shall be subject to the right of enjoyment equally by them": *Horne v. Macon Telegraph Publishing Co.*, 142 Ga. 489, 83 S. E. 204, Ann. Cas. 1916B, 1212n.

<sup>40</sup> *Francis v. Big Sandy Co.*, 171 Ky. 209, 188 S. W. 345; *Huntley v. McBrayer*, 172 N. Car. 642, 90 S. E. 754.

<sup>41</sup> *Huntley v. McBrayer*, 172 N. Car. 642, 90 S. E. 754. Where the act of the town in making a different use of the land was under authority of law, a condition in a conveyance that the land will revert to the grantor upon ceasing to be used for town

purposes is not waived: *Sherman v. Jefferson*, 274 Ill. 294, 113 N. E. 624. Where it does not appear that grantor understood there was a waiver or that he relied thereon in doing act claimed to operate as forfeiture, breach of condition subsequent is not waived by mere indulgence or silent acquiescence: *Ross v. Sanderson (Okla.)*, 162 Pac. 709; *Sherman v. Jefferson*, 274 Ill. 294, 113 N. E. 624.

<sup>42</sup> *Coble v. Barringer*, 171 N. Car. 445, 88 S. E. 518, L. R. A. 1916E, 901n, and note.

## CHAPTER CXIII

### DEEDS—THEIR EXECUTION AND DELIVERY

#### § 3890. Execution of deed—Signing in general.<sup>1</sup>

§ 3893. Execution of deed—Execution under power of attorney.—No legal right is conferred by a direction to an attorney to fill in, at a future time, the name of a grantee in a deed, because the filling in of such a blank would create a substantial part of the deed, and stand on a level with signing and sealing, and could be conferred only by a power under seal.<sup>2</sup>

#### § 3896. Sealing—Use and necessity of seals.<sup>3</sup>

§ 3899. Attestation—At common law and by statute.—It is held that an attorney at law is not disqualified from acting as an attesting witness where he is a notary public and negotiates a loan and receives a fee for so doing.<sup>4</sup> It seems that an attesting witness attests to the capacity of the grantors to execute a deed as well as to the fact of execution.<sup>5</sup>

§ 3910. Delivery—A matter of intention.<sup>6</sup>—Delivery to the grantee is included in the execution of a deed and a deed is

<sup>1</sup> A deed must be signed to be valid under Hurd's Rev. Stat. 1915-16, chap. 30, § 1: *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906.

<sup>2</sup> *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366.

<sup>3</sup> A deed must be sealed to be valid, under Hurd's Rev. Stat. 1915-16, chap. 30, § 1: *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906.

<sup>4</sup> *Harvard v. Davis*, 145 Ga. 580, 89 S. E. 740.

<sup>5</sup> *Cathcart v. Matthews*, 105 S. Car. 329, 89 S. E. 1021.

<sup>6</sup> Whether facts required to constitute a legal delivery are proved is a question of fact, where a deed is delivered to a third person for delivery to grantee on death of grantor: *Saltzsieder v. Saltzsieder*, 219 N. Y. 523, 114 N. E. 856. That the grantor mistakenly thought that a delivery was unnecessary to a valid gift be-

fore her death can not supply the place of delivery to create an operative instrument during her life: *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042. Surrounding circumstances may be proved to show the intent of the grantor in delivering a deed: *Schultz v. Schultz*, 274 Ill. 341, 113 N. E. 638; *Fleming v. Reheis*, 275 Ill. 132, 113 N. E. 923; *Showalter v. Spangle*, 90 Wash. 326, 160 Pac. 1042. The father's subsequent conduct asserting ownership of the property was competent evidence on the issue whether the deeds were to be effective when executed or only at the grantor's death, where a father had executed deeds to his son: *White v. White*, 99 Kans. 133, 160 Pac. 993; *Saltzsieder v. Saltzsieder*, 219 N. Y. 523, 114 N. E. 856. To be valid, delivery of a deed must be coupled with the intention to pass

not executed until delivered.<sup>7</sup> There must be a giving by the grantor and a receiving by the grantee with a mutual intention to pass a present title from the one to the other.<sup>8</sup>

**§ 3911. Delivery—Gives immediate effect to a deed.**<sup>9</sup>—Although the parties thereto were members of the grantor's family during his lifetime, a deed produced by the grantee after the grantor's death is presumed to have been delivered in the lifetime of the grantor.<sup>10</sup> One is as fully bound as if he had signed it, where he accepts the benefits of a deed providing for payment of the grantor's debts.<sup>11</sup> The delivery does not relate to the time the incomplete instrument was deposited with the agent, but is referable either to the actual delivery or to the time when the name of the grantee was filled in, where the grantor's agent fills in the name of the grantee in the grantor's presence, who had previously executed it and deposited it with the agent to be so filled in, and the agent is authorized to deliver the deed.<sup>12</sup>

**§ 3912. Delivery—To whom it may be made.**—Where a deed is made to an infant, no delivery to or acceptance by the grantee is required, and delivery to a third person for his benefit is sufficient to pass title.<sup>13</sup>

title: *Schultz v. Schultz*, 274 Ill. 341, 113 N. E. 638; *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906; *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042. No title is passed by an undelivered deed: *Schultz v. Schultz*, 274 Ill. 341, 113 N. E. 638; *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906; *Fleming v. Reheis*, 275 Ill. 132, 113 N. E. 923; *Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)*, 160 N. W. 24.

<sup>7</sup> *Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)*, 160 N. W. 24. See also *Nelson v. Thomas (Cal.)*, 172 Pac. 398.

<sup>8</sup> *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042, 1044.

<sup>9</sup> Title passes where grantor unconditionally delivers deed to third party for benefit of grantee: *Gideon v. Gideon*, 99 Kans. 332, 161 Pac. 595. Date of delivery must be taken to have been date of acknowledgment, where a quitclaim deed was dated October 2, 1871, and acknowledged March 4, 1872, and recorded Febru-

ary 6, 1873: *Mighill v. Inhabitants of Town of Rowley*, 224 Mass. 586, 113 N. E. 569.

<sup>10</sup> *In re Teeple's Estate*, 196 Ill. App. 378.

<sup>11</sup> *Spencer v. Spencer*, 253 Pa. 315, 98 Atl. 571.

<sup>12</sup> *Macurda v. Fuller*, 225 Mass. 341, 114 N. E. 366. If the grantor delivers a deed to a third person, in escrow for delivery to the grantee after the grantor's death, and retains no dominion or control, the delivery is valid and the estate vests immediately as of the date of the delivery in escrow, subject to the life estate of the grantor: *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042.

<sup>13</sup> *Turner v. Turner*, 173 Cal. 782, 161 Pac. 980. To constitute a valid delivery of a deed, there be a giving by the grantor and a receipt by the grantee with a mutual intention to pass a present title, and delivery may be made through an agent: *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042.



**§ 3913. Delivery—Presumption of from possession.<sup>14</sup>**

**§ 3914. Delivery—Destruction, cancellation, or surrender of deed.**—Where a deed has been delivered, but not recorded, the alteration of the name of the grantee does not divest the title from the original grantee and vest it in the substituted grantee.<sup>15</sup>

**§ 3915. Delivery—When complete.<sup>16</sup>**—Delivery of a deed must be voluntary to pass title.<sup>17</sup>

**§ 3916. Delivery—Acceptance by grantee essential.<sup>18</sup>**—The presumption of acceptance does not arise if the deed is not of a beneficial character to the grantee, but imposes a duty to be performed by the grantee.<sup>19</sup> Neither will acceptance be presumed where the grantor keeps the deed under his control.<sup>20</sup>

<sup>14</sup> Delivery will be presumed, where a signed warranty deed containing the usual attestation clause is found, after the death of the grantee, in the grantee's safety-deposit box in which other papers were kept: *Hill v. Merritt*, 146 Ga. 307, 91 S. E. 204. Even in absence of evidence that it was obtained prior to the grantor's death, presumption of delivery arises from possession of deed by grantee: *Malaney v. Cameron*, 98 Kans. 620, 159 Pac. 19; *Schultz v. Schultz*, 274 Ill. 341, 113 N. E. 638. See also *Barras v. Barras*, 192 Mich. 584, 159 N. W. 147.

<sup>15</sup> *Carr v. Frye*, 225 Mass. 531, 114 N. E. 745.

<sup>16</sup> The grantor must absolutely divest himself of control over the deed to constitute a valid delivery, and if he retains custody or control over it in any way, there is no valid delivery: *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906; *Pettis v. McLarne*, 135 Minn. 269, 160 N. W. 691; *Rogers v. Jones*, 172 N. Car. 156, 90 S. E. 117. Delivery was nothing but offer which grantor had legal right to withdraw, her death terminating and revoking offer and authority of third person to accept payment and deliver deed on payment, where grantor delivered a deed to third person to hold until payment of price by grantees: *Holland v. McCarthy*, 173 Cal. 597, 160 Pac. 1069. Taking possession by pur-

chasers of land shows acceptance of deed by them which supplies absence of their signatures to the deed: *Megason v. Boleyn Lumber Co.*, 140 La. 431, 73 So. 257.

<sup>17</sup> *Schultz v. Schultz*, 274 Ill. 341, 113 N. E. 638.

<sup>18</sup> It is essential to a transfer of title that the deed be accepted: *Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)*, 160 N. W. 24; *Ferrell v. Childress*, 172 Ky. 760, 189 S. W. 1149. See also *Little v. Eaton (Ill.)*, 108 N. E. 727. Receipt and retention of a deed is evidence of acceptance: *Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)*, 160 N. W. 24. Acceptance of a deed of correction in place of a prior deed misdescribing the land intended to be conveyed is an election to take the land conveyed by the deed of correction: *Borgeson v. Tubb (Mont.)*, 172 Pac. 326, citing *Hall v. Wright*, 138 Ky. 71, 127 S. W. 516, Ann. Cas. 1912A, 1255n and other authorities.

<sup>19</sup> *Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)*, 160 N. W. 24. See also *Little v. Eaton (Ill.)*, 108 N. E. 727.

<sup>20</sup> *Dudley v. Dudley*, 126 Ark. 182, 189 S. W. 838. Acceptance of a deed, under some circumstances, will be presumed from the beneficial character of the conveyance: *Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)*, 160 N. W. 24.

§ 3917. **Delivery—Presumption of from recording.**—There is a presumption of delivery which must be rebutted, where a deed is recorded, whether before or after the grantor's death.<sup>21</sup>

§ 3918. **Delivery in escrow—What constitutes a delivery in escrow.**<sup>22</sup>—If a deed is delivered to the grantee, it becomes operative and freed from any condition not expressed in the deed, as a deed can not be delivered to a grantee as in escrow.<sup>23</sup>

<sup>21</sup> *Rogers v. Jones*, 172 N. Car. 156, 90 S. E. 117.

<sup>22</sup> There was a valid delivery, where previously thereto the attorney explained to the grantor that he would have no power thereafter to withdraw the deeds, where deeds to his sons were delivered by an aged father to his attorney with directions to hold them in escrow until his death, and then to deliver them to his sons: *Smith v. Smith*, 173 Cal. 725, 161 Pac. 495. Although grantee does not know of it, his acceptance being presumed, delivery of a valid deed to a third person to be delivered to grantee at owner's death with intention to part with all control of the

instrument, is a delivery which binds the owner: *Saltzsieder v. Saltzsieder*, 219 N. Y. 523, 114 N. E. 856. If the grantor delivers a deed to another in escrow for delivery to the grantee after his death, and retains no dominion or control, the delivery is valid: *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042. Where the grantor delivers a deed to third person, to be delivered to grantee after grantor's death and with intention that title pass only on delivery to grantee, is inoperative: *Hunt v. Wicht*, 174 Cal. 205, 162 Pac. 639.

<sup>23</sup> *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053, Ann. Cas. 1916B, 519n.

## CHAPTER CXIV

### GUARANTY AND SURETYSHIP—DEFINITION AND GENERAL PRINCIPLES

#### § 3930. Guaranty and suretyship defined.<sup>1</sup>

#### § 3931. Distinction between guaranty and suretyship.—

A contract signed by a third person on the back of a note is held in Georgia to be *prima facie* a contract of guaranty rather than of suretyship.<sup>2</sup> A contract should be construed as a guaranty if such is the substance and effect of the instrument, even though the word “surety” is used in it.<sup>3</sup> A contract of guaranty has been held to differ from one of suretyship in that the consideration of the former is a benefit to the guarantor.<sup>4</sup> A guarantor answers for the debtor’s solvency and is bound only in case the principal does not pay or perform, while a surety insures the debt and is bound with the principal as an original promisor.<sup>5</sup>

<sup>1</sup> For definitions and nature of guaranty, see: *First Nat. Bank v. Nakdimen*, 111 Ark. 223, 163 S. W. 785, Ann. Cas. 1916A, 968n; *Tyson v. Reinecke*, 25 Cal. App. 696, 145 Pac. 153; *McClain v. Georgian Co.*, 17 Ga. App. 648, 87 S. E. 1090; *Schultz v. Deeming*, 194 Ill. App. 513; *Eisfeldt v. Schwartz*, 161 N. Y. S. 194; *Crowder State Bank v. American Powder Mills*, 46 Okla. 105, 148 Pac. 698. The question as to whether an oral promise to pay one person for goods delivered to another is original or collateral depends on the intent as ascertained from the situation and conduct of the parties, the words used, and other attendant circumstances: *Channell Bros. v. West Virginia Pulp & Co. Co. (W. Va.)*, 87 S. E. 876.

<sup>2</sup> *Paris v. Farmers’ & Co. Bank*, 143 Ga. 324, 85 S. E. 126.

<sup>3</sup> *J. R. Watkins Med. Co. v. Lovelady*, 186 Ala. 414, 65 So. 52; *Gambill v. Fox Typewriter Co.*, 190 Ala. 36, 66 So. 655. So where clearly a contract of suretyship it should be so

construed although the word “guarantees” is used: *Society Operaia San Cristiforo Di Ricigliano v. Rock*, 176 Ill. App. 132.

<sup>4</sup> *John Church Co. v. Ætna Indemnity Co.*, 13 Ga. App. 826, 80 S. E. 1093.

<sup>5</sup> *J. R. Watkins Medical Co. v. Lovelady*, 186 Ala. 414, 65 So. 52. See also *Hall v. Equitable Surety Co.*, 126 Ark. 535, 191 S. W. 32; *Eckhart v. Heier*, 37 S. Dak. 382, 158 N. W. 403; *Ricketson v. Lizotte*, 90 Vt. 386, 98 Atl. 801. See generally as to the test: *Jones & Co. Steel Co. v. Graham*, 194 Ill. App. 571; *Taylor v. First State Bank (Tex. Civ. App.)*, 178 S. W. 35. For contracts held guaranty, see: *W. T. Rawleigh Medical Co. v. Wilson*, 7 Ala. App. 242, 60 So. 1001; *Hydraulic-Press Brick Co. v. Miller*, 191 Ill. App. 201; *Young v. Merle & Co. Mfg. Co.*, 184 Ind. 403, 110 N. E. 669; *Vodrie v. Schoedinger (Tex. Civ. App.)*, 180 S. W. 152; *Exchange Nat. Bank v. Pantages*, 74 Wash. 481, 133 Pac. 1025, 46 L. R. A. (N. S.) 484n.

### § 3932. General nature and essentials of contract.<sup>6</sup>

§ 3934. **Classification of guaranties.**—If the liability of the the promisor depends upon any other event than the non-performance of the principal, it is a "conditional guaranty", but where the promisor's liability is fixed by the mere default of the principal, it is an "absolute guaranty."<sup>7</sup> Delay in bringing suit or failure to collect from the principal will not discharge the guarantor in case of an absolute guaranty.<sup>8</sup>

§ 3935. **Parties to contract.**<sup>9</sup>—When the creditor's name appeared in the body of the contract and the guarantors signed their names at the foot of the instrument, the names of all parties intended to be bound by the contract were sufficiently identified.<sup>10</sup>

§ 3936. **The consideration.**—A guaranty contract must be supported by a sufficient consideration, but this may consist of

Contracts held not to be contracts of guaranty: *Kinderman v. Hersch*, 53 Colo. 561, 129 Pac. 228; *McClain v. Georgian Co.*, 17 Ga. App. 648, 87 S. E. 1090; *Jones &c. Steel Co. v. Graham*, 273 Ill. 377, 112 N. E. 967; *Hammer v. Trainer*, 181 Ill. App. 519; *Dilts v. Wilson*, 150 N. Y. S. 628; *Westinghouse Elec. &c. Co. v. Wilson*, 63 Pa. Super. Ct. 294; *Citizens' Bank v. Norfolk &c. R. Co.*, 115 Va. 45, 78 S. E. 568.

<sup>6</sup> Nothing in law prevents one from becoming bound as surety in a separate instrument executed at a time later than the contract of the principal: *Westinghouse Elec. & Mfg. Co. v. Wilson*, 63 Pa. Super. Ct. 294.

<sup>7</sup> *D. T. Williams Valve Co. v. Amorous*, 19 Ga. App. 155, 91 S. E. 240.

<sup>8</sup> *Lee v. Perlberg*, 190 Ill. App. 13; *Home Savings Bank v. Shallenberger*, 95 Nebr. 593, 146 N. W. 993; *H. S. Gile Grocery Co. v. Lachmund*, 75 Ore. 122, 146 Pac. 519. Under Civ. Code 1910, § 3546, after debt becomes due, guarantor may give written notice, stating residence of principal, to collect from principal, and on failure to begin action within three months guarantor is discharged: *Smith v. Morris Fertilizer Co.*, 18 Ga. App. 217, 89 S. E. 174.

<sup>9</sup> *Savant v. Mercadal*, 136 La. 248, 66 So. 961.

<sup>10</sup> *Union Trust Co. v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615. The holder of a corporation's bonds, who was not a party to the agreement to form such corporation and who was not interested in it, could not sue certain parties to such agreement for breach of their agreement therein to indorse such bonds: *Postlethwaite v. Minor*, 168 Cal. 227, 142 Pac. 55. A contract guaranty signed "Ia. Mfg. Co., A. Updegraff, Pres.," on its face purports to be the contract of the Iowa Mfg. Co.: *Farmers' Nat. Bank v. Hatcher*, 176 Iowa 259, 157 N. W. 876. Where defendant wrote to the president of a corporation and agreed to guarantee the debt of a third party which he knew was due the corporation, the guaranty was available to the corporation: *Martin v. Blair &c. Co.* (Tex. Civ. App.), 187 S. W. 505. Where securities belonging to a customer of brokers were pledged by them to secure their own debt, the customer, though he had authorized the pledge, was not a surety for the debts of the brokers, for, in case the security was insufficient to discharge them, no personal liability attached: *Robinson v. Roe*, 233 Fed. 936, 147 C. C. A. 610.

either a benefit to the principal debtor or guarantor or a detriment to the guarantee.<sup>11</sup>

§ 3937. **Offer and acceptance.**<sup>12</sup>—Where an instrument claimed to be a guaranty is merely an offer to make good the de-

<sup>11</sup> First Nat. Bank v. Nakdimen, 111 Ark. 223, 163 S. W. 785, Ann. Cas. 1916A, 968n. Where the guaranty is contemporaneous with the principal contract the consideration of the latter is generally also a sufficient consideration for the guaranty and no new and distinct consideration is required in such case: Hyde v. Sokol, 178 Ill. App. 601; Automatic Electric Co. v. Campbell, 197 Ill. App. 591; Marshall v. State (Okla.), 158 Pac. 1166; First Nat. Bank v. Hawkins, 73 Ore. 186, 144 Pac. 131. See generally as to what is sufficient consideration: Norvell v. Gilreath, 189 Ala. 452, 66 So. 635; First Nat. Bank v. Nakdimen, 111 Ark. 223, 163 S. W. 785, Ann. Cas. 1916A, 968n; Reese v. W. T. Rawleigh Medical Co., 115 Ark. 606, 172 S. W. 820; Crane Co. v. Hempstead, 126 Ark. 587, 191 S. W. 234; Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679; Miller v. Dunlap, 28 Cal. App. 313, 152 Pac. 309; Broughton v. Jos. Lazarus Co., 13 Ga. App. 153, 78 S. E. 1024; Foley v. Friestedt, 178 Ill. App. 636; Western Pine Lumber Co. v. Nelson, 189 Ill. App. 41; Herbert L. Joseph & Co. v. Levy, 191 Ill. App. 595; Lord v. Hahn, 195 Ill. App. 356; L. W. Hubbell Fertilizer Co. v. Jacobellis, 195 Ill. App. 410; Franco-American Hygienic Co. v. Chladek, 195 Ill. App. 443; Automatic Electric Co. v. Campbell, 197 Ill. App. 591; Valley Nat. Bank v. Cownie, 164 Iowa 421, 145 N. W. 904; Harman v. Hartman (Iowa), 160 N. W. 295; West v. King, 163 Ky. 561, 174 S. W. 11; Succession of Scullin, 134 La. 153, 63 So. 858; Union Trust Co. v. Knabe, 122 Md. 584, 89 Atl. 1106; Union Trust Co. v. Schlens, 122 Md. 584, 89 Atl. 1116; Gate City Nat. Bank v. Elliott (Mo.), 181 S. W. 25; Jacobs v. Bernstein, 156 App. Div. 263, 141 N. Y. S. 287; Catskill Nat. Bank v. Lasher, 165 App. Div. 548, 151 N. Y. S. 191; J. P. Duffy Co. v. Todebush, 139 N. Y. S. 112; Catskill Nat. Bank

v. Lasher, 84 Misc. 523, 147 N. Y. S. 641; National Watch Co. v. Weiss, 98 Misc. 453, 163 N. Y. S. 46; Clements v. Jackson County Oil & C. Co. (Okla.), 161 Pac. 216, 797; First Nat. Bank v. Hawkins, 73 Ore. 186, 144 Pac. 131; Bonner Oil Co. v. Gaines (Texas), 191 S. W. 552; Citizens' Nat. Bank v. Abeel (Tex. Civ. App.), 160 S. W. 609; Bonner Oil Co. v. Gaines (Tex. Civ. App.), 179 S. W. 686; Clevenger v. Commercial Guaranty State Bank (Tex. Civ. App.), 183 S. W. 65; Noyes v. Adams, 76 Wash. 412, 136 Pac. 696; Western Dry Goods Co. v. Hamilton, 92 Wash. 395, 159 Pac. 373; Farmers' State Bank v. Gray, 94 Wash. 431, 162 Pac. 531; First State Bank v. Boetcher, 154 Wis. 444, 143 N. W. 172; International Text-Book Co. v. Mabbott, 159 Wis. 423, 150 N. W. 429. Extension of time of payment of a note is a sufficient consideration for a guaranty of payment thereof: Greenberg v. Van Duzee, 124 Minn. 411, 145 N. W. 124; J. R. Watkins Medical Co. v. Holloway (Mo. App.), 181 S. W. 602; Home Savings Bank v. Shallenberger, 95 Nebr. 593, 146 N. W. 993; Live Stock Nat. Bank v. Bragonier, 98 Nebr. 506, 153 N. W. 504. A contract of guaranty must be supported by an additional consideration when it was not made concurrently with the original contract: In re Thomson's Estate, 165 Cal. 290, 131 Pac. 1045; Ailes v. Miller, 52 Ind. App. 280, 100 N. E. 475; Voska v. Ruland, 172 App. Div. 616, 158 N. Y. S. 780; First Nat. Bank v. Hawkins, 73 Ore. 186, 144 Pac. 131. The signing of a note as surety, after it was executed and delivered and after acceptance thereof, and after the consideration had passed without any agreement for such signing, is without consideration: Bank of Carrollton v. Latting, 37 Okla. 8, 130 Pac. 144.

<sup>12</sup> A letter by defendant to a bank which read: "Please honor M's drafts on us for \$1.25 per crate to extent of

fault of another, an acceptance is necessary within a reasonable time to constitute a valid guaranty.<sup>13</sup>

**§ 3938. Fraud, duress and undue influence.<sup>14</sup>**

**§ 3939. Incomplete instrument.**—One who signs a bond as surety on condition that it shall be signed by another before delivery, is not bound where it is delivered without such addi-

six cars of peaches. We shall protect same at this end" was held an absolute guaranty of advances made by the bank to him, so that no acceptance was necessary to make defendant liable, where the bank honored drafts relying on the letter: *American Nat. Bank v. Pillman*, 176 Mo. App. 430, 158 S. W. 433. Where a guarantor with full knowledge of the extent of his obligation agrees without qualification to pay the obligation assumed, notice of acceptance by the other party is not necessary: *American Nat. Bank v. Pillman*, 176 Mo. App. 430, 158 S. W. 433. See also *Danner v. Walker-Smith Co.* (Tex. Civ. App.), 154 S. W. 295. Guaranty contained in a letter on which seller of goods relied was held not to be rejected by requesting a formal guaranty which was not given: *Phillips-Boyd Pub. Co. v. McKinnon* 197 Ala. 443, 73 So. 43; *Wheeler v. Krohn*, 9 Ala. App. 409, 64 So. 179; *Falls City Const. Co. v. Boardman*, 111 Ark. 415, 163 S. W. 1134; *Reese v. W. T. Rawleigh Medical Co.*, 115 Ark. 606, 172 S. W. 820; *York v. Powell*, 125 Ark. 597, 187 S. W. 628; *Asmussen v. Post Printing & Co.*, 26 Colo. App. 416, 143 Pac. 396; *Holmes v. Schwab*, 141 Ga. 44, 80 S. E. 313; *Valley Nat. Bank v. Cownie*, 164 Iowa 421, 145 N. W. 904; *F. W. Heitmann Co. v. Kansas City Southern R. Co.*, 136 La. 825, 67 So. 895; *Stauffer v. Koch*, 225 Mass. 525, 114 N. E. 750; *State Nat. Bank v. Wernicke*, 185 Mich. 281, 151 N. W. 1033; *National City Bank v. Zimmer Vacuum Renovator Co.*, 132 Minn. 211, 156 N. W. 265; *Linro Medicine Co. v. Moon*, 190 Mo. App. 366, 177 S. W. 322; *American Woolen Co. v. Moskowitz*, 159 App. Div. 382, 144 N. Y. S. 532; *Oklahoma City Nat. Bank v. Ezzard* (Okla.), 159 Pac. 267; *State Bank v. King*, 244 Pa. 29, 90

Atl. 453; *Siegel v. Baily*, 252 Pa. 231, 97 Atl. 401; *International Text-Book Co. v. Mabbott*, 159 Wis. 423, 150 N. W. 429.

<sup>13</sup> *Asmussen v. Post Printing & Co.*, 26 Colo. App. 416, 143 Pac. 396; *Black v. Grabow*, 216 Mass. 516, 104 N. E. 346, 52 L. R. A. (N. S.) 569; *American Nat. Bank v. Pillman*, 176 Mo. App. 430, 158 S. W. 433. A guaranty of performance by a third person of a contract which was not in existence, held conditional, and notice of acceptance is necessary to bind guarantor: *Phillips-Boyd Pub. Co. v. McKinnon*, 197 Ala. 443, 73 So. 43; *Northern Nat. Bank v. Douglas*, 135 Minn. 81, 160 N. W. 193; *Linro Medicine Co. v. Moon*, 190 Mo. App. 366, 177 S. W. 322. It is not necessary that notice of acceptance of an offer of a guaranty be formal: *Kleman v. Anheuser-Busch Brewing Assn.*, 237 Fed. 993, 150 C. C. A. 643. If a guarantor expressly or impliedly intimates the manner of acceptance of his proffered guaranty, the other person need only follow the method indicated: *Phillips-Boyd Pub. Co. v. McKinnon*, 197 Ala. 443, 73 So. 43. Performance of the condition is all that is necessary if the person offering the guaranty intimates that action upon the proposal, without other acceptance is sufficient: *Phillips-Boyd Pub. Co. v. McKinnon*, 197 Ala. 443, 73 So. 43.

<sup>14</sup> [Main section quoted in *B. F. Watkins Medical Co. v. Coombs* (Okla.), 166 Pac. 1072, 1073.]

For cases in which fraudulent misrepresentations and the like were held to release the surety or guarantor, see: *Whitcomb v. Shultz*, 223 Fed. 268, 138 C. C. A. 510; *Equitable Surety Co. v. Board of Comrs. Dist. No. 1*, 231 Fed. 33, 145 C. C. A. 221; *Stone v. Goldberg*, 6 Ala. App. 249, 60 So. 744; *W. T. Rawleigh Medical*

tional signature, if the obligee had actual or implied notice of such condition.<sup>15</sup>

Co. v. Wilson, 7 Ala. App. 242, 60 So. 1001; American Nat. Bank v. Donnellan, 170 Cal. 9, 148 Pac. 188, Ann. Cas. 1917C, 744n; First Nat. Bank v. Clark's Estate, 59 Colo. 455, 149 Pac. 612; Shores-Mueller Co. v. Knox, 160 Iowa 340, 141 N. W. 948; Selma Savings Bank v. Harlan, 167 Iowa 673, 149 N. W. 882; Bank of Neelyville v. Lee, 182 Mo. App. 185, 168 S. W. 796; Damon v. Empire State Surety Co., 161 App. Div. 875, 146 N. Y. S. 996; Kerbow v. Wooldridge (Tex. Civ. App.), 184 S. W. 746. For cases in which surety was not released, see: Agnew v. Mathieson, 26 Colo. App. 59, 140 Pac. 484; Broughton v. Jos. Lazarus Co., 13 Ga. App. 153, 78 S. E. 1024; Merchants' Nat. Bank v. Cressey, 164 Iowa 721, 146 N. W. 761; Rohrman v. Bonser, 157 Ky. 397, 163 S. W. 193; Saginaw Medicine Co. v. Batey, 179 Mich. 651, 146 N. W. 329; Peerless Casualty Co. v. Howard, 77 N. H. 355, 92 Atl. 165; Damon v. Empire State Surety Co., 161 App. Div. 875, 146 N. Y. S. 996; Potts v. First State Bank (Okla.), 151 Pac. 859; Cimini v. Zambiarano, 36 R. I. 122, 89 Atl. 295; First Nat. Bank v. Hix (Tex. Civ. App.), 164 S. W. 1035; Wait v. Homestead Building Assn., 76 W. Va. 431, 85 S. E. 637. Sureties will not as a matter of law be discharged from liability on a second contract because the creditor did not inform them when they executed second contract of suretyship that principal was in default on a prior contract for which they were already bound: Southwestern Co. v. Wynnegar, 111 Miss. 412, 71 So. 737. Where it did not amount to an evasion or concealment, the failure of a creditor to disclose facts to a guarantor is not a fraud: State Nat. Bank v. Wernicke, 185 Mich. 281, 151 N. W. 1033. Unless the creditor was a privy to the fraud, the fact that the principal practiced fraud upon the sureties and thereby induced them to sign is not a defense: Shepard Land Co. v. Banigan, 36 R. I. 1, 87 Atl. 531. Where a surety is induced by a void agreement made by the holder of a note to release or forego any means of pro-

tection, he will be discharged to the extent of his loss occasioned thereby: Johnson v. Longley, 142 Ga. 814, 83 S. E. 952.

<sup>15</sup> Husak v. Clifford, 179 Ind. 173, 100 N. E. 466; Williams v. Hitchcock, 86 Wash. 536, 150 Pac. 1143. One who signs an obligation as surety, on condition that another shall also sign it, is not bound when the signature of the other is not secured, if the obligee has notice of the condition, but, where the obligee has no knowledge of the condition, the surety is bound: Wharton v. Fidelity Mutual Life Ins. Co. (Tex. Civ. App.), 156 S. W. 539. Under the Alabama Code 1907, § 1505, sureties on a garnishment bond were held liable notwithstanding the principal wrongfully delivered the bond without executing it himself as agreed: Hannis Distilling Co. v. Lanning, 191 Ala. 280, 68 So. 137. But sureties signing a note on condition that others shall sign it as sureties before being delivered are not liable as between the parties where it is delivered without such signatures unless they estop themselves: Stone v. Goldberg, 6 Ala. App. 249, 60 So. 744. It was held in Rohrman v. Bonser, 157 Ky. 397, 163 S. W. 193, that the payee's failure to obtain the additional surety agreed upon will not impair the obligation of the defendants, but will give them a counterclaim for damages where the defendants signed the note of a third person as surety, and delivered it to the payee under an agreement that the payee should secure the signature of another party. See also Ex parte Goldberg & Lewis, 191 Ala. 356, 67 So. 839; Peal v. Cairo Nat. Bank, 166 Ky. 156, 179 S. W. 10; Wharton v. Fidelity Mut. Life Ins. Co. (Tex. Civ. App.), 156 S. W. 539. It has been held in Indiana that the facts warranted a finding that a surety bond was delivered to the obligee by the surety with the intention to be bound thereby, though it was not signed by the principal, and though it contained a provision that it should not be construed as entered into or delivered until signed by the

§ 3940. **Agency in establishing relation.**—It is held that where one signs a certiorari bond as attorney in fact for a surety the power of attorney must accompany the bond.<sup>16</sup>

§ 3941. **Construction of the contract.**—It is said that a guaranty should be given a liberal, fair, and reasonable interpretation in furtherance of its object.<sup>17</sup> But, while both a guaranty and a contract of suretyship should be reasonably construed, the construction should be strict in favor of the surety or guarantor so as not to enlarge and extend his liability by implication.<sup>18</sup> This rule of strictissimi juris has, however, no application to paid or compensated sureties or companies engaged in such business for hire; and, as a rule, bonds and the like, at least when prepared by them, should be construed most strongly against rather than

principal: *American Surety Co. v. Pangburn*, 182 Ind. 116, 105 N. E. 769.

<sup>16</sup> *Seaboard Air Line R. v. Rosenbusch*, 12 Ga. App. 154, 76 S. E. 1041.

<sup>17</sup> *Glaser v. United States*, 224 Fed. 84, 139 C. C. A. 566. See also *Lcyenson v. Lindenbaum*, 94 Misc. 309, 158 N. Y. S. 355; *J. P. Duffy Co. v. Todebush*, 157 App. Div. 688, 142 N. Y. S. 790; *Taylor v. First State Bank* (Tex. Civ. App.), 178 S. W. 35; *Exchange Nat. Bank v. Pantages*, 74 Wash. 481, 133 Pac. 1025, 46 L. R. A. (N. S.) 484n; *L. Schreiber & Sons Co. v. Miller Supply Co.*, 77 W. Va. 236, 87 S. E. 353.

<sup>18</sup> *United States Fidelity & Co. v. French Mut. Gen. Society*, 212 Fed. 620, 129 C. C. A. 156; *Postlethwaite v. Minor*, 168 Cal. 227, 142 Pac. 55; *Wickersham Co. v. Nichols*, 22 Cal. App. 731, 136 Pac. 511; *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *W. P. Fuller & Co. v. Alturas School Dist.*, 28 Cal. App. 609, 153 Pac. 743; *D. T. Williams Valve Co. v. Amorous*, 19 Ga. App. 155, 91 S. E. 240; *Toledo Bridge & Co. v. Oil Belt Traction Co.*, 173 Ill. App. 298; *Brown v. Massachusetts Bonding & Co.*, 176 Ill. App. 502; *Popper v. Spelz*, 184 Ill. App. 35; *American Credit & Co. v. Witz*, 186 Ill. App. 184; *Merchants' Nat. Bank v. Cressey*, 164 Iowa 721, 146 N. W. 761; *Jewel Tea Co. v. Shepard*, 172 Iowa 480, 154 N. W.

755; *Southern Real Estate & Co. v. Bankers' Surety Co. (Mo.)*, 184 S. W. 1030; *Fiester v. Drozda*, 171 Mo. App. 604, 154 S. W. 441; *Schultz v. Wise*, 93 Nebr. 718, 141 N. W. 813; *In re Quimby's Estate*, 84 N. J. Eq. 1, 92 Atl. 56; *Hamilton Trust Co. v. Shevlin*, 156 App. Div. 307, 141 N. Y. S. 232; *National Surety Co. v. Seaich*, 171 App. Div. 414, 157 N. Y. S. 422; *Knit Goods Exchange v. Halpern*, 81 Misc. 218, 142 N. Y. S. 566; *Mutual Life Ins. Co. v. United States Hotel Co.*, 82 Misc. 632, 144 N. Y. S. 476; *Bomar v. Galagan* (Tex. Civ. App.), 152 S. W. 689; *Bomar v. Wynn* (Tex. Civ. App.), 164 S. W. 1038; *Waggoner Banking Co. v. Gray County State Bank* (Tex. Civ. App.), 165 S. W. 922; *General Bonding & Ins. Co. v. Waples Lumber Co.* (Tex. Civ. App.), 176 S. W. 651; *Taylor v. First State Bank* (Tex. Civ. App.), 178 S. W. 35; *Simpson Logging Co. v. Northwest Bridge Co.*, 76 Wash. 533, 137 Pac. 127; *Snow v. Duxstad*, 23 Wyo. 82, 147 Pac. 174. A guarantor is entitled to have the principal contract strictly performed: *London v. Funsch*, 188 Mo. App. 14, 173 S. W. 88. Where not expressly limited by the terms of the guaranty, liability of guarantor is generally coextensive with that of the principal: *Compagnie Générale de Fourrures v. Simon Herzig & Co.*, 89 Misc. 573, 153 N. Y. S. 717.



for them, and in favor of the obligee.<sup>19</sup> Provisions are frequently found making the liability of the guarantor depend upon some condition, and a guaranty of the account of a corporation provided it was presented on a certain day has been construed as expressly making such presentation on such date a condition precedent to liability of the guarantor.<sup>20</sup> Two or more instruments may sometimes have to be construed together as constituting the contract, as, for instance, a contract for sale of goods and a guaranty of payment executed as part of the same transaction, although on separate pieces of paper.<sup>21</sup> And contractors' bonds and the like must be construed in connection with the main contract, plans and specifications, to which reference is usually made.<sup>22</sup> Where there are a number of signers of a contract of

<sup>19</sup> *Gilmore &c. R. Co. v. United States Fidelity &c. Co.*, 208 Fed. 277, 125 C. C. A. 477; *Justice v. Empire State Surety Co.*, 209 Fed. 105; *Topeka v. Federal Union Surety Co.*, 213 Fed. 958, 130 C. C. A. 364; *United States v. Bayly*, 39 App. D. C. 105; *Federal Union Surety Co. v. McGuire*, 111 Ark. 373, 163 S. W. 1171; *Equitable Surety Co. v. Bank of Hazen*, 121 Ark. 630, 181 S. W. 279, 1200; *Empire State Surety Co. v. Lindenmeier*, 54 Colo. 497, 131 Pac. 437, Ann. Cas. 1914C, 1189n; *United States Fidelity &c. Co. v. Poetker*, 180 Ind. 255, 102 N. E. 372; *American Surety Co. v. Pangburn*, 182 Ind. 116, 105 N. E. 769. But see *Matchett v. Winona Assembly &c. Assn. (Ind.)*, 113 N. E. 1 (where corporation is one not for profit); *Hileman v. Faus (Iowa)*, 158 N. W. 597; *Chicago Lumber Co. v. Douglas*, 89 Kans. 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843; *State v. Massachusetts Bonding &c. Co.*, 91 Kans. 74, 136 Pac. 905, Ann. Cas. 1915C, 192; *School District No. 1 v. Massachusetts Bonding &c. Co.*, 92 Kans. 53, 142 Pac. 1077, Ann. Cas. 1916B, 238n; *State v. National Surety Co.*, 126 Md. 290, 94 Atl. 916; *American Fidelity Co. v. State*, 128 Md. 50, 97 Atl. 12; *People v. Traves*, 188 Mich. 345, 154 N. W. 130; *Standard Salt &c. Co. v. National Surety Co.*, 134 Minn. 121, 158 N. W. 802; *State v. Cochrane*, 264 Mo. 581, 175 S. W. 599; *Mercantile Trust Co. v. Donk (Mo.)*, 178 S. W. 113; *State v. Ogden*, 187 Mo. App. 39, 172 S. W. 1172; *Barton v. Title*

*Guaranty &c. Co.*, 192 Mo. App. 561, 183 S. W. 694; *State Agricultural &c. Soc. v. Taylor*, 104 S. Car. 167, 88 S. E. 372; *Green v. United States Fidelity &c. Co.*, 135 Tenn. 117, 185 S. W. 726; *Blyth-Fargo Co. v. Free*, 46 Utah 233, 148 Pac. 427; *Northern Pac. R. Co. v. Fidelity &c. Co.*, 74 Wash. 543, 134 Pac. 498; *Great Northern R. Co. v. Fidelity &c. Co.*, 74 Wash. 698, 134 Pac. 500; *Costello v. Bridges*, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915A, 853.

<sup>20</sup> *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603. And see further as to conditions: *Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203; *Lynip v. Alturas School Dist.*, 29 Cal. App. 158, 155 Pac. 109; *Wells v. Garrison*, 96 Nebr. 301, 147 N. W. 685; *Stagg v. Spray Water Power &c. Co.*, 171 N. Car. 583, 89 S. E. 47; *Waggoner Banking Co. v. Gray County State Bank (Tex. Civ. App.)*, 165 S. W. 922.

<sup>21</sup> *Fluhart v. W. T. Rawleigh Co.*, 126 Ark. 307, 190 S. W. 118; *Catskill Nat. Bank v. Dumary*, 206 N. Y. 550, 100 N. E. 422. In construing a contract of guaranty, resort may be had to surrounding circumstances only when the intent of the parties is not clear from the instrument itself: *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603.

<sup>22</sup> *Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 129 Pac. 978, 981; *State v. Heim*, 58 Ind. App. 654, 108 N. E. 776; *International Text-Book Co. v. Martin*, 221 Mass. 1, 108 N. E. 469; *Doyle v. Faust*, 187 Mich.

guaranty the obligation is construed as joint and several even though worded in the singular and containing the phrase, "I, the undersigned," etc.<sup>23</sup> The guaranty of payment of a note is an original and absolute promise, and, ordinarily, the only way the guarantor can be relieved of liability thereon is by payment of the note.<sup>24</sup>

**§ 3944. Commencement and duration of relation.**—A surety, in general, is liable only for a default during the period specified and not for a default on renewal of the contract, to which he did not consent, after expiration of the original contract.<sup>25</sup>

108, 153 N. W. 725; Catskill Nat. Bank v. Dumary, 206 N. Y. 550, 100 N. E. 422; Morganton Mfg. & Co. v. Anderson, 165 N. Car. 285, 81 S. E. 418, Ann. Cas. 1916A, 763n.

<sup>23</sup> National Surety Co. v. Seaich, 171 App. Div. 414, 157 N. Y. S. 422. See also L. L. Satler Lumber Co. v. Exler, 239 Pa. 135, 86 Atl. 793; American Lumber & Mfg. Co. v. Exler, 239 Pa. 153, 86 Atl. 798 (contract held several and not joint); Bradley v. Holleran, 59 Pa. Super. Ct. 1; Adams Co. v. Nesbit, 38 S. Dak. 6, 159 N. W. 869. For contract held indivisible, see: Wheeler v. Krohn, 9 Ala. App. 409, 64 So. 179. And see generally for additional cases as to construction: Cobban v. Hyde, 212 Fed. 480; Lytle v. Allison, 22 Cal. App. 35, 133 Pac. 999, 1000; Scovill Mfg. Co. v. Cassidy, 195 Ill. App. 448; Farmers' Savings Bank v. Jameson (Iowa), 157 N. W. 460; American Nat. Bank v. Pillman (Mo. App.), 158 S. W. 433; Home Savings Bank v. Shallenberger, 95 Nebr. 593, 146 N. W. 993; Utica City Nat. Bank v. Gunn, 169 App. Div. 295, 154 N. Y. S. 705; United States Rubber Co. v. Silverstein, 161 N. Y. S. 369; Bank of Murphy v. Murphy Furniture Mfg. Co., 169 N. Car. 380, 85 S. E. 381; Self v. Albany Nat. Bank (Tex. Civ. App.), 187 S. W. 982; Friedman-Shelley Shoe Co. v. Davidson (Tex. Civ. App.), 189 S. W. 1029; Noyes v. Adams, 76 Wash. 412, 136 Pac. 696; First State Bank v. Boetcher, 154 Wis. 444, 143 N. W. 172; John A. Tolman & Co. v. Smith, 159 Wis. 361, 150 N. W. 419. A guarantor's consent that securities should be re-

leased which were given to secure loans to individuals named as joint principals in the guaranty does not constitute a practical construction extending it to individual loans: Hamilton Trust Co. v. Shevlin, 156 App. Div. 307, 141 N. Y. S. 232.

<sup>24</sup> Chattanooga Savings Bank v. Lumby, 185 Ill. App. 111; Home Savings Bank v. Shallenberger, 95 Nebr. 593, 146 N. W. 993; Westchester Mortgage Co. v. Thomas B. McIntire Inc., 168 App. Div. 139, 153 N. Y. S. 437; Cleveland v. First State Bank (Tex. Civ. App.), 176 S. W. 663.

<sup>25</sup> United States v. Bayly, 39 App. D. C. 105; Wilkesbarre Realty Co. v. Powell, 86 Misc. 321, 149 N. Y. S. 209; Challenge Yearly Beneficial Assn. v. Weis, 52 Pa. Super. Ct. 262; Platt v. Fisher, 59 Pa. Super. Ct. 114. Although no time is mentioned in a bond for the termination of liability thereunder, a surety can cancel it upon reasonable notice to the principal: Vidi v. United Surety Co., 155 App. Div. 502, 140 N. Y. S. 612. But it has been held that a surety for a trustee, in the absence of default of the latter, may not terminate his liability, nor compel the trustee to account before termination of the trust term: Lawyers' Surety Co. v. Ayrault, 165 App. Div. 254, 150 N. Y. S. 800. For construction of bond for building an electric railway held to cover result at the end of the three-years' term of the bond, and not progress of the work at any intermediate period, see: People of Porto Rico v. Title Guaranty & Surety Co., 227 U. S. 382, 57 L. ed. 561, 33 Sup. Ct. 362.

## CHAPTER CXV

### REVOCATION AND DISCHARGE

§ 3950. **Discharge of surety by termination of employment.**<sup>1</sup>—Where within the time allowed for performance of a contract by a party thereto the adverse party makes performance impossible, the surety is not liable.<sup>2</sup>

§ 3952. **Discharge of surety of a lease.**—Where a lease is merged in the fee, the guarantor is not discharged as to claims which matured before the merger.<sup>3</sup>

§ 3955. **Discharge by death of principal.**<sup>4</sup>

§ 3957. **Discharge by death of guarantor or surety.**—The rule that a continuing guaranty is revoked as to subsequent advances by notice of the death of the guarantor, in the absence of a provision to the contrary, does not apply to a debt for money loaned prior to the death of the guarantor and evidenced by a note which is renewed after such death.<sup>5</sup>

§ 3958. **Termination of liability by notice.**<sup>6</sup>—A surety will not be released unless his notice to proceed against the principal is clear and explicit and amounts to a demand, and, where the

<sup>1</sup> A surety is released from liability for rent thereafter accruing where an old lease was surrendered by the lessor and a new lease executed for the unexpired term: *Wilkesbarre Realty Co. v. Powell*, 86 Misc. 321, 149 N. Y. S. 209; *People of Porto Rico v. Title Guaranty & Surety Co.*, 227 U. S. 382, 57 L. ed. 561, 33 Sup. Ct. 362. It was held in *Manhattan Co. v. United States Fidelity & Co.*, 77 Wash. 405, 137 Pac. 1003, that an overpayment by the owner to contractor's workmen was not a taking over of the work from the contractor by the owner so as to relieve the contractor's surety from liability on the bond.

<sup>2</sup> *Sharon v. American Fidelity Co.*, 172 Mo. App. 309, 157 S. W. 972.

<sup>3</sup> *Kehoe v. Backer*, 157 App. Div. 792, 142 N. Y. S. 691.

<sup>4</sup> *National Bank v. Gilvin* (Tex. Civ. App.), 152 S. W. 652.

<sup>5</sup> *Exchange Nat. Bank v. Hunt*, 75 Wash. 513, 135 Pac. 224.

<sup>6</sup> When it is provided by statute that the surety may give the payee notice to sue within a certain time, suit must be brought or the surety will be discharged: *Central Bank & Co. v. Hill* (Tex. Civ. App.), 160 S. W. 1099; *Brown & Co. v. Steele*, 195 Ala. 211, 70 So. 161; *Armour Fertilizer Works v. Bond*, 139 Ga. 246, 77 S. E. 22; *Smith v. Morris Fertilizer Co.*, 18 Ga. App. 217, 89 S. E. 174; *Frye v. Eisenbiess*, 56 Ind. App. 123, 104 N. E. 995; *National Bank v. Lowrey* (Okla.), 157 Pac. 103; *Davidson v. McKinley* (Tex. Civ. App.), 152 S. W. 1142; *Ricketson v. Lizotte*, 90 Vt. 386, 98 Atl. 801. The surety is discharged where the payee fails

statute prescribes the notice, a substantial compliance therewith is essential.<sup>7</sup>

§ 3959. **Discharge by new obligation.**<sup>8</sup>—The guarantor is not released where the lessor enters into a contract to sell to the guarantor of the lessee, but fails to perfect his title.<sup>9</sup>

§ 3962. **Discharge by change in obligation and principal.**<sup>10</sup>—Though a permit to sublet the premises did not contain a re-

to bring suit against the maker of a note, even where the maker is insolvent, after notice by the surety requesting that suit be brought: *Central Bank & Co. v. Hill* (Tex. Civ. App.), 160 S. W. 1099. A surety is not discharged because of the creditor's failure to sue the principal upon a verbal request under Kirby's Dig. § 7921, relating to discharge of sureties: *Sims v. Everett*, 113 Ark. 198, 168 S. W. 559, Ann. Cas. 1916C, 629n; *Johnson v. Longley*, 142 Ga. 814, 83 S. E. 952; *Palmer v. Noe*, 48 Okla. 450, 150 Pac. 462; *Miller v. State* (Okla.), 152 Pac. 409; *National Bank v. Lowrey* (Okla.), 157 Pac. 103; *Brooks v. Stevens* (Tex. Civ. App.), 178 S. W. 30; *Naylor v. Anderson* (Tex. Civ. App.), 178 S. W. 620. Failure to probate a claim against the estate prevents recovery from the estate, but it does not discharge a surety on the claim, unless failure to probate occurred after the surety had demanded of the creditor that the claim be probated: *Johnson v. Success Brick Machinery Co.*, 104 Miss. 217, 61 So. 178, 62 So. 4; *Kemp Lumber Co. v. Stanley*, 22 N. Mex. 198, 160 Pac. 351. The administrator of the estate of a deceased surety on a note may properly give notice to the holder to sue those primarily liable: *Hammond v. McHargue*, 170 Mo. App. 497, 156 S. W. 725; *National Bank v. Gilvin* (Tex. Civ. App.), 152 S. W. 652.

<sup>7</sup> *Benge v. Eversole*, 156 Ky. 131, 160 S. W. 911. Sureties on a note secured by chattel mortgage were held not entitled to complain that foreclosure was delayed or made at an inopportune time, without showing that the delay was due to want of good faith: *Moorehead v. Daniels* (Okla.), 153 Pac. 623. Mere neglect of the creditor to proceed against the

principal, though requested to do so, will not relieve a surety under Rev. Laws 1910, § 1058, where it is in power of surety on note to pursue remedy against principal: *National Bank v. Lowrey* (Okla.), 157 Pac. 103.

<sup>8</sup> *Cohen v. Hurwitz*, 142 N. Y. S. 305.

<sup>9</sup> *Ruffin v. Lilienthal*, 26 Cal. App. 701, 148 Pac. 233.

<sup>10</sup> A material alteration in the original contract, without the knowledge and consent of the guarantor, relieves him from the guaranty: *Little Rock Furniture Co. v. Jones & Co.*, 13 Ga. App. 502, 79 S. E. 375; *Hubbard v. First State Bank* (Ind. App.), 114 N. E. 642; *Johannes v. St. Regis Realty & Co.* (Mo. App.), 188 S. W. 1138; *Metropolitan Trust Co. v. Truax*, 154 App. Div. 442, 139 N. Y. S. 181; *Cottage Home Remedy Co. v. Smith* (Okla.), 162 Pac. 185; *Shepard Land Co. v. Banigan*, 36 R. I. 1, 87 Atl. 531. *Contra*: The old rule that any change in a written contract, made by the parties without the knowledge of the guarantor, would release the guarantor, has been relaxed, so as to require that the change must be a material alteration of the original contract: *Exchange Nat. Bank v. Hunt*, 75 Wash. 513, 135 Pac. 224. Where lessors accepted the lessee's surrender of the premises without bringing an eviction suit, there was no change in the contract or rights of the parties so as to release a guarantor of the rent under Civ. Code, § 2819; *Boschetti v. Morton*, 23 Cal. App. 325, 137 Pac. 1085; *Union Trust Co. v. Knabe*, 122 Md. 584, 89 Atl. 1106; *Union Trust Co. v. Schlens*, 122 Md. 584, 89 Atl. 1116. An oral agreement between the lessor and lessee, changing the date when rent should begin

striction which was contained in the original lease which authorized subletting, the guarantor was not discharged.<sup>11</sup>

**§ 3963. Discharge by change in duties of office or employment.**<sup>12</sup>—It seems that when an officer of a corporation, being under bond, is required to perform other duties than those covered by the bond, that the surety will not be discharged if the new and additional duties do not hinder faithful performance of his original duties.<sup>13</sup>

**§ 3964. Discharge by change in provisions of contract.**<sup>14</sup>—The departure from the contract must be shown to be a mate-

under the lease, did not alter the lease, and therefore did not discharge the guarantor: *Laskey v. Bew*, 22 Cal. App. 393, 134 Pac. 358. It is held that a guaranty in favor of a county to secure deposits in a partnership bank applies only to the particular firm, and not to survive changes in its personnel: *Richards v. Steuben County*, 155 N. Y. S. 571. A surety upon the bond of a building contractor is not discharged because of alterations in the building, where it consented to the alterations which were done upon the written order of the architect and for which the owner was liable; the fact of unauthorized alterations and additions not affecting its liability: *Wiley v. Hart*, 74 Wash. 142, 132 Pac. 1015; *Johannes v. St. Regis Realty & Co.* (Mo. App.), 188 S. W. 1138; *Comey v. United Surety Co.*, 217 N. Y. 268, 111 N. E. 832; *Christensen v. Hamilton Realty Co.*, 42 Utah 70, 129 Pac. 412.

<sup>11</sup> *Sagal v. Mann*, 89 Conn. 576, 95 Atl. 6; *Federal Sign System v. Berger*, 149 N. Y. S. 936.

<sup>12</sup> When a secured contract contains a provision requiring an agent to make monthly statements and payments it is held to be a material provision, a change of which would affect the obligation of the surety: *Alabama Fidelity & Co. v. Alabama Fuel & Co.*, 190 Ala. 397, 67 So. 318; *Jewel Tea Co. v. Shepard*, 172 Iowa 480, 154 N. W. 755.

<sup>13</sup> *Marshall v. Brainerd*, 253 Pa. 35, 97 Atl. 1057.

<sup>14</sup> *Pittsburg-Buffalo Co. v. American Fidelity Co.*, 219 Fed. 818,

135 C. C. A. 488; *Baglin v. Southern Surety Co.*, 41 App. D. C. 530; *Alabama Fidelity & Co. v. Alabama Fuel & Co.*, 190 Ala. 397, 67 So. 318; *Bright v. Mack* (Ala.), 72 So. 433; *Hinton v. Stanton*, 112 Ark. 207, 165 S. W. 299; *Coddington v. Brown*, 123 Ark. 486, 185 S. W. 809; *Dunne Inv. Co. v. Empire State Surety Co.*, 27 Cal. App. 208, 150 Pac. 411; *Laskey v. Bew*, 22 Cal. App. 393, 134 Pac. 358; *Henne v. Summers*, 23 Cal. App. 763, 139 Pac. 907; *Watterson v. Owens River Canal Co.*, 25 Cal. App. 247, 143 Pac. 90; *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607; *Little Rock Furniture Co. v. Jones & Co.*, 13 Ga. App. 502, 79 S. E. 375; *Blackburn v. Morel*, 13 Ga. App. 516, 79 S. E. 492; *Evatt v. Dulaney*, 51 Okla. 81, 151 Pac. 607; *Shepard Land Co. v. Banigan*, 36 R. I. 1, 87 Atl. 531; *Thomas Drug Store v. National Surety Co.*, 104 S. Car. 190, 88 S. E. 442; *M. Rumely Co. v. Anderson*, 35 S. Dak. 114, 150 N. W. 939; *Christensen v. Hamilton Realty Co.*, 42 Utah 70, 129 Pac. 412. But, in an action against one guarantor on a guaranty governed by the laws of Illinois, it was no defense that the names of two other guarantors were added after defendant had signed it, and though this was done without his knowledge or consent: *State Bank v. King*, 244 Pa. 29, 90 Atl. 453. For decisions in particular instances, see: *Bankers' Surety Co. v. Elkhorn River Drainage Dist.*, 214 Fed. 342, 130 C. C. A. 650; *Chicago v. Agnew*, 264 Ill. 288, 106 N. E. 252; *Mudd v. Shroader*, 152 Ky. 696, 154 S. W. 21; *United*

rial variance before a paid surety company can be relieved from its obligation of suretyship.<sup>15</sup>

**§ 3965. Discharge by change in building contracts.<sup>16</sup>—**

The rule is said to be that where there is doubt as to whether

States Fidelity &c. Co. v. Travelers' Ins. Mach. Co., 167 Ky. 382, 180 S. W. 815; Shreveport v. United States Fidelity &c. Co., 131 La. 933, 60 So. 621; Meyer v. Bichow, 133 La. 975, 63 So. 487; Duffy v. Buena Vista Ice Co., 122 Md. 275, 90 Atl. 53; Hiller v. Daman, 183 Mo. App. 315, 166 S. W. 869; Leiter v. Dwyer Plumbing &c. Co., 66 Ore. 474, 133 Pac. 1180.

<sup>15</sup> Justice v. Empire State Surety Co., 209 Fed. 105; American Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300; Doyle v. Faust, 187 Mich. 108, 153 N. W. 725; Butz v. United States Metal Products Co., 255 Pa. 53, 99 Atl. 169.

<sup>16</sup> The surety was not discharged in the absence of evidence showing that his liability was increased when a stipulation in a building contract permitted alterations: Dunne Inv. Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 Pac. 405; Equitable Surety Co. v. Connors, 27 Colo. App. 213, 147 Pac. 438; Doyle v. Faust, 187 Mich. 108, 153 N. W. 725; Lackland v. Renshaw, 256 Mo. 133, 165 S. W. 314; Burt County v. Lewis, 93 Nebr. 690, 141 N. W. 1032; Cortright Metal Roofing Co. v. Merten, 95 Nebr. 164, 145 N. W. 261; Farley &c. Mfg. Co. v. Merten, 95 Nebr. 171, 145 N. W. 263; Nebraska Material Co. v. Merten, 95 Nebr. 172, 145 N. W. 264; Johnson v. Merten, 95 Nebr. 174, 145 N. W. 264; Heldenfels v. School Trustees of School Dist. No. 7 (Tex. Civ. App.), 182 S. W. 386; Da Moth v. Hillsboro Independent School Dist. (Tex. Civ. App.), 186 S. W. 437. Whether or not the alterations worked mischief to him, the surety is discharged where there is a change in the contract for the performance of which a bond is given: Poe v. Cameron, 139 Minn. 15, 153 N. W. 129; Neuwirth v. Moydell, 188 Mo. App. 467, 174 S. W. 206; American Bonding Co. v. Kelly, 172 App. Div. 437, 158 N. Y. S. 812. The surety

is discharged when a material change is made in a building contract as to payments thereunder, made after signing the contract and giving bond for performance: American Metal Ceiling Co. v. New Hyde Park Fire Dist., 91 Misc. 236, 154 N. Y. S. 661; Evatt v. Dulaney, 51 Okla. 81, 151 Pac. 607. There was a material change in the contract and the subcontractor's surety was relieved from obligation where a subcontract provided for payments to the subcontractor of 85 per cent. of estimates, but the contractor agreed to make advancements for necessary materials and labor, which exceeded the contract-price: McKnight v. Lange Mfg. Co. (Tex. Civ. App.), 155 S. W. 977; Justice v. Empire State Surety Co., 209 Fed. 105. Though slight changes were made in the plans of a building without the consent of the sureties, which did not increase the cost of construction, the sureties were not released thereby: Hinton v. Stanton, 112 Ark. 207, 165 S. W. 299; Crudup v. Oklahoma Portland Cement Co. (Okla.), 156 Pac. 899; Da Moth v. Hillsboro Independent School District (Tex. Civ. App.), 186 S. W. 437. For decisions in particular cases as to whether or not changes were material, see: United States v. United States Fidelity &c. Co., 236 U. S. 512, 59 L. ed. 696, 35 Sup. Ct. 298; Equitable Surety Co. v. United States, 42 App. D. C. 374, 380; Howison v. United States, 42 App. D. C. 379; Southwestern Surety Ins. Co. v. Terry, 122 Ark. 522, 184 S. W. 54; Ft. Dodge &c. R. Co. v. Burns, 177 Iowa 51, 158 N. W. 582; School Dist. No. 3 v. De Lano, 96 Kans. 499, 152 Pac. 668; Neuwirth v. Moydell, 188 Mo. App. 467, 174 S. W. 206; Maryland Casualty Co. v. Wellston, 47 Okla. 417, 148 Pac. 691. National Surety Co. v. Haley (Okla.), 159 Pac. 292; General Bonding &c. Ins. Co. v. Beckville Independent School Dist. (Tex. Civ. App.), 156 S. W. 1161.

changes in specifications were such as were permitted by the contract, it must be resolved against the contractor's surety.<sup>17</sup>

§ 3966. **Discharge by alteration of instrument.**<sup>18</sup>—It was held in a recent case that a surety can not defeat recovery where a contract for the performance of which a bond was given, was changed before the bond was signed and the surety received the premium after its principal's default with notice.<sup>19</sup>

§ 3967. **Discharge by change in parties to obligation secured.**<sup>20</sup>—Sureties are released by the addition of another

<sup>17</sup> Doyle v. Faust, 187 Mich. 108, 153 N. W. 725.

<sup>18</sup> Any material change in a building contract releases nonconsenting sureties upon the contractor's bond, regardless of any question of the damage done by the alteration: Bright v. Mack (Ala.), 72 So. 433; Snodgrass v. Shader, 113 Ark. 429, 168 S. W. 567; Chicago v. Agnew, 182 Ill. App. 499; Pond Creek Coal Co. v. Citizens' Trust & Co., 170 Ky. 601, 186 S. W. 494; Lyons v. Kitchell, 18 N. Mex. 82, 134 Pac. 213, Ann. Cas. 1915C, 671n; Allen Iron & Co. v. Provident Iron & Co., 63 Pa. Super. Ct. 459; Shepard Land Co. v. Baniagan, 36 R. I. 1, 87 Atl. 531; Ayer v. Hughes, 97 S. Car. 255, 81 S. E. 510; General Bonding & Ins. Co. v. Beckville Independent School Dist. (Tex. Civ. App.), 156 S. W. 1161; Kelsay Lumber Co. v. Rotsky (Tex. Civ. App.), 178 S. W. 837; General Bonding & Ins. Co. v. McCurdy (Tex. Civ. App.), 183 S. W. 796; Kerbow v. Wooldridge (Tex. Civ. App.), 184 S. W. 746. A surety is bound, where, with full knowledge of the facts, he approves the alteration of a note: Gray v. Williams (Vt.), 99 Atl. 735. The surety whose name was erased was not relieved where a constable, after receiving a claim bond, erased the name of one of the sureties thereon, and substituted another, such act being mere spoliation by a stranger to the bond: Bullard v. Norton, 107 Tex. 571, 182 S. W. 668; Sumner v. Swink (Tex. Civ. App.), 163 S. W. 355. Where a bond binds surety to all changes and modifications made in the contract between the obligor and obligee, the surety is not dis-

charged from liability because of material modifications: Wharton v. Fidelity Mut. Life Ins. Co. (Tex. Civ. App.), 156 S. W. 539. Unless the payee acted under the agreement after learning that the sureties refused to assent thereto, where a maker falsely represented to the payee that the sureties had agreed to an alteration of the note by raising the interest rate in consideration of extension of time, the sureties were not discharged: Waugh v. Cook, 113 Ark. 127, 167 S. W. 103. None of the sureties were liable to an amount beyond the amount originally fixed, despite Code 1917, § 742, held, where, after procuring signatures to a supersedeas bond, the principal raised the amount and then procured another signature: Parsons-May-Oberschmidt Co. v. Furr, 110 Miss. 795, 70 So. 895.

<sup>19</sup> State Agricultural & Soc. v. Taylor, 104 S. Car. 167, 88 S. E. 372.

<sup>20</sup> A contract being unassignable by one of the parties without the consent of the other, consent of his sureties thereon is necessary to establishment of privity between the assignee and them in virtue of such contract: Standard Sewing Mach. Co. v. Smith 51 Mont. 245, 152 Pac. 38. So a surety for a copartnership can not be held upon his obligation for debts contracted after a change in the personnel of the firm: Richardson v. Steuben County, 174 App. Div. 491, 160 N. Y. S. 445; Richards v. Steuben County, 155 N. Y. S. 571. But where a contract of suretyship having a partnership as principal so specifically provides, it is a continuing guaranty, surviving changes in its principal's firm: Richardson v. Steuben County, 174

name to the contract only where the name is added after execution and delivery of the bond and its acceptance.<sup>21</sup>

§ 3968. **Discharge by extension of time for payment.**<sup>22</sup>—A paid surety is not released by an extension of time granted the

App. Div. 491, 160 N. Y. S. 445. An assignment of a lease by tenant does not discharge surety from liability for rent: *Kamioner v. Balkind*, 93 Misc. 458, 158 N. Y. S. 310. It was held that the change was not sufficiently material to release either the principal or the surety from liability when materialmen assented to assignment of the contractor's bond: *United States v. Illinois Surety Co.*, 226 Fed. 653, 141 C. C. A. 409; *Johnson v. Bernstein* (Iowa), 155 N. W. 266. The contractor's surety is not liable for work done by such third person where a third party takes over a construction contract: *Northern Minnesota Drainage Co. v. Equitable Surety Co.*, 131 Minn. 243, 154 N. W. 1092.

<sup>21</sup> *Fry v. P. Bannon Sewer Pipe Co.*, 179 Ind. 309, 101 N. E. 10.

<sup>22</sup> A surety not consenting thereto is discharged whenever the time for payment of a debt is extended for a definite time by a valid agreement which ties up the hands of the creditor from enforcing the debt, though it be for only a single day: *Citizen's Bank v. Evans*, 170 Mo. App. 704, 159 S. W. 765; *Thornton v. Bowie*, 123 Ark. 463, 185 S. W. 793; *Matchett v. Winona Assembly & Assn. (Ind.)*, 113 N. E. 1; *Hoopston Nat. Bank v. Williams*, 181 Ill. App. 122; *Marshall v. Hollingsworth*, 166 Ky. 190, 179 S. W. 34; *Way v. Mooers*, 135 Minn. 339, 160 N. W. 1014; *Miller v. Lewis*, 103 Miss. 598, 60 So. 654; *Citizen's Bank v. Evans*, 176 Mo. App. 704, 159 S. W. 765; *Citizens' Bank v. Douglass*, 178 Mo. App. 664, 161 S. W. 601; *Bank of Neelyville v. Lee*, 193 Mo. App. 537, 182 S. W. 1016; *Ott v. Mindlin*, 170 App. Div. 558, 156 N. Y. S. 695; *Orth v. Anderson*, 146 N. Y. S. 689; *Adams v. Ferguson*, 44 Okla. 544, 147 Pac. 772; *Bennett v. Odneal*, 44 Okla. 354, 147 Pac. 1013; *McKaughan v. Baldwin* (Tex. Civ. App.), 153 S. W. 660; *Speer v. Rushing* (Tex. Civ. App.), 183 S. W. 67; *Carson v. J. L. Mott Iron Works*, 117

Va. 21, 84 S. E. 12. An extension of time must rest upon a valid consideration to relieve a surety, and must preclude the creditor from enforcing the debt during the period of extension: *American Bonding Co. v. Kelly*, 172 App. Div. 437, 158 N. Y. S. 812; *Ward v. Nutt*, 129 Ark. 443, 179 S. W. 667; *Thornton v. Bowie*, 123 Ark. 463, 185 S. W. 793; *First Nat. Bank v. Blake*, 113 Maine 313, 93 Atl. 840; *Manufacturers' Nat. Bank v. Chabot & Co.*, 114 Maine 514, 96 Atl. 836; *Citizens' Bank v. Douglass*, 178 Mo. App. 664, 161 S. W. 601; *Speer v. Rushing* (Tex. Civ. App.), 183 S. W. 67. The payment of interest in advance is a sufficient consideration for an agreement to extend the time of payment so as to release the surety: *Stewart v. Oliver*, 110 Maine 208, 85 Atl. 747; *Adams v. Ferguson*, 44 Okla. 544, 147 Pac. 772. The time of payment is extended and the sureties discharged by a renewal of the notes before maturity: *Edwards v. Goode*, 228 Fed. 664, 143 C. C. A. 186; *Matthews v. Richards*, 13 Ga. App. 412, 79 S. E. 227. The extension of time as to one payment released the guarantor from liability for that payment, but not for subsequent payments when the contract called for successive payments: *Shepard Land Co. v. Banigan*, 36 R. I. 1, 87 Atl. 531; *Bankers' Surety Co. v. Watt*, 118 Ark. 492, 177 S. W. 20; *I. J. Cooper Rubber Co. v. Johnson*, 113 Tenn. 562, 182 S. W. 593. Where one was acting as secretary of a corporation, and signed as surety a note of the corporation, she was not released by the execution of renewal notes by the corporation alone: *Agnew v. Mathieson*, 26 Colo. App. 59, 140 Pac. 484; *First Nat. Bank v. Livermore*, 90 Kans. 395, 133 Pac. 734, 47 L. R. A. (N. S.) 274n. Where a note, which was signed by a surety and the principal debtor, provided that time of payment might be extended without notice, only one extension was per-



principal without the consent of the surety unless harm has resulted to it.<sup>23</sup>

**§ 3969. Discharge by extension of time of payment or performance.**<sup>24</sup>—A surety waives the extensions and estops himself from asserting release because of them, if, after extension of a note by the payee, the surety accepts security to protect himself.<sup>25</sup>

**§ 3970. Discharge by taking additional or substituted security.**<sup>26</sup>—A guarantor of payments for goods sold on credit

mitted; so that a subsequent extension, without the knowledge and consent of the surety, binding the payee, discharged the surety: *Heaton v. State Nat. Bank* (Tex. Civ. App.), 159 S. W. 874. Mere indulgence to the principal will not release the guarantor: *International Text-Book Co. v. Mabbott*, 159 Wis. 423, 150 N. W. 429. The following are cases in which the guarantor was held not to be discharged: *Citizens' Bank v. Bowden*, 98 Kans. 140, 157 Pac. 429; *Graham v. United States*, 231 U. S. 474, 58 L. ed. 319, 34 Sup. Ct. 148; *Illinois Surety Co. v. United States*, 212 Fed. 136; *Alabama Fidelity & Co. v. Alabama Fuel & Co.*, 190 Ala. 397, 67 So. 318; *Ward v. Nutt*, 120 Ark. 443, 179 S. W. 667; *Tyson v. Reinecke*, 25 Cal. App. 696, 145 Pac. 153; *Clark v. United Grocery Co.*, 69 Fla. 624, 68 So. 766; *Massachusetts Bonding & Ins. Co. v. Realty Trust Co.*, 142 Ga. 499, 83 S. E. 210; *Matthews v. Richards*, 13 Ga. App. 412, 79 S. E. 227; *Ver Nooy v. Pitner*, 17 Ga. App. 229, 86 S. E. 456; *Alexander v. Capitol Lumber Co.*, 181 Ind. 527, 105 N. E. 45; *Valley Nat. Bank v. Cowrie*, 164 Iowa 421, 145 N. W. 904; *People's State Bank v. Dryden*, 91 Kans. 216, 137 Pac. 928; *Citizens Bank v. Bowden*, 98 Kans. 140, 157 Pac. 429; *People v. Traves*, 188 Mich. 345, 154 N. W. 130; *Thyssel v. Holm*, 124 Minn. 541, 145 N. W. 164; *Mercantile Trust Co. v. Donk* (Mo.), 178 S. W. 113; *Southard v. Latham*, 18 N. Mex. 503, 138 Pac. 205, 50 L. R. A. (N. S.) 871n; *Riehl v. Austin*, 155 App. Div. 207, 140 N. Y. S. 217; *Kehoe v. Backer*, 157 App. Div. 792, 142 N. Y. S. 691;

*Meredith v. Dibrell*, 127 Tenn. 387, 155 S. W. 163, 46 L. R. A. (N. S.) 92n, Ann. Cas. 1914B, 1079n; *Dies v. Wilson County Bank*, 129 Tenn. 89, 165 S. W. 248, Ann. Cas. 1915A, 1090n; *I. J. Cooper Rubber Co. v. Johnson*, 133 Tenn. 562, 182 S. W. 593, L. R. A. 1917A, 282; *Central Bank & Co. v. Hill* (Tex. Civ. App.), 160 S. W. 1099; *Roberds v. Laney* (Tex. Civ. App.), 165 S. W. 114; *Neblett v. Cooper Grocery Co.* (Tex. Civ. App.), 180 S. W. 1162; *Jackson v. Home Nat. Bank* (Tex. Civ. App.), 185 S. W. 893; *Wait v. Homestead Building Assn.*, 76 W. Va. 431, 85 S. E. 637.

<sup>23</sup> *Standard Salt & Co. v. National Surety Co.*, 134 Minn. 121, 158 N. W. 802.

<sup>24</sup> A surety is discharged by an extension of note for definite period by agreement between holder and principal, supported by valid consideration, without consent of surety: *Western Nat. Bank v. Wittman*, 31 Cal. App. 615, 161 Pac. 137; *Kremke v. Radamaker* (Okla.), 159 Pac. 475. But where continued use of note as collateral security without indorsement was within intention and plan originally adopted for raising money to which a maker lent his name for accommodation, acceptance of renewal note without indorsement did not affect or violate the contract of the maker of the collateral note, and did not discharge him: *Hulbard v. First State Bank* (Ind. App.), 114 N. E. 642.

<sup>25</sup> *Kremke v. Radamaker* (Okla.), 159 Pac. 475.

<sup>26</sup> *Sciaballa v. Illinois Surety Co.*, 166 App. Div. 677, 152 N. Y. S. 760;

is not released by the seller accepting notes for the price maturing within the time in which the original debt was due.<sup>27</sup>

**§ 3972. Discharge by payment or satisfaction by principal.**<sup>28</sup>—The surety is not released by paying the amount of the guaranteed debt over to his principal.<sup>29</sup>

**§ 3974. Discharge by relinquishment or loss of funds or securities.**<sup>30</sup>—When a third person puts up collateral security with the payee of notes and this collateral is later turned back

Cohen v. Illinois Surety Co., 166 App. Div. 680, 152 N. Y. S. 763; Cohen v. Illinois Surety Co., 215 N. Y. 692, 109 N. E. 1070. The surety was not discharged on the original note by the mere fact that the payee of a note, after maturity, accepted other notes of the principal as collateral security: Ft. Dodge Grocery Co. v. Brown (Iowa), 152 N. W. 500; Riehl v. Austin, 155 App. Div. 207, 140 N. Y. S. 217. Where one signed a written guaranty expressly authorizing the extension of time for payment he is not released by the taking of additional security as consideration for such extension: Woelfel v. Rotan Grocery Co. (Tex. Civ. App.), 184 S. W. 803.

<sup>27</sup> Scarboro v. Kalmon, 13 Ga. App. 28, 78 S. E. 686; Gottsegen Cigar Co. v. Levy, 42 Utah 366, 130 Pac. 780.

<sup>28</sup> Payment of the principal indebtedness discharges the surety: Gartrell v. Johns, 15 Ga. App. 671, 84 S. E. 175. The guarantors on the prior note, who did not consent thereto, were discharged, as there was a constructive taking up of the old note and reissue thereof as collateral, the makers being without power to pledge it as collateral without first taking it up, when notes were executed with the agreement that a prior note for the same debt should be collateral security therefor: Citizens' Bank v. Evans, 176 Mo. App. 704, 159 S. W. 765; Orth v. Anderson, 146 N. Y. S. 689; Dies v. Wilson County Bank, 129 Tenn. 89, 165 S. W. 248, Ann. Cas. 1915A, 1090n. The substitution of an insolvent as principal payor of the note for the original payor who was solvent releases the surety: May v. Waniger (Tex. Civ. App.), 164 S. W. 1106. A surety who does not sign the new note, unless there is some

agreement to the contrary, or there are peculiar circumstances affording a reason for holding the former surety liable, is released when a note is paid by the giving of a new note executed by the principal and one of the sureties: Knight v. Kerfoot (Ind. App.), 102 N. E. 983. Where the holder makes unsuccessful efforts to have the note paid or renewed the surety is not released: First Nat. Bank of Boothbay Harbor v. Blake, 113 Maine 313, 93 Atl. 840. The surety on the note of a minor which was given in payment for real estate, is discharged from liability where the minor, on reaching his majority, disaffirms the contract and restores the property: Evans v. Taylor, 18 N. Mex. 371, 137 Pac. 583, 50 L. R. A. (N. S.) 1113. Where the amount due on a note is erroneously fixed or estimated and such incorrect amount is paid by the guarantor, he is liable for any balance that may be due: Barber Asphalt Paving Co. v. Mullen, 220 Mass. 308, 107 N. E. 978. The taking of a note for a pre-existing liability which was covered by a guaranty did not constitute payment of the debt or release the guarantors: Exchange Nat. Bank v. Hunt, 75 Wash. 513, 135 Pac. 224. The sureties as well as the principal are released where the principal establishes a defense in bar, or is released from his obligation: Wills v. Tyer (Tex. Civ. App.), 186 S. W. 862.

<sup>29</sup> Toledo Bridge & C. Co. v. Oil Belt Trac. Co., 173 Ill. App. 298.

<sup>30</sup> The payee loses to the extent of the impairment, his recourse against the indorser where a holder of mortgage notes, indorsed as additional security, impairs the mortgage security: Young Men's Christian Assn. v. Rit-

to such third person after failure to realize on the collateral, a surety on the notes secured is not discharged thereby.<sup>31</sup>

**§ 3975. Discharge by misapplication of funds or securities by creditor.**<sup>32</sup>—A surety is discharged where the payee and surety agree that the proceeds of a note shall be applied in a certain way for a certain purpose and the payee applies them to another purpose.<sup>33</sup>

**§ 3976. Discharge by nonperformance of conditions.**<sup>34</sup>—The strict rule as to discharge of a surety by omission of the obligee to perform certain conditions applies only to voluntary

ter, 90 Kans. 332, 133 Pac. 894; Interstate Trust & Co. v. Young, 135 La. 465, 65 So. 611; Troll v. Dougherty & Co. Real Estate Co., 186 Mo. App. 196, 171 S. W. 665; Senter v. Senter, 87 Ohio St. 377, 101 N. E. 272; Saunders v. Lanier, 128 Tenn. 693, 164 S. W. 780, Ann. Cas. 1915C, 370n; State Bank v. Michel, 152 Wis. 88, 139 N. W. 748. The surety is discharged under Rev. Laws 1910, § 1056, whenever a creditor, having in his hands any securities, relinquishes or loses same by his wilful acts or through his negligence the surety is discharged: State Bank v. Bryan, 268 Ill. 151, 108 N. E. 1004; Johnson v. Jones, 39 Okla. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547n; National Bank v. Gilvin (Tex. Civ. App.), 152 S. W. 652. It is held that the surety on the bond of a building contractor is discharged, where the obligee fails to retain not less than 15 per cent. of the value of all work performed and material furnished as required by the bond: Morgan v. Salmon, 18 N. Mex. 72, 135 Pac. 553, L. R. A. 1915B, 407n. A surety was not discharged where the payee of a note secured by a chattel mortgage failed to foreclose before the goods were destroyed: Thornton v. Bowie, 123 Ark. 463, 185 S. W. 793.

<sup>31</sup> Armstrong v. Citizens' & Co. Bank, 145 Ga. 861, 90 S. E. 44; Farmers' State Bank v. Gray, 94 Wash. 431, 162 Pac. 531.

<sup>32</sup> The holder of the note could not recover against a surety thereon where bonds pledged to secure a note were invalidly sold for a small per cent. of their value and purchased by the pledgee, who thereafter transferred

the notes and the bonds separately to the same persons, and they used the bonds to purchase the property on foreclosure of the bond mortgage, the bonds being worth more than the debt for which they were pledged: Dibert v. Wernicke, 214 Fed. 673; Simpson Logging Co. v. Northwest Bridge Co., 76 Wash. 533, 137 Pac. 127. See also Eades v. Muhlenberg County Savings Bank, 157 Ky. 416, 163 S. W. 494. But see Chicago v. Agnew, 264 Ill. 288, 106 N. E. 252. The creditor could not recover against the surety on failure to apply the proceeds of the crop to the note signed by the surety, when a note signed by a surety for supplies furnished to a cropper was subordinated to a note for additional supplies signed by the cropper alone, but the creditor received sufficient from the crop to pay both notes: Ward & Co. v. Womack (Tex. Civ. App.), 168 S. W. 433.

<sup>33</sup> Hermitage Nat. Bank v. Carpenter, 131 Tenn. 136, 174 S. W. 263.

<sup>34</sup> Although the obligee considers such acts unimportant, when contract of suretyship provides for information of specific acts, such information must be given, otherwise the surety will be discharged: D. T. Williams Valve Co. v. Amorous (Ga. App.), 91 S. E. 240. The plaintiff could not recover on the guaranty when guaranty was conditioned on mortgages being extended by parties other than plaintiff, and, though parties holding mortgages, agreed to give extensions, no formal extension of either mortgage was executed, and foreclosure proceedings were renewed: Cowen v. Winter, 162 N. Y. S. 971. The surety

sureties and is not enforced with the same strictness in favor of a paid surety.<sup>35</sup>

§ 3977. **Discharge by neglect to give surety notice of default.**<sup>36</sup>—Where a note contains a provision that the sureties

is generally released unless the secured party exercises good faith and complies strictly with the contract: *Pond Creek Coal Co. v. Citizens' Trust & Guaranty Co.*, 170 Ky. 601, 186 S. W. 494.

<sup>35</sup> *Pond Creek Coal Co. v. Citizens' Trust & Co.*, 170 Ky. 601, 186 S. W. 494.

<sup>36</sup> Where the contract provides for notice it must be given, or the surety will be discharged: *Bankers' Surety Co. v. Watt*, 118 Ark. 492, 177 S. W. 20; *United States v. Fidelity & Co.*, 224 Fed. 866, 140 C. C. A. 288; *Alabama Fidelity & Co. v. Alabama Fuel & Co.*, 190 Ala. 397, 67 So. 318; *D. T. Williams Valve Co. v. Amorous* (Ga. App.), 91 S. E. 240; *Wainwright Trust Co. v. United States Fidelity & Co.* (Ind. App.), 114 N. E. 470; *Phoenix Ins. Co. v. Newell* (Okla.), 159 Pac. 1127. But if the contract does not provide for notice no notice to a surety is required of the principal's default or failure to comply with the contract: *Maine Cent. R. Co. v. National Surety Co.*, 113 Maine 465, 94 Atl. 929, L. R. A. 1916A, 881; *Baskett Lumber & Mfg. Co. v. Graylee* (Ala. App.), 73 So. 291. When a corporation merely has constructive notice of an officer's default it is not obligated to notify his sureties or prospective sureties on a subsequent bond or to dismiss him: *Wait v. Homestead Building Assn.*, 76 W. Va. 431, 85 S. E. 637. The guarantor held entitled to notice of change of interest of a bank, to which he has guaranteed the collection of a claim against a supposedly insolvent estate: *Fitzmaurice v. Merchants' Nat. Bank*, 172 Iowa 554, 154 N. W. 895. A guarantor is entitled to timely notice of the default of the principal, and delay in giving notice will work a discharge: *Young v. Merle & Co. Mfg. Co.*, 184 Ind. 403, 110 N. E. 669; *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382. The time for notice begins to run from the comple-

tion of the building, where time is not of the essence of a building contract, and no claim is asserted because the building was not finished on the date set: *Pulaski Hall Assn. v. McLeod*, 123 Minn. 222, 143 N. W. 715; *Fitger Brewing Co. v. American Bonding Co.*, 127 Minn. 330, 149 N. W. 539; *Lackland v. Renshaw*, 256 Mo. 133, 165 S. W. 314; *Harris v. United States Fidelity & Co.*, 167 N. Car. 623, 83 S. E. 805. Provision in a contract for immediate notice is fulfilled by notice within a reasonable time: *United States Fidelity & Guaranty Co. v. Travelers' Ins. Mach. Co.*, 167 Ky. 382, 180 S. W. 815; *Bross v. McNicholas*, 66 Ore. 42, 133 Pac. 782, Ann. Cas. 1915B, 1272n; *Astoria Southern R. Co. v. Pacific Surety Co.*, 68 Ore. 569, 137 Pac. 857; *Lyman v. Title Guaranty & Co.*, 48 Utah 230, 158 Pac. 423. Guarantors of a corporation's debt who are also officers engaged in transacting the business of the corporation are charged with knowledge of the furnishing of the goods on which the debt guaranteed is based: *Scovill Mfg. Co. v. Cassidy*, 195 Ill. App. 448. It is incumbent on the guarantor to show that he was injured by the obligee's failure to notify it of the principal's default and it is a defense only in so far as it can show damages on account of such lack of notice: *Franco-American Hygienic Co. v. Chladek*, 195 Ill. App. 443; *Illinois Surety Co. v. Huber*, 57 Ind. App. 408, 107 N. E. 298; *McClure v. Freeborn Engineering Const. Co.*, 97 Kans. 695, 156 Pac. 692; *Peerless Casualty Co. v. Howard*, 77 N. H. 355, 92 Atl. 165; *Bross v. McNicholas*, 66 Ore. 42, 133 Pac. 782, Ann. Cas. 1915B, 1272; *Leiter v. Dwyer Plumbing & Co.*, 66 Ore. 474, 133 Pac. 1180. The following cases are upon the sufficiency of notice: *Illinois Surety Co. v. Huber*, 57 Ind. App. 408, 107 N. E. 298; *Wainwright Trust Co. v. United States Fidelity & Co.*

and indorsers waived notice, protest and presentation for payment, the liability of a surety upon nonpayment was fixed, without protest, as effectually as a protest would have fixed it.<sup>37</sup>

§ 3978. **Discharge by release of cosurety.**<sup>38</sup>—A cosurety is not released by the failure of the payee of a note to prove its claim in bankruptcy proceedings against one of the sureties.<sup>39</sup> When a payee sues one surety only, his failure to sue the maker and the other sureties does not release the surety against whom suit is brought.<sup>40</sup>

§ 3979. **Discharge by unauthorized payments to contractors.**<sup>41</sup>—When a building contract makes the superintendent of construction an umpire to decide the amount of work done as a basis for monthly payments during the progress of the

(Ind. App.), 114 N. E. 470; Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259; McKegney v. Illinois Surety Co., 170 App. Div. 261, 155 N. Y. S. 1041; Fass v. Illinois Surety Co., 95 Misc. 267, 158 N. Y. S. 890.

<sup>37</sup> Marshall v. Hollingsworth, 166 Ky. 190, 179 S. W. 34; Home Savings Bank v. Shallenberger, 95 Nebr. 593, 146 N. W. 993; Central Bank & Co. v. Hill (Tex. Civ. App.), 160 S. W. 1099. One who signs a note as maker, while in fact a surety, is not entitled to notice of nonpayment or protest: Ft. Dodge Grocery Co. v. Brown (Iowa), 152 N. W. 500.

<sup>38</sup> The remaining surety is released for one-half of the debt by a creditor releasing one of two cosureties: Singleton v. Shepherd (Mo. App.), 183 S. W. 1077; Britnell v. Smith, 189 Ala. 440, 66 So. 569; Ayer v. Hughes, 97 S. Car. 255, 81 S. E. 510; Montgomery v. Boyd (Tex. Civ. App.), 171 S. W. 273. But a surety is not discharged when a person liable on the instrument is released with the consent of the surety: Ayer v. Hughes, 97 S. Car. 255, 81 S. E. 510.

<sup>39</sup> Armstrong v. Citizens' & Co. Bank, 145 Ga. 861, 90 S. E. 44.

<sup>40</sup> Where a payee sues one surety only his failure to sue the maker and the other sureties does not release the surety against whom the suit is brought: Palmer v. Noe, 48 Okla.

450, 150 Pac. 462; Miller v. State (Okla.), 152 Pac. 409.

<sup>41</sup> Regardless of how the sureties were affected by the owner's action, where the owner of a building under construction made payments to the contractor in excess of the amount authorized by the contract, and failed to require affidavits provided for therein, the sureties on the contractor's bond, as their liability could not be extended, were discharged: Blackburn v. Morel, 13 Ga. App. 516, 79 S. E. 492; Justice v. Empire State Surety Co., 218 Fed. 802, 134 C. C. A. 490; Equitable Surety Co. v. Tappah County, 231 Fed. 33, 145 C. C. A. 221; Lowndes Alliance Warehouse Co. v. Greene, 17 Ga. App. 542, 87 S. E. 826; Chicago v. Agnew, 182 Ill. App. 499; Barton v. Title Guaranty & Co. Surety Co., 192 Mo. App. 561, 183 S. W. 694; Southern Real Estate & Co. v. Bankers' Surety Co. (Mo.), 184 S. W. 1030; Lyons v. Kitchell, 18 N. Mex. 82, 134 Pac. 213, Ann. Cas. 1915C, 671n; Welsh v. Warren (Tex. Civ. App.), 159 S. W. 106; Kelsay Lumber Co. v. Rotsky (Tex. Civ. App.), 178 S. W. 837. See Southern Real Estate & Co. v. Bankers' Surety Co. (Mo.), 184 S. W. 1030. The surety on a bond is not relieved because the obligees lent the contractor money independent of the contract-price, and not paid on the amount due the contractor for his

work, his decision, unless fraud or palpable mistake is shown, is binding on all parties, including the surety.<sup>42</sup>

§ 3980. **Rights of surety as to creditor.**<sup>43</sup>—When the executor of an estate defaulted, his sureties were held entitled to compel the executor's successor to sue a bank which wrongfully misapplied the estate's funds to discharge personal notes of the executor.<sup>44</sup>

§ 3981. **Rights of surety as to principal.**<sup>45</sup>—Until he has first paid the note, a surety on the same can not recover of the

work: *Ft. Dodge & C. R. Co. v. Burns*, 177 Iowa 51, 158 N. W. 582; *Meyer v. Bichow*, 133 La. 975, 63 So. 487. An accommodation note from contractor to subcontractor was held an anticipation of payments under the contract, discharging the subcontractor's surety: *Wells v. National Surety Co.*, 222 Fed. 8, 137 C. C. A. 546. When anticipated payment did not tend to prevent the contractor's performance a surety on a construction contractor's bond was held not discharged by such payment: *Maine Cent. R. Co. v. National Surety Co.*, 113 Maine 465, 94 Atl. 929. A letter written by an architect was held not to be a certificate on which the owner, as against the contractor's surety, was authorized to make payments to the contractor: *Doyle v. Faust*, 187 Mich. 108, 153 N. W. 725. But it has been held that a provision in a building contractor's bond that all payments should be made on written certificates of the architects, being for the owner's benefit, could be waived by him without affecting the liability of the surety on the bond: *Southwestern Surety Ins. Co. v. Minnetonka Lumber Co. (Okla.)*, 148 Pac. 1038. Where the owner paid the contractor in conformity with the contract without awaiting the expiration of sixty days after the labor was performed or material furnished for which liens, under Comp. Laws 1909, § 6153, were established, it was held that the surety was not released from liability: *Gorton v. Freeman*, 51 Okla. 516, 152 Pac. 127. A paid surety on a building contractor's bond held not discharged by overpayments to the contractor or to his servants to pay

labor claims of the contractor's employees where the advances were made to save the premises from liens: *Manhattan Co. v. United States Fidelity & C. Co.*, 77 Wash. 405, 137 Pac. 1003.

<sup>42</sup> *Dunne Inv. Co. v. Empire State Surety Co.*, 27 Cal. App. 208, 150 Pac. 405, 411; *Hastings Land Improvement Co. v. Empire State Surety Co.*, 156 App. Div. 258, 141 N. Y. S. 417; *Da Moth & Rose v. Hillsboro Independent School Dist. (Tex. Civ. App.)*, 186 S. W. 437.

<sup>43</sup> As against a bank which had advanced money to the subcontractor, not shown to have been used in the work, plaintiff, surety for a subcontractor, which, after subcontractor's failure to perform, had completed the contract and earned the balance paid in court, held entitled thereto: *Fidelity & C. Deposit Co. v. Northwestern Nat. Bank*, 90 Wash. 179, 155 Pac. 743.

<sup>44</sup> *Hale v. Windsor Sav. Bank*, 90 Vt. 487, 98 Atl. 993.

<sup>45</sup> There is an implied obligation of the principal debtor to reimburse the surety where a surety pays the obligation at maturity, on default of the principal debtor: *Green v. Hoppe (Tex. Civ. App.)*, 175 S. W. 1117. A debt secured by a lien, assigned by the principal of the surety for the protection of the surety remains in force for the protection of the surety: *Roberts v. Terry*, 161 Ky. 397, 170 S. W. 965; *Higgins v. Utterback*, 167 Ky. 689, 181 S. W. 333. On a debt becoming due, the surety may sue to compel the principal to pay this debt: *Des Moines Bridge & C. Works v. Plane*, 163 Iowa 18, 143 N. W. 866; *Southwestern Surety Ins. Co. v.*

principal.<sup>46</sup> A principal is bound to indemnify his surety without express contract and a contract by a principal to indemnify his surety requires only general language.<sup>47</sup>

§ 3982. Rights of surety as to principal after payment.<sup>48</sup>

§ 3983. Rights of surety as to cosureties.<sup>49</sup>—Under the rule that equality is equity, where one surety takes security from

Wells, 217 Fed. 294; Cherry v. Cherry, 162 Ky. 245, 172 S. W. 505; Lewis v. Toney, 76 W. Va. 80, 85 S. E. 30; Shattles v. Baker, 18 Ga. App. 300, 89 S. E. 373. A surety company's forbearance from withdrawing from bond of executor is sufficient consideration to support contract of indemnity against loss of the bond: American Surety Co. v. Cabell (Okla.), 159 Pac. 352. Fee to counsel paid by surety in suit for premium not being expense arising "by reason of such suretyship" within the contract, a surety company was held unable, in an action to recover second instalment of premium of bond, to recover counsel fee paid by it in action for first instalment: National Surety Co. v. Breuchaud, 173 App. Div. 795, 160 N. Y. S. 77. Although the general rule is that a surety can not recover against his principal until the former has paid the debt it does not apply where the surety has satisfied the debt of the principal by the execution of his negotiable note: Ball v. Miller (Tex. Civ. App.), 187 S. W. 688.

<sup>46</sup> Valdosta Bank & Co. v. Pendleton, 145 Ga. 336, 89 S. E. 216; McCormick v. Obanion, 168 Mo. App. 606, 153 S. W. 267; Van Hoose v. Southwestern Mach. Co., 169 Mo. App. 54, 154 S. W. 165.

<sup>47</sup> American Bonding Co. v. Alcatraz Const. Co., 202 Fed. 483; United States Fidelity & Co. v. Gray (Del. Super.), 97 Atl. 425; Frye v. Sims, 144 Ga. 74, 86 S. E. 249; Wilson v. Hite's Exr., 154 Ky. 61, 157 S. W. 41; Seymour v. Dabbs, 170 Mo. App. 151, 155 S. W. 493; Brown v. Marmaduke, 248 Pa. 247, 93 Atl. 1023.

<sup>48</sup> Cooper v. Jewett, 233 Fed. 618, 147 C. C. 426. Surety is secondarily liable on a debt, and after paying it is entitled to indemnity from the

principal: Bright v. Mack (Ala.), 72 So. 433.

<sup>49</sup> The obligation of a cosurety to make contribution is generally not expressed, but is implied by law, in order equitably to apportion the burdens of suretyship, and he may recover his proportionate share from each cosurety: Flickinger v. Price, 165 Iowa 570, 146 N. W. 738; Train v. Emerson, 141 Ga. 95, 80 S. E. 554, 49 L. R. A. (N. S.) 950; Trego v. Cunningham's Estate, 267 Ill. 367, 108 N. E. 350; Hall v. Gleason, 158 Ky. 789, 166 S. W. 608; Jefferson's Admr. v. Bogard's Admr., 159 Ky. 376, 167 S. W. 150; Sinclair v. Wisman, 183 Mo. App. 709, 167 S. W. 580; Singleton v. Shepherd (Mo. App.), 183 S. W. 1077; Yawger v. American Surety Co., 212 N. Y. 292, 106 N. E. 64, L. R. A. 1915D, 481n; People v. Metropolitan Surety Co., 175 App. Div. 43, 161 N. Y. S. 616; Fowle v. McLean, 168 N. Car. 537, 84 S. E. 852; A. Guckenheimer & Bros. Co. v. Kann, 243 Pa. 75, 89 Atl. 807; Lindblom v. Johnston, 92 Wash. 171, 158 Pac. 972; Selvey v. Armstrong, 73 W. Va. 13, 79 S. E. 1019. However, it is competent for one surety to agree that, as between himself and the other surety, he would be primarily liable: Hoyt v. Griggs, 164 Iowa 672, 146 N. W. 745. But there can be no contribution where each surety pays the same amount: Broderick v. Lucas (Mo. App.), 182 S. W. 154. Failure of consideration is no defense to an action for contribution by a surety against his cosurety where a negotiable note is paid after maturity to a holder in due course by a surety: Cummins v. Line, 43 Okla. 575, 143 Pac. 672. Contribution between sureties is an equitable doctrine, based on the fact that one surety has paid the debt for which he and his cosurety

the principal debtor for his own indemnity it will inure to the benefit of all the sureties.<sup>50</sup>

§ 3985. **Rights of creditor or obligee.**<sup>51</sup>—When a surety has satisfied the obligation of his principal he is entitled to possession of the personalty pledged by the principal to the obligee to the extent of reimbursing him for the amount he has paid.<sup>52</sup>

§ 3988. **Surety's liability limited to terms of contract.**<sup>53</sup>—A contract of suretyship must be strictly construed.<sup>54</sup>

were liable, and that fact must be proved by the surety asking contribution: *Knight v. Kerfoot*, (Ind.), 102 N. E. 983; *Comstock v. Potter*, 191 Mich. 629, 158 N. W. 102; *Strasburger v. Myer Strasburger & Co.*, 167 App. Div. 198, 152 N. Y. S. 757; *Shuford v. Cook*, 164 N. Car. 46, 80 S. E. 61; *Fowle v. McLean*, 168 N. Car. 537, 84 S. E. 852. Though bound by different instruments, sureties for the same debt may be required to contribute proportionately: *Remage v. Marple*, 76 W. Va. 379, 85 S. E. 663. But a cosurety's payment on a bond after the claim against him has been barred by the statute of limitations is voluntary, and does not entitle him to contribution: *Gronna v. Goldammer*, 26 N. Dak. 122, 143 N. W. 394, Ann. Cas. 1916A, 165n. See for review of cases on both sides as to whether right of surety to indemnity from principal or contribution from cosureties is affected by fact that statute of limitations has run against an action by the creditor against the principal or cosureties: *Frew v. Scouler* (Nebr.), 162 N. W. 496, L. R. A. 1917F, 1065, 1074-1076. Where there has been no payment one of the two sureties can not sue the other to compel payment of his share to the principal debtor, for payment to the creditor: *Zachry v. Peterson* (Tex. Civ. App.), 171 S. W. 494. A paid surety may have contribution from an accommodation surety: *United States Fidelity & Guaranty Co. v. Naylor*, 237 Fed. 314. Where one or more cosureties are insolvent and one of the sureties pays the debt, he is entitled, in a suit for contribution, to a proportionate increase of contribution from those who are solvent: *Comstock v. Potter*, 191 Mich. 629, 158 N. W. 102; *Trego v. Cunningham's Estate*, 267 Ill. 367, 108 N.

E. 350; *Lindblom v. Johnston*, 92 Wash. 171, 158 Pac. 972.

<sup>50</sup> *Broussard v. Mason*, 187 Mo. App. 281, 173 S. W. 698; *Baber v. Hanie*, 163 N. Car. 588, 80 S. E. 57. But see *Assets Realization Co. v. American Bonding Co.*, 88 Ohio St. 216, 102 N. E. 719, Ann. Cas. 1915A, 1194n. Under Rev. Stat. 1909, §§ 2777, 11277, a surety who settles with creditor for less than his share of the indebtedness held not entitled to contribution from cosurety, who had previously procured a release by paying a less amount: *Singleton v. Shepherd* (Mo. App.), 183 S. W. 1077.

<sup>51</sup> The undertaking of a surety on a note is independent and additional to any security that the maker may give the creditor, and a holder of the note may sue on the promise of the surety without reference to any collateral security available from other sources: *Erwin v. E. I. Du Pont De Nemours Powder Co.* (Tex. Civ. App.), 156 S. W. 1097; *Dillard v. Chandler* (Tex. Civ. App.), 157 S. W. 303. An indorsee of a note before maturity for value and without notice need not foreclose a materialman's lien but may at once sue the sureties, especially where the value of the lien is uncertain: *Erwin v. E. I. Du Pont De Nemours Powder Co.*, (Tex. Civ. App.), 156 S. W. 1097.

<sup>52</sup> *Interstate Trust & Co. v. Young*, 135 La. 465, 65 So. 611; *Wills v. Fuller*, 47 Okla. 720, 150 Pac. 693.

<sup>53</sup> The liability of a surety company must be determined under the ordinary rules of law, and can not be extended beyond the terms of the contract: *Pacific County v. Illinois Surety Co.*, 234 Fed. 97; *Bright v. Mack* (Ala.), 72 So. 433; *Mann v. Mann*, 119 Va. 630, 89 S. E. 897.

<sup>54</sup> *Bright v. Mack* (Ala.), 72 So.



433; *D. T. Williams Valve Co. v. Amorous*, 19 Ga. App. 155, 91 S. E. 240; *Wainwright Trust Co. v. United States Fidelity &c. Guaranty Co.* (Ind. App.), 114 N. E. 470. The rule of *strictissimi juris*, usually available to sureties without compensation, is generally relaxed when applied to a paid surety: *Neilson v. Title Guaranty &c. Co.*, 81 Ore. 422, 159 Pac. 1151.

## CHAPTER CXVI

### INDEMNITY CONTRACTS

§ 3996. **Definition.**<sup>1</sup>—A contract of indemnity is distinguishable from one of guaranty and suretyship in that the former is to make good and save another from loss on some obligation to a third person, and is not a promise to one to whom another is answerable or bound to pay in case of the default of a principal.<sup>2</sup>

§ 4000. **Construction and operation.**<sup>3</sup>—The intent of the covenant is decisive of the question as to whether a contract of indemnity is one against liability or merely against loss or damage.<sup>4</sup>

§ 4007. **Indemnity against negligence.**<sup>5</sup>

<sup>1</sup>See ch. XCII on "Private Indemnity Bonds;" also chaps. CXVII-CXXXIV on "Insurance." A contract is one of indemnity when bond is given for performance of covenants of a building contract, payment of debt incurred by contractors, completion of the building free from mechanics' liens, performance of the covenants of the contract and payment of costs incident to enforcement of payment and collection of debts incurred by contractors: *Stuart v. Carter* (W. Va.), 90 S. E. 537.

<sup>2</sup>*Hall v. Equitable Surety Co.*, 126 Ark. 535, 191 S. W. 32; *Stuart v. Carter* (W. Va.), 90 S. E. 537.

<sup>3</sup>One who contracted to build an elevated railroad structure was held liable to indemnify the road against damages recovered against it by an employé of subcontractor, though his injuries were caused solely by negligence of road itself: *Long Island R. Co. v. American Bridge Co.*, 175 App. Div. 170, 161 N. Y. S. 543; *People's Bank v. Ætna Indemnity Co.*, 91

Conn. 57, 98 Atl. 353. Under a contract of indemnity by an express company with a railroad, the railroad company was entitled to recover amounts paid by it on judgments in favor of employés of express company for personal injuries and expense of resisting actions therefor: *Central R. Co. v. Morgan*, 89 N. J. L. 165, 98 Atl. 443. Where the language in a contract of indemnity was broad enough to create such liability but was harsh and burdensome it was held that the contract of railroad and defendant would not render defendant liable for personal injuries to a third person due to negligence of the road on spur track paid for by defendant and controlled by the road: *Houston & C. R. Co. v. Diamond Press Brick Co.* (Tex. Civ. App.), 188 S. W. 32.

<sup>4</sup>*Stuart v. Carter* (W. Va.), 90 S. E. 537.

<sup>5</sup>[Main section cited in *Houston & C. R. Co. v. Diamond Brick Co.* (Tex. Civ. App.), 188 S. W. 32, 34.]

## CHAPTER CXVII

### DEFINITION, NATURE AND MANNER OF MAKING INSURANCE CONTRACTS

§ 4020. **Definition.**<sup>1</sup>—A fire insurance contract is not a contract to insure the property against fire, but to insure the owner of the property against loss by fire, and the insurer is not rendered liable by destruction of the property by fire unless the insured has sustained a loss thereby.<sup>2</sup>

§ 4022. **What constitutes insurance.**<sup>3</sup>—A corporation contracting to care for plate glass for a fixed term for a fixed consideration and to replace the glass if broken within the contract

<sup>1</sup> The essential elements of a contract of insurance are an agreement, which may be oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss: *State v. Revelle*, 257 Mo. 529, 165 S. W. 1084; *Draper v. Delaware State Grange Mut. Fire Ins. Co.* (Del. Super.), 91 Atl. 206; *Baltimore Life Ins. Co. v. Floyd* (Del. Super.), 91 Atl. 653; *Pirics v. First Russian Slavonic Greek Catholic Benevolent Soc.*, 83 N. J. Eq. 29, 89 Atl. 1036; *Moore v. Prudential Casualty Co.*, 170 App. Div. 849, 156 N. Y. S. 892; *Commonwealth v. Metropolitan Life Ins. Co.*, 254 Pa. 510, 98 Atl. 1072.

<sup>2</sup> *Draper v. Delaware State Grange Mut. Fire Ins. Co.* (Del. Super.), 91 Atl. 206. A broker's certificate to plaintiff was held not a contract of insurance, but merely a memorandum notifying it that they had effected insurance in its favor: *California Canners Co. v. Canton Ins. Office*, 25 Cal. App. 303, 143 Pac. 549.

<sup>3</sup> "Fidelity insurance," under Civ. Code 1910, § 2550, is a contract whereby one agrees in consideration of an amount to be paid, to indemnify another from the loss arising from the want of honesty, integrity, or fidelity of employees or

others holding positions of trust: *John Church Co. v. Aetna Indemnity Co.*, 13 Ga. App. 826, 80 S. E. 1093; *People v. Potts*, 264 Ill. 522, 106 N. E. 524. A policy may be a life policy, though it included injuries not resulting in death, and provided a graduated amount in case of death within five years: *Eminent Household of Columbian Woodmen v. Gallant*, 194 Ala. 680, 69 So. 884. The constitution and by-laws of the company, the application for membership, and the benefit certificate constitute the contract of insurance in a fraternal beneficiary society: *Neenan v. National Council of Knights and Ladies of Security*, 188 Ill. App. 490. The following are cases in which the companies were held not to be insurers. A company which agreed to procure for subscribers medical services, drugs, and merchandise from a physician and retailers, but did not guarantee the performance by them held not engaged in insurance business within the insurance code: *State v. Universal Service Agency*, 87 Wash. 413, 151 Pac. 768, Ann. Cas. 1916C, 1017n. A contract of endowment by the terms of which the insurer agreed to pay testator \$5,000 if living March 18, 1910, but if he should die before that time the contract should be void, was not a contract of insurance as

period was attempting to do an insurance business.<sup>4</sup> Though it collected money to meet its obligations by "annual dues" instead of premiums, the Kansas Mutual Life Insurance Company was held to be practically an old line life insurance company.<sup>5</sup> It was held that a corporation executing contracts to furnish members a funeral and all necessary requisites was engaged in writing life insurance.<sup>6</sup>

§ 4023. **Reinsurance.**<sup>7</sup>—When a company has assumed a benefit certificate and has accepted dues from month to month it can not assert that the contract is *ultra vires*.<sup>8</sup>

§ 4024. **Parties.**<sup>9</sup>—The word "assured" is sometimes used to designate the person who procures the insurance and the word

defined by Rev. Laws, ch. 118, § 3: *Curtis v. New York Life Ins. Co.*, 217 Mass. 47, 104 N. E. 553, Ann. Cas. 1915C, 1003n. A mercantile agency which was organized under the General Business Corporation Law may amend its articles of incorporation so as to authorize it to guarantee the accuracy of facts in its reports and to specify its liability; such guaranty not making it a credit guaranty company, within the meaning of Insurance Law, § 170, subd. 2, or amounting to any other form of insurance: *People v. May*, 162 App. Div. 215, 147 N. Y. S. 487. Railroad corporation maintaining a relief department for the relief of disabled employes who might become members thereof, and which guaranteed the fulfilment of its obligations and furnishing part of its relief fund, was held not to be engaged in the business of life or casualty insurance upon the cooperative or assessment plan within Insurance Law, § 201, and hence not required to comply with its provisions: *Colaizzi v. Pennsylvania R. Co.*, 208 N. Y. 275, 101 N. E. 859.

<sup>4</sup> *People v. Standard Plate Glass & Salvage Co.*, 156 N. Y. S. 1012.

<sup>5</sup> *Filley v. Illinois Life Ins. Co.*, 93 Kans. 193, 144 Pac. 257, L. R. A. 1915D, 134n.

<sup>6</sup> *Renschler v. State*, 90 Ohio 363, 107 N. E. 758, Ann. 1916C, 1014n; *State v. Globe Casket &c. Co.*, 82 Wash. 124, 143 Pac. 878, L. R. A. 1915B, 976.

<sup>7</sup> Plaintiff is not bound to prove terms of the contract between the defendant and the order in an action against defendant, which has assumed the obligations of a fraternal order: *Spande v. Western Life Indemnity Co.*, 68 Ore. 171, 136 Pac. 1189. Although the contract with the defendant was oral the beneficiary under insurance policy issued by a defunct insurance company and taken over by defendant was held entitled to recover: *Morgan v. Royal Ben. Society*, 170 N. Car. 75, 86 S. E. 975. Where the secretary of defendant fraternal society submitted a written proposal to insurer of deceased, to assume its obligations in consideration of a transfer of property of insurer, the delivery and acceptance of property and subsequent correspondence between plaintiff and defendant was held sufficient evidence of approval to make a *prima facie* case: *Witherow v. Mystic Tailors (Utah)*, 161 Pac. 1126.

<sup>8</sup> *Spande v. Western Life Indemnity Co.*, 68 Ore. 171, 136 Pac. 1189; *Contra, Alexander v. Bankers' Union*, 187 Ill. App. 469.

<sup>9</sup> Under a policy taken out by a father on the life of his minor son, which was payable to the "executors, administrators or assigns of the insured," the son was the person insured and the beneficiary, while the father had a right to the custody of the policy: *Burke v. Prudential Ins. Co.*, 221 Mass. 253, 108 N. E. 1069.

"insured" to designate the person whose life is covered, but ordinarily the words are synonymous.<sup>10</sup>

§ 4026. The insurer—Foreign corporations—State control.<sup>11</sup>—The legislature has authority to regulate the rates of insurance companies because they are affected with a public interest.<sup>12</sup>

§ 4035. Subrogation.<sup>13</sup>—The insurer is subrogated to the

<sup>10</sup> Thompson v. Northwestern Mut. Life Ins. Co., 161 Iowa 446, 143 N. W. 518.

<sup>11</sup> Insurance is a business affected with such public interest that it may be regulated by the state for the common good: La Tourette v. McMaster, 104 S. Car. 501, 89 S. E. 398; Wright v. State Mut. Life Ins. Co., 142 Ga. 764, 765, 83 S. E. 666; Clay v. Employers' Indemnity Co., 157 Ky. 232, 162 S. W. 1122; Hopkins v. Connecticut General Life Ins. Co., 158 N. Y. S. 79. It is within the police power of the state to create a state insurance board: Insurance Co. of North America v. Welch 49 Okla. 620, 154 Pac. 48. The legislature has authority to prescribe the form of insurance policies used within the state: Nalley v. Home Ins. Co., 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915A, 283n. The state has a right to exclude a foreign insurance company that has established a business in the state: Citizens' Ins. Co. v. Hebert, 139 La. 708, 71 So. 955. While the legislature may regulate the abuses of the insurance business, it can not create a monopoly in the business or authorize a public official to arbitrarily and capriciously give or withhold permission to pursue such business: Stern v. Metropolitan Life Ins. Co., 90 Misc. 129, 154 N. Y. S. 283. While the state has a right to supervise the business of insurance it is a legitimate business, in which any citizen of good character has a constitutional right to engage without arbitrary restriction: Stern v. Metropolitan Life Ins. Co., 90 Misc. 129, 154 N. Y. S. 283.

<sup>12</sup> German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. 612; Aetna Ins. Co. v. Lewis, 92 Kans. 1012, 142 Pac. 954.

An accident insurance company, insuring against loss of time resulting from injury, is not entitled to subrogation to the claim for damages against a railway company for negligently causing the injury: Suttles v. Railway Mail Assn., 156 App. Div. 435, 141 N. Y. S. 1024. An insurance company's right of subrogation to a claim against a tort-feasor is not barred by settlement between the tort-feasor and the owner for less than the damages, such settlement being only a defense pro tanto to the extent of the amount paid: Fire Assn. of Philadelphia v. Wells, 84 N. J. Eq. 484, 94 Atl. 619, L. R. A. 1916A, 1280n, Ann. Cas. 1917A, 1296n; Aetna Ins. Co. v. Hann, 196 Ala. 234, 72 So. 48.

<sup>13</sup> The insurers of a cargo can only claim as subrogees of the insured interest, and they have no greater right than the insured: The Rensalaer, 49 Ct. Cl. 1. An insurer, on paying a loss, is subrogated to the insured's claim against the wrongdoer causing the loss: Norwich Union Fire Ins. Soc. v. Bainbridge Grocery Co., 16 Ga. App. 432, 85 S. E. 622; Pittsburgh & C. R. Co. v. Home Ins. Co., 183 Ind. 355, 108 N. E. 525; Stevens v. Stewart-Warner Speedometer Corp., 223 Mass. 44, 111 N. E. 771; Smith v. Phoenix Ins. Co., 181 Mo. App. 455, 168 S. W. 831; Aetna Life Ins. Co. v. National Union Fire Ins. Co., 98 Nebr. 446, 153 N. W. 553; Fire Assn. v. Schellenger, 83 N. J. Eq. 144, 90 Atl. 240; Allen & C. Auto Renting Co. v. United Traction Co., 91 Misc. 531, 154 N. Y. S. 934; Powell v. Wake Water Co., 171 N. Car. 290, 88 S. E. 426, Ann. Cas. 1917A, 1302n; Milwaukee Mechanics' Ins. Co. v. Ramsey, 76 Ore. 570, 149 Pac. 542, Ann. Cas. 1917B, 1132n. The insurance

rights of the insured by operation of law and a subrogation receipt or other agreement is unnecessary.<sup>14</sup>

### § 4037. Form of the contract.<sup>15</sup>

company has right to pay mortgage and take an assignment or to become subrogated to rights of mortgagee in case there is no assignment where a fire policy is upon interest of mortgagee, and does not accrue to the benefit of the mortgagor: *Hackett v. Cash*, 196 Ala. 403, 72 So. 52; *Bateman v. Sarbach*, 89 Kans. 488, 132 Pac. 169; *Leyden v. Lawrence*, 80 N. J. Eq. 550, 85 Atl. 1134; *Stuyvesant Ins. Co. v. Reid*, 171 N. Car. 513, 88 S. E. 779. Without first paying the mortgagee the remainder of the mortgage debt the insurer held not entitled to be subrogated to the insured mortgagee's security: *Carroll v. Hartford Fire Ins. Co.*, 28 Idaho 466, 154 Pac. 985. Insurer who paid loss held entitled to bring suit in the name of insured against the one causing the fire: *Coffman v. Louisville & C. R. Co.*, 184 Ala. 474, 63 So. 527. Where an insurer has paid a loss on property destroyed by the negligence of a tort-feasor, the insurer is subrogated to the rights of the owner, and those rights are limited by those of the insured: *Fidelity Ins. Co. v. Atlantic Coast Line R. Co.*, 165 N. Car. 136, 80 S. E. 1069. Regardless of what might have been recovered under the policy, where an insurance company paid insurance on a house burned through the negligence of a railroad, and the insured assigned his cause of action to it, the measure of recovery in an action by the insurer is the full amount of the damage sustained: *Connecticut Fire Ins. Co. v. Chester & C. R. Co.*, 171 Mo. App. 70, 153 S. W. 544. The right of a marine insurer to subrogation on payment of a loss through collision arises in equity from the nature of the contract, and it is unnecessary that the policy carry a provision to that effect: *Federal Ins. Co. v. Detroit Fire & C. Ins. Co.*, 202 Fed. 648, 121 C. C. A. 58. The right of subrogation may be waived by contract: *Fire Assn. of Philadelphia v. Schellenger*, 84 N. J. L. 464, 94 Atl. 615. The insurer

waives its right to subrogation where an insurer indemnifies insured, with full knowledge of an antecedent settlement between him and a third person causing the injury: *Weaver v. New Jersey Fidelity & C. Ins. Co.*, 56 Colo. 112, 136 Pac. 1180, 51 L. R. A. (N. S.) 414. So where by the terms of a lease by a railroad company it was exempted from liability to the lessee for fires, the lessee's insurer can obtain no rights against the lessee upon the principle of subrogation: *New York Ins. Co. v. Chicago & C. R. Co.*, 159 Iowa 129, 140 N. W. 373.

<sup>14</sup> *Fire Assn. of Philadelphia v. Wells*, 83 N. J. Eq. 140, 90 Atl. 244.

<sup>15</sup> The use of the standard form of fire policy prescribed by Laws 1909, ch. 164, is compulsory, and its provisions not only constitute the contract between insurer and insured, but is also the law governing the rights of the parties: *Hronish v. Home Ins. Co.*, 33 S. Dak. 428, 146 N. W. 588. The company was liable where a fire insurance agent's clerk wrote a policy in the agent's absence, pursuant to his directions, and signed the agent's name, and accepted a portion of the premium, and the agent verbally ratified his acts, and accepted the balance of the premium before the loss, and delivered the policy: *Atlas Assur. Co., Limited v. Kettles*, 144 Ga. 306, 87 S. E. 1. The terms required by Insurance Act of New Jersey of 1907, to be inserted in life insurance policies should be a part of every contract of life insurance within the act: *Hollin v. Essex Mut. Ben. Assn.*, 88 N. J. L. 204, 96 Atl. 71. Pasting in policy, in space left for property description, a sheet left loose at one end, containing description of property and book warranty and iron safe and other clauses, was held to constitute a substantial compliance with Rev. Laws 1910, § 3481, subds. 4, 6: *Phoenix Ins. Co. v. Hall (Okla.)*, 158 Pac. 903. A life insurance policy, combining elements of accident insurance, which says, "This

§ 4039. **Statute of frauds.**—It is held that an insurance company can bind itself to issue a policy in the future by a preliminary oral contract.<sup>16</sup>

§ 4040. **Renewal by parol.**<sup>17</sup>—And an oral contract to renew a policy in the future is binding on the company.<sup>18</sup>

§ 4045. **Completion of the contract—Delivery of the policy.**<sup>19</sup>—The policy, as accepted by the insured, is the contract, though he did not know it was to contain an iron safe clause.<sup>20</sup>

provision is granted without additional cost to the insured," is held to comply with Stat. 1912, ch. 524, requiring that the policy "shall state the cost of such concessions to the insured": *Metropolitan Life Ins. Co. v. Hardison*, 220 Mass. 52, 107 N. E. 397. The signing of the bond by the employer is a condition precedent to liability of the company where a surety bond, guaranteeing an employer from larceny or embezzlement of an employé so provided: *Oklahoma Sash & Co. v. American Bonding Co. (Okla.)*, 153 Pac. 1151.  
<sup>16</sup> *National Live Stock Ins. Co. v. Cramer (Ind. App.)*, 114 N. E. 427.

<sup>17</sup> Where an insurance agent has apparent authority to transact the business intrusted to his care and no restriction on his authority has been brought home to the applicant, he can orally contract for the company to renew a policy: *National Live Stock Ins. Co. v. Cramer (Ind. App.)*, 114 N. E. 427; *Gresham v. Norwich Union Fire Ins. Society*, 157 Ky. 402, 163 S. W. 214; *Fireman's Fund Ins. Co. v. Searcy*, 157 Ky. 749, 163 S. W. 1103.

<sup>18</sup> *National Live Stock Ins. Co. v. Cramer (Ind. App.)*, 114 N. E. 427.

<sup>19</sup> See generally as to delivery and acceptance of policy, note in L. R. A. 1917E, 983. Though insured had not taken the policy from the bank when the loss occurred, where insured

merely ordered insurance on certain property which the agent said he would write and leave for him with a bank, it was held that the policy was not avoided by its stipulation that it should be avoided by existing insurance: *Springfield Fire & Ins. Co. v. Snowden*, 173 Ky. 664, 191 S. W. 439. When there is fraud in the application for, as well as in the procurement of the policy, it can not be said that the transmission of the policy to the agent is the same as a delivery to the insured, without considering whether there was that mutuality of agreement and intention which excuses the actual delivery: *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498. As soon as the policy is placed in the postoffice liability attaches, in the absence of notice of refusal on good grounds by the applicant to accept it as issued: *Williams v. Philadelphia Life Ins. Co.*, 105 S. Car. 305, 89 S. E. 675. Though the agent wrongfully fails to deliver the policy, when the insurer mails its policy to its agent for delivery to the applicant without contemplation of further action, liability attaches: *Williams v. Philadelphia Life Ins. Co.*, 105 S. Car. 305, 89 S. E. 675.

<sup>20</sup> *Merchants' & Fire Underwriters v. Brooks (Tex. Civ. App.)*, 188 S. W. 243.

## CHAPTER CXVIII

### INSURABLE INTEREST IN PROPERTY.

#### § 4056. Definition.<sup>1</sup>—An equitable owner of property has

<sup>1</sup> A carrier may insure the goods left in his charge, not only for his own benefit, but also for the benefit of the owners: *Symmers v. Carroll*, 207 N. Y. 632, 101 N. E. 698, 47 L. R. A. (N. S.) 196n, Ann. Cas. 1914C, 685. Irrespective of payments made to him by the owner, one who has contracted to furnish materials and erect a building has an insurable interest in the building: *Sammons v. American Home Fire Ins. Co.*, 94 S. Car. 366, 77 S. E. 1108, Ann. Cas. 1915B, 1095n; *Fuhrman v. Sun Ins. Office*, 180 Mich. 439, 147 N. W. 618, Ann. Cas. 1913A, 466n; *Hudson v. Glens Falls Ins. Co.*, 218 N. Y. 133, 112 N. E. 728, L. R. A. 1917A, 482n; *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Tex. Civ. App.), 167 S. W. 816. The mortgagee and owner of property may each obtain insurance upon his interest: *Kelley v. People's Nat. Fire Ins. Co.*, 181 Ill. App. 142; *Continental Ins. Co. v. Bair* (Ind. App.), 114 N. E. 763; *Dodge v. Grain Shippers' Mut. Fire Ins. Assn.*, 176 Iowa 316, 157 N. W. 955; *Gould v. Maine Farmers' Mut. Fire Ins. Co.*, 114 Maine 416, 96 Atl. 732, L. R. A. 1917A, 604n; *Stuyvesant Ins. Co. v. Reid*, 171 N. Car. 513, 88 S. E. 779. A lessee had an insurable interest where he leased certain land with the right of occupancy and with a provision that any improvement at the end of the lease should revert to the owner of the property, and he had the right of occupancy of the entire premises: *Home Ins. Co. v. Coker*, 43 Okla. 331, 142 Pac. 1195; *Richmond v. Kelsey*, 225 Mass. 209, 114 N. E. 319. But in Oregon it has been held that a lessee with the option to purchase real estate on which a building owned by them is situated has not the fee simple title to such real estate, within L. O. L. § 4666, providing that fire policies, unless otherwise provided, shall be void if the subject of insurance be a building

on ground the fee of which is not owned by the insured: *Finlon v. National Union Fire Ins. Co.*, 65 Ore. 493, 132 Pac. 712. A grain warehouseman has an insurable interest in merchandise which may be subsequently stored with him: *Johnson v. Stewart*, 243 Pa. 485, 90 Atl. 349. A receiver in bankruptcy has an insurable interest of the bankrupt's property: *Reiley v. Buffalo German Ins. Co.*, 86 Misc. 69, 147 N. Y. S. 1086. A postmaster held to have such an interest in government stamps for which he was required to account: *General Accident &c. Corporation v. Stratton*, 165 Ky. 754, 178 S. W. 1060. A steamship company does not have an insurable interest in the freight to be earned on a cargo which is being loaded at the time the covering agreement for insurance was executed under Civ. Code, § 2662, defining an insurable interest in freightage: *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 Pac. 807. Though a husband collects the rents and uses the money for his own purposes he has no insurable interest in the separate property of his wife: *Wisecup v. American Ins. Co.*, 186 Mo. App. 310, 172 S. W. 73; *La Font v. Home Ins. Co.*, 193 Mo. App. 543, 182 S. W. 1029; *Oatman v. Bankers' &c. Mut. Fire Relief Assn.*, 66 Ore. 388, 133 Pac. 1183, 134 Pac. 1033. But it is held that he has an insurable interest in the separate property of the wife where it is used by himself and family as a dwelling house: *Kludt v. German Mut. Fire Ins. Co.*, 152 Wis. 637, 140 N. W. 321, 45 L. R. A. (N. S.) 1131n, Ann. Cas. 1914C, 609n; *Funk v. Anchor Fire Ins. Co.*, 171 Iowa 331, 153 N. W. 1048. See also as to where husband or wife has insurable interest: *Hawkins v. Southwestern Mut. F. Ins. Co.* (W. Va.), 93 S. E. 873, L. R. A. 1918A, 789, and cases reviewed in note. No in-



an insurable interest therein though his legal title is not perfect.<sup>2</sup>

### § 4060. Continuity of interest.<sup>3</sup>

insurable interest is passed in property by a sale by one without title or interest: *Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090. The following are decisions of the question of insurable interest in human life or health: *Morrow v. National Life Assn.* 184 Mo. App. 308, 168 S. W. 881; *Thomas v. National Benefit Assn.*, 84 N. J. L. 281, 86 Atl. 375, 46 L. R. A. (N. S.) 779n, Ann. Cas. 1914D, 1121n; *In re Phillips' Estate*, 238 Pa. 423, 86 Atl. 289, 45 L. R. A. (N. S.) 982n; *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749n, Ann. Cas. 1915B, 677n; *Maxey v. Franklin Life Ins. Co.* (Tex. Civ. App.), 164 S. W. 438; *Overton v. Colored Knights of Pythias* (Tex. Civ. App.), 173 S. W. 472; *Mutual Life Ins. Co. v. Board, Armstrong & Co. Corporation*, 115 Va. 836, 80 S. E. 565; *Mutual Life Ins. Co. v. Board Motor Truck Co. Corporation*, 115 Va. 843, 80 S. E. 567. Based on affinity, a wife has an insurable interest in her husband and a husband in his wife, and based upon consanguinity, a father has an insurable interest in his child and a child in the life of its father: *Crismond's Admx. v. Jones*, 117 Va. 34, 83 S. E. 1045; *In re Cohen*, 230 Fed. 733; *Afro-American Life Ins. Co. v. Adams*, 195 Ala. 147, 70 So. 119; *Metropolitan Life Ins. Co. v. Nelson*, 170 Ky. 674, 186 S. W. 520, L. R. A. 1917C, 1n; *Lawler v. Home Life Ins. Co.*, 59 Pa. Super. Ct. 409; *Gaughan v. Home Life Ins. Co.*, 59 Pa. Super. Ct. 414. But a niece does not have an insurable interest in the life of an uncle because of the relationship: *Equitable Life Assur. Society v. O'Connor*, 162 Ky. 262, 172 S. W. 496. A son-in-law does not have an insurable interest in the life of his father-in-law; *Cris-*

*mond v. Jones*, 117 Va. 34, 83 S. E. 1045, Ann. Cas. 1917C, 155n. Divorce does not dissolve the insurable interest which a divorced wife has in a policy which has been assigned to her by her husband: *Humphrey v. Mutual Life Ins. Co.*, 86 Wash. 672, 151 Pac. 100.

<sup>2</sup> *Cummings v. Dirigo Mut. Fire Ins. Co.*, 112 Maine 379, 92 Atl. 298; *Padgett v. North Carolina Home Ins. Co.*, 98 S. Car. 244, 82 S. E. 409; *Scott v. Liverpool & Co. Globe Ins. Co.*, 102 S. Car. 115, 86 S. E. 484. See also *Crossman v. American Ins. Co.* (Mich.), 164 N. W. 428, L. R. A. 1918A, 390 (holder of option on property has insurable interest).

<sup>3</sup> A judgment annulling her marriage as void ab initio terminated the wife's insurable interest in the husband's life where a woman, living with a man as his wife under a formal but illegal marriage, had him procure a policy on his life containing a change of beneficiary clause and she paid the premiums therefor; *Ky. St. § 2121*, as to property restored on divorce "from the bond of matrimony," not applying: *Western & Co. Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271n. A woman was entitled to recover only the premiums paid with interest where she, after the termination of her insurable interest by divorce, continued until his death to pay premiums on a policy on his life in which she had been beneficiary: *Western & Co. Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271n. It is held in *Northwestern Mut. Life Ins. Co. v. Whiteselle* (Tex. Civ. App.), 188 S. W. 22, that a wife, on being divorced, ceased to have any interest as beneficiary in a policy on the husband's life.

## CHAPTER CXIX

### INSURABLE INTEREST IN LIVES

§ 4065. **Common-law rule.**<sup>1</sup>—If a policy was valid at its inception it is not invalidated by being assigned to one without an insurable interest.<sup>2</sup>

§ 4068. **The modern rule—Pecuniary interest not required.**<sup>3</sup>

§ 4071. **Continuance of interest in life.**<sup>4</sup>

<sup>1</sup> Under the code a contract of life insurance is void unless the beneficiary has an insurable interest in the life of the insured: *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749n, Ann. Cas. 1915B, 677n; *Prudential Ins. Co. v. Williams*, 113 Ark. 373, 168 S. W. 1114; *Moving Picture Co. v. Scottish Union &c. Ins. Co.*, 244 Pa. 358, 90 Atl. 642. A beneficiary having no insurable interest in the life of insured but paying the premium held entitled to recover on the policy, which was valid at its inception: *Langford v. National Life &c. Ins. Co.*, 116 Ark. 527, 173 S. W. 414, Ann. Cas. 1917A, 1081n. It is held in Louisiana that life insurance for the benefit of another, having no insurable interest therein, is not contrary to public policy: *New York Life Ins. Co. v. Murtagh*, 137 La. 760, 69 So. 165.

<sup>2</sup> *Foryciarz v. Prudential Ins. Co.*, 95 Misc. 306, 158 N. Y. S. 834; *In re Phillips' Estate*, 238 Pa. 423, 86 Atl. 289, 45 L. R. A. (N. S.) 982n, Ann. Cas. 1914C, 282n. Contra, see *Crismond v. Jones*, 117 Va. 34, 83 S. E. 1045, Ann. Cas. 1917C, 155n.

<sup>3</sup> "Insurable interest" is dependent upon the relationship of the parties, which must be such as will justify a reasonable expectation of advantage from the continuance of the life of the insured to the party obtaining the insurance: *Western &c. Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271n. See also notes in Ann. Cas. 1917C, 158; Ann. Cas. 1917E,

643; L. R. A. 1917C, 924. A policy of life insurance which names as beneficiary a person who has no insurable interest in the life of the insured, is void as being a wager policy: *Dresen v. Metropolitan Life Ins. Co.*, 195 Ill. App. 292. Unless the person taking it out has at that time an insurable interest in the life of the other a policy taken out on the life of another by one who pays the premium is void: *Western &c. Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271n. A contract of insurer made with stranger to insure another's life is void as against public policy: *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S. W. 1195. See also as to insurance of life of alien enemy, Ann. Cas. 1917C, 200. But insurance, taken out by the insured himself for the benefit of one who does not have an insurable interest in his life, is not void as against public policy: *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S. W. 1195. It is held in *Potvin v. Prudential Ins. Co.*, 225 Mass. 247, 114 N. E. 292, that it is not necessary that a beneficiary have an insurable interest in the absence of any evidence indicating a wagering contract.

<sup>4</sup> Though the insurable interest or relationship of the beneficiary has ceased, in absence of contrary stipulation, the designation of the beneficiary in a life policy, if valid in its inception, remains so: *Gibbs v. Knights of Pythias of Missouri*, 173 Mo. App. 34, 156 S. W. 11.

§ 4075. **Illustrations of insurable interest in life.**—It seems that a valid marriage is not essential where a man and woman live together as husband and wife, and that either has an insurable interest in the life of the other.<sup>5</sup> The statement by the insured is insufficient to show an insurable interest, where he states in his application for insurance that the reason for naming the beneficiary is because he contributes to her support and will care for her in case of her death.<sup>6</sup> It is held that a mere moral claim for support will not amount to an insurable interest.<sup>7</sup>

§ 4076. **Right of assignee without interest to recover premiums paid.**<sup>8</sup>

<sup>5</sup> *Western & Southern Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271n.

<sup>6</sup> *Dresen v. Metropolitan Life Ins. Co.*, 195 Ill. App. 292.

<sup>7</sup> *Dresen v. Metropolitan Life Ins. Co.*, 195 Ill. App. 292.

<sup>8</sup> Policy held invalid if procured and assigned under a wagering trans-

action between insured and person who was to pay premiums, but if nothing was done to carry out the agreement or if the assignment was merely intended to be security for money borrowed by insured to pay the premiums, it was valid: *Prudential Ins. Co. v. Williams*, 113 Ark. 373, 168 S. W. 1114.

## CHAPTER CXX

### NONDISCLOSURE OF MATERIAL FACTS

§ 4087. **Concealment — Definition.**<sup>1</sup> — It seems that the modern rule is that there must usually be a fraudulent concealment of a material fact to avoid a policy on the ground of concealment.<sup>2</sup>

§ 4092. **Where no written application is made.**<sup>3</sup> — If the agent knows that the premises are vacant or that other conditions exist which are contracted against by the terms of the policy, but nevertheless issues a policy, the terms are waived.<sup>4</sup>

§ 4093. **Incomplete answers to inquiries.**<sup>5</sup>

§ 4094. **Answers calculated to mislead.**<sup>6</sup>

§ 4096. **Materiality.**<sup>7</sup>

§ 4098. **Concealment or misrepresentation by agent.**<sup>8</sup> — A policy is void where the insured agreed with the soliciting agent

<sup>1</sup> Where there was no request for representation, declarations, warranties or medical examination on the part of the insurer, it was held that insurer could not stop payment of annuity to widow on ground that mental condition of insured was not disclosed where there was no request for representation, declaration, warranties or medical examination on the part of the insurer: *Helmbold v. Independent Order of Puritans*, 61 Pa. Super. Ct. 164.

<sup>2</sup> *Niagara Fire Ins. Co. v. Layne*, 170 Ky. 339, 185 S. W. 1136.

<sup>3</sup> The insurer waives a forfeiture by reason of an existing mortgage where there is no written application for fire insurance, and no questions asked of, nor statements made by, insured, and no knowledge by him that the existence of a mortgage on the property will avoid a policy: *Manufacturers' Mut. Fire Ins. Co. v. Swaney*, 53 Ind. App. 429, 101 N. E. 843.

<sup>4</sup> *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113; *Globe &c. Fire Ins. Co. v. Indiana Reduction Co.* (Ind. App.), 113 N. E. 425; *Tilton v. Farmers' Ins. Co.*, 82 Misc. 79, 143 N. Y. S. 107.

<sup>5</sup> The defects in the policy will not be available as a defense to an action on the policy where an application for credit insurance is clearly incomplete or ambiguous and the insurer issues the policy without demanding fuller information: *L. Black Co. v. London Guarantee &c. Co.*, 159 App. Div. 186, 144 N. Y. S. 424.

<sup>6</sup> There is no fraud in the procuring of a life policy made to a creditor because the debt owing to him is much less than the face of the policy where the application discloses that he was a creditor but making no statement or inquiry as to the amount of the debt: *Morrow v. National Life Assn.*, 184 Mo. App. 308, 168 S. W. 881.

<sup>7</sup> Any material misrepresentation in the application or wilful concealment of a material fact which would enhance the risk will invalidate the policy, though failure to state a material fact will not avoid a policy, unless such failure be fraudulent: *Empire Life Ins. Co. v. Jones*, 14 Ga. App. 647, 82 S. E. 62.

<sup>8</sup> Where the applicant indicates to the agent that she suffered with pains over the heart, the fact that false answers were entered by the agent in

to suppress the existence of a known disease, and falsely represented to the authorized medical examiner that he did not have such disease, from which he died within six months.<sup>9</sup>

the written application did not avoid the policy: *Groffinger v. Metropolitan Life Ins. Co.*, 183 Ill. App. 618; *California Reclamation Co. v. New Zealand Ins. Co.*, 23 Cal. App. 611, 138 Pac. 960; *Northwestern Mut. Life Ins. Co. v. Farnsworth*, 60 Colo. 324, 153 Pac. 699; *Cohen v. Home Ins. Co.* (Del. Super.), 97 Atl. 1014; *Eagleton v. Prudential Ins. Co.*, 193 Ill. App. 306; *Western Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45; *West v. National Casualty Co.* (Ind. App.), 112 N. E. 115; *Strickland v. Peerless Casualty Co.*, 112 Maine 100, 90 Atl. 974; *Equitable Life Assur. Society v. National Bank* (Mo. App.), 181 S. W. 1176; *Maryland Casualty Co. v. Gaffney Mfg. Co.*, 93 S. Car. 406, 76 S. E. 1089. Notwith-

standing a contrary provision in the application or policy, the knowledge of the local agents, who negotiated an insurance policy, is the knowledge of the company: *Schuler v. Metropolitan Life Ins. Co.*, 191 Mo. App. 52, 176 S. W. 274. When the agent had no interest in the property, friendly relations between insured and insurance agent and payment of the premium by the agent held not to show such collusion or fraud as prevented notice to the agent of incumbrances on the property, constituting notice to the company: *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848.

<sup>9</sup> *Mallen v. National Life Assn.*, 168 Mo. App. 503, 153 S. W. 1065.

## CHAPTER CXXI

### REPRESENTATIONS AND WARRANTIES

§ 4105. **Representations — Definition.** — Representations are statements collateral or incidental to the contract, or inducements thereto, rather than part of the contract itself in the sense that warranties are, and there is no guaranty or contract that they are literally true.<sup>1</sup>

§ 4106. **Warranties distinguished from representations.** — A warranty is a statement constituting a vital part of the contract and the truth of which must be fulfilled, while a representation is merely incidental or collateral.<sup>2</sup>

<sup>1</sup> *Nash v. Eddy*, 184 Ill. App. 375; *Merchant's Reserve Life Ins. Co. v. Richardson* (Ind. App.), 118 N. E. 576; *Commercial Bank v. American Bonding Co.*, 194 Mo. App. 224, 187 S. W. 99. *New York Insurance Law*, § 58, is construed to require that all statements made by the assured shall be set out and made to appear upon the face of the policy: *Archer v. Equitable Life Assur. Soc.*, 218 N. Y. 18, 112 N. E. 433.

<sup>2</sup> *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449; *Baltimore Life Ins. Co. v. Floyd* (Del.), 94 Atl. 515; *Johnson v. National Life Ins. Co.*, 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915A, 458n; *Gardner v. North State Mutual Life Ins. Co.*, 163 N. Car. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714n, Ann. Cas. 1915B, 652n; *Miller v. National Casualty Co.*, 62 Pa. Super. Ct. 417. See also *Mutual Life Ins. Co. v. Hilton Green*, 211 Fed. 31; *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 112 N. E. 350; *Farber v. American Automobile Ins. Co.*, 191 Mo. App. 307, 177 S. W. 675; *Guarantee Life Ins. Co. v. Evert* (Tex. Civ. App.), 178 S. W. 643. In some states statements in an application for life insurance, not incorporated in the policy, are representations and not warranties: *Mutual Life Ins. Co. v.*

*Morgan*, 39 Okla. 205, 135 Pac. 279. It is immaterial whether a promise to repair defects in insured property whose purpose is to reduce the risk, is a warranty or a representation, if the promise is by reference included in the contract of insurance and is relied on by the insurer: *Mendenhall v. Farmers' Ins. Co.*, 183 Ind. 694, 110 N. E. 60. In an application for life insurance the use of the word "warrant" is not conclusive as to whether statements of applicant therein will be considered as warranties or as representations and, if possible under any reasonable theory, they will be considered representations: *Teeplev. Fraternal Bankers' Reserve Society* (Iowa), 161 N. W. 102. The following are cases in which applicant's statements were held to be warranties: A representation made in an application for an accident policy that insured was in sound condition and had not been disabled or received medical or surgical attention within the past five years: *Rathman v. New Amsterdam Casualty Co.*, 186 Mich. 115, 152 N. W. 983, L. R. A. 1915E, 980, Ann. Cas. 1917C, 459n. A false statement in his application for a life policy, to the effect that he was then carrying insurance in no other company: *Floyd v. Metropolitan Life Ins. Co.* (Del. Super.), 90 Atl. 404; *Amer-*

§ 4107. **Affirmative and promissory warranties.**—Warranties, whether express or implied, are of two kinds, affirmative and promissory; the first is one relating to the existence of some fact before the making of the policy, and the second is one relating to the happening of some future event or the performance of some future act.<sup>3</sup>

ican Nat. Ins. Co. v. Anderson (Tex. Civ. App.), 179 S. W. 66. The following are cases in which statements of applicants were held to be representations: Applicant's statements in an application for an accident policy that he had an income of at least \$750 annually: *Murphy v. National Travelers' Benefit Assn.* (Iowa), 161 N. W. 57. Statements of an applicant for life insurance regarding diseases of which his relatives had died, and of which he is or has been afflicted: *New York Life Ins. Co. v. Moats*, 207 Fed. 481, 125 C. C. A. 143; *Teeple v. Fraternal Bankers Reserve Society* (Iowa), 161 N. W. 102. Answers by insured in his application for a life policy that he was then in good health: *Roedel v. John Hancock Mut. Life Ins. Co.*, 176 Mo. App. 584, 160 S. W. 44. Answers in application for fidelity bond as to correctness of agent's accounts in view of stipulations qualifying the provision that they were warranties: *Whinfield v. Massachusetts Bonding & Ins. Co.*, 162 Wis. 1, 154 N. W. 632. Statements by the insured as to his employer, his duties, and the beneficiary, under Insurance Law, § 58, declaring that all statements by the insured shall, in the absence of fraud, be deemed representations, and not warranties: *Moore v. Prudential Casualty Co.*, 170 App. Div. 849, 156 N. Y. S. 892. Where insured, before receiving a policy, was required to execute a certificate of continued good health, such certificate was a representation: *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768. Statement in renewal receipt upon fidelity bond that the employé was not then in default, not made a warranty by any terms of contract: *Commercial Bank v. American Bonding Co.*, 194 Mo. App. 224, 187 S. W. 99. Statement in application for policy of life insurance that the beneficiary was the

applicant's uncle held not intended as a warranty: *Baltimore Life Ins. Co. v. Floyd* (Del.), 94 Atl. 515. A statement, in an application for accident insurance, that the applicant's habits of life were correct and temperate is a representation rather than a warranty: *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845. The following cases are illustrative of representations material to the risk: A representation that an automobile, insured against fire to the amount of \$1,750, cost \$2,000: *Farber v. American Automobile Ins. Co.*, 191 Mo. App. 307, 177 S. W. 675. Under insurance Code 1911, § 34, it being presumed that one who makes a false representation knowing it to be false does so with intent to deceive, where deceased concealed the fact that he had syphilis in his application for a policy: *Quinn v. Mutual Life Ins. Co.*, 91 Wash. 543, 158 Pac. 82. Where an applicant for insurance falsely represented that within a year he had not been intimately associated with any one suffering from a transmissible disease, unless the insurer waived the same with full knowledge of the facts: *Gardner v. North State Mut. Life Ins. Co.*, 163 N. Car. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714n, Ann. Cas. 1915B, 652n.

<sup>3</sup> *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449; *Wilson v. Commercial Union Assur. Co.*, 90 Vt. 105, 96 Atl. 540 (and an affirmative warranty has the effect of a condition precedent). Provisions in policies, requiring the taking of an inventory, the keeping of regular books, and their preservation in an iron safe, and the like, are promissory warranties which must be strictly performed or the insured can not recover: *Hartford Fire Ins. Co. v. Farris*, 116 Va. 880, 83 S. E. 377. For illustrative cases as to what is or is not sufficient compliance with

§ 4108. **Effect of breach of warranty.**—In the absence of any statutory provision to the contrary, such as is found in some jurisdictions, a breach of warranty ordinarily avoids the policy,

such provisions, see: *Queen of Arkansas Ins. Co. v. Malone*, 111 Ark. 229, 163 S. W. 771; *Royal Ins. Co. v. Morgan*, 122 Ark. 243, 183 S. W. 198; *Cohen v. Home Ins. Co.* (Del. Super.), 97 Atl. 1014; *Finleyson Bros. v. Liverpool &c. Globe Ins. Co.*, 16 Ga. App. 51, 84 S. E. 311; *Hammond v. Niagara Fire Ins. Co.*, 92 Kans. 851, 142 Pac. 936, L. R. A. 1915F, 759n; *Miller v. Home Ins. Co.*, 127 Md. 140, 96 Atl. 267; *Phoenix Ins. Co. v. Bourgeois*, 105 Miss. 698, 63 So. 212; *Georgia Life Ins. Co. v. Friedman*, 105 Miss. 789, 63 So. 214; *Penix v. American Cent. Ins. Co.*, 106 Miss. 145, 63 So. 346; *Pace v. American Cent. Ins. Co.*, 173 Mo. App. 485, 158 S. W. 892; *Gruening v. Fidelity &c. Co.* (Mo. App.), 184 S. W. 936; *Ennis v. Retail Merchants' Assn. Mut. Fire Ins. Co.*, 33 N. Dak. 20, 156 N. W. 234; *Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co.*, 37 Okla. 213, 131 Pac. 691; *Wadleigh v. Home Ins. Co.*, 38 Okla. 316, 132 Pac. 1111; *Scottish Union &c. Ins. Co. v. Cornett Bros.*, 42 Okla. 645, 142 Pac. 315; *Fire Assn. of Philadelphia v. Cornett Bros.*, 42 Okla. 703, 142 Pac. 317; *Scottish Union &c. Ins. Co. v. Moore Mill & Gin Co.*, 43 Okla. 370, 143 Pac. 12; *Hanover Fire Ins. Co. v. Eisman*, 45 Okla. 639, 146 Pac. 214; *Royal Ins. Co. v. Scritchfield* (Okla.), 152 Pac. 97; *Springfield Fire &c. Ins. Co. v. Halsey* (Okla.), 153 Pac. 145; *Brown v. Connecticut Fire Ins. Co.* (Okla.), 153 Pac. 173; *Dickey v. Springfield Fire &c. Ins. Co.* (Okla.), 156 Pac. 204; *Springfield Fire &c. Ins. Co. v. Hays* (Okla.), 156 Pac. 673; *Queen Ins. Co. v. Dalrymple* (Okla.), 158 Pac. 1154; *Kaplan v. Manufacturers' &c. Fire Ins. Co.*, 55 Pa. Super. Ct. 8; *Hartford Fire Ins. Co. v. Walker* (Tex. Civ. App.), 153 S. W. 398; *National Union Fire Ins. Co. v. Walker* (Tex. Civ. App.), 156 S. W. 1095; *Hartford Fire Ins. Co. v. Adams* (Tex. Civ. App.), 158 S. W. 231; *Mechanics' &c. Ins. Co. v. Davis* (Tex. Civ. App.), 167 S. W. 175; *State Mut. Fire Ins. Co. v. Kellner*

(Tex. Civ. App.), 169 S. W. 636; *Royal Ins. Co. v. Okasaki* (Tex. Civ. App.), 177 S. W. 200; *Camden Fire Ins. Co. v. Yarbrough* (Tex. Civ. App.), 182 S. W. 66; *Commonwealth Ins. Co. v. Finegold* (Tex. Civ. App.), 183 S. W. 833; *Fisher v. Sun Ins. Co.*, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619; *Houseman v. Globe &c. Fire Ins. Co.*, 78 W. Va. 586, 89 S. E. 269. For "watchman" clause and what is sufficient compliance, see: *Therault v. California Ins. Co.*, 27 Idaho 476, 149 Pac. 719, Ann. Cas. 1917D, 818n; *Therault v. Springfield Fire & Marine Ins. Co.*, 27 Idaho 485, 149 Pac. 722; *St. Paul Fire &c. Ins. Co. v. Kendle*, 163 Ky. 146, 173 S. W. 373; *Frick v. Millers' Nat. Ins. Co.* (Mo.), 184 S. W. 1161; *Axe v. Fidelity &c. Co.*, 239 Pa. 569, 86 Atl. 1095, 46 L. R. A. (N. S.) 574; *Mannheim Ins. Co. v. Charles Clarke & Co.* (Tex. Civ. App.), 157 S. W. 291. Only when the language is so clear and definite as to leave the court no other alternative, will statements in an application for insurance be construed as warranties: *Nash v. Eddy*, 184 Ill. App. 375; *E. H. Stanton Co. v. Rochester German Underwriters' Agency*, 206 Fed. 978; *Padgett v. North Carolina Home Ins. Co.*, 98 S. Car. 244, 82 S. E. 409; *Hunter v. United States Fidelity &c. Co.*, 129 Tenn. 572, 167 S. W. 692; *Wilson v. Commercial Union Assur. Co.*, 90 Vt. 105, 96 Atl. 540. The law does not favor forfeitures of policies for purely technical violations: *Georgia Life Ins. Co. v. Friedman*, 105 Miss. 789, 63 So. 214. The common-law rule that a breach of an express warranty voids the policy, whether material or not, is changed under Civ. Code, §§ 2608, 2610, and 2611, providing for the avoidance of an insurance policy for the breach of a material warranty, and applies to express as well as implied warranties: *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 Pac. 807. A "warranty" is any statement material or not which the parties have expressly agreed is



even though it may not be otherwise regarded as material.<sup>4</sup> But a breach of warranty as to one class of property covered by a fire insurance contract, where it is divisible, will not affect the insurance on the other property.<sup>5</sup>

**§ 4110. Application made part of policy.**—The application is usually made part of the contract, and, in case of a mutual

true: *Kasprzyk v. Metropolitan Life Ins. Co.*, 79 Misc. 263, 140 N. Y. S. 211.

<sup>4</sup> *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449; *Brotherhood of American Yeomen v. Fordham*, 120 Ark. 605, 180 S. W. 206; *Baltimore Life Ins. Co. v. Floyd (Del.)*, 94 Atl. 515; *Grant v. Mutual Protective League*, 192 Ill. App. 4; *Hermann v. Court of Honor*, 193 Ill. App. 366; *Sovereign Camp of Woodmen of the World v. Latham*, 59 Ind. App. 290, 107 N. E. 749; *Supreme Lodge of Modern American Fraternal Order v. Miller*, 60 Ind. App. 269, 110 N. E. 556; *National Live Stock Ins. Co. v. Owens (Ind. App.)*, 113 N. E. 1024; *Murphy v. National Travelers' Benefit Assn. (Iowa)*, 161 N. W. 57; *McManus v. Peerless Casualty Co.*, 114 Maine 98, 95 Atl. 510; *Citizens' Nat. Life Ins. Co. v. Swords*, 109 Miss. 635, 68 So. 920; *Daffron v. Modern Woodmen of America*, 190 Mo. App. 303, 176 S. W. 498; *Kribs v. United Order of Foresters*, 191 Mo. App. 524, 177 S. W. 766; *Commercial Bank v. American Bonding Co.*, 194 Mo. App. 224, 187 S. W. 99; *Hill v. Business Men's Accident Assn. (Mo. App.)*, 189 S. W. 587; *Klein v. Supreme Council of Loyal Assn.*, 92 Misc. 216, 155 N. Y. S. 580; *Robinson v. Brotherhood of Locomotive Firemen and Engineers*, 170 N. Car. 545, 87 S. E. 537; *Sovereign Camp v. Gallagher*, 1 Ohio App. 368, 35 Ohio Cir. Ct. 271; *Owen v. United States Surety Co.*, 38 Okla. 123, 131 Pac. 1091; *National Council, Knights and Ladies of Security v. Owen*, 47 Okla. 464, 149 Pac. 231; *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498; *McKnelly v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N. W. 169. It is held in *Johnson v. Rhode Island Ins. Co.*, 172 N. Car. 142, 90

S. E. 124, that the trend of modern authority is that a stipulation in a policy which might avoid it does not do so if it in no way contributes to the loss, and if conditions provided for therein do not exist at the time of the loss as courts look with disfavor upon forfeitures. The Kentucky statute, which declares that misrepresentations in insurance application, unless material or fraudulent, shall not prevent recovery, is intended to prevent loss of indemnity on warranties not fraudulent or material: *Kentucky Live Stock Ins. Co. v. McWilliams*, 173 Ky. 92, 190 S. W. 697; *Collins v. Casualty Co.*, 224 Mass. 327, 112 N. E. 634, L. R. A. 1916E, 1203. As statements of family history in an application can not be held to be warranties, such statements, when believed to be true, would not necessarily vitiate a certificate, warranting truth of applicant's answers: *Loesch v. Supreme Tribe of Ben Hur (Tex. Civ. App.)*, 190 S. W. 506. It is held that a warranty of good health is not disproved in an application for membership in a beneficial association where it appears that the applicant had slight troubles and infrequent and light attacks of sickness, not of such character to produce bodily infirmity or serious impairment, or derangement of vital organs: *Csizik v. Verhovay Sick Benefit Assn.*, 60 Pa. Super. Ct. 466. Where a woman who, under the terms of her certificate, when applying for reinstatement, warranted that she was in good health, although suffering at the time with valvular heart trouble, but not knowing it, this was not a breach of such warranty: *Greenwood v. Royal Neighbors of America*, 118 Va. 329, 87 S. E. 581.

<sup>5</sup> *National Union Fire Ins. Co. v. Cubberly*, 68 Fla. 253, 67 So. 133.

benefit association, its constitution and by-laws together with the benefit certificate and the application constitute the contract of insurance.<sup>6</sup> But, under some statutes, statements in an application are not considered part of the policy, and their falseness will not avoid it, unless the application or such part thereof is indorsed upon or attached to the policy.<sup>7</sup>

§ 4111. **Construction.**—Where the words used in an application for insurance permit two interpretations, that most favorable to the insured will be adopted. A warranty in an application is created only by the most unequivocal language.<sup>8</sup>

§ 4113. **Mistake—Good faith answer.**<sup>9</sup>

<sup>6</sup> *Love v. Modern Woodmen of America*, 259 Ill. 102, 102 N. E. 183; *Dromgold v. Royal Neighbors of America*, 261 Ill. 60, 103 N. E. 584; *Pride v. Switchmen's Union of North America*, 178 Ill. App. 434; *Gurley v. Massac County Mut. Relief Assn.*, 186 Ill. App. 492; *Sovereign Camp of Woodmen of the World v. Latham*, 59 Ind. App. 290, 107 N. E. 749; *Stitt v. Locomotive Engineers' Mut. Protective Assn.*, 177 Mich. 207, 142 N. W. 1110; *Newman v. Supreme Lodge, Knights of Pythias*, 110 Miss. 371, 70 So. 241, L. R. A. 1916C, 1051; *Daffron v. Modern Woodmen of America*, 190 Mo. App. 303, 176 S. W. 498.

<sup>7</sup> *New York Life Ins. Co. v. Hamburger*, 174 Mich. 254, 140 N. W. 510; *Murphy v. Colonial Life Ins. Co.*, 83 Misc. 475, 145 N. Y. S. 196; *Linzee v. Frankfort General Ins. Co.*, 162 App. Div. 282, 147 N. Y. S. 606; *Mees v. Pittsburgh Life & Trust Co.*, 169 App. Div. 86, 154 N. Y. S. 660; *Archer v. Equitable Life Assur. Soc. of United States*, 218 N. Y. 18, 112 N. E. 433; *Arnold v. New York Life Ins. Co.*, 131 Tenn. 720, 177 S. W. 78. It was held in an Illinois case that the application was not sufficiently incorporated in and made a part of the policy where an applicant signed the application and delivered it to the society, though directly beneath his signature was the following printed words: "A copy of your application for membership is attached to this certificate. Read it. If any answer or statement therein is not

correct, notify the head clerk at once"; *Turner v. Modern Woodmen of America*, 186 Ill. App. 404. And see generally under other statutes: *Metropolitan Life Ins. Co. v. Burch*, 39 App. D. C. 397; *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655; *Pacific Mut. Life Ins. Co. v. Barnes*, 35 Ohio Cir. Ct. 380; *Grell v. Sam Houston Life Ins. Co. (Tex. Civ. App.)*, 157 S. W. 757. Where an application or other collateral instrument is not made part of the policy, a statement therein and not in the policy is generally regarded as a representation rather than a warranty even though the words would constitute a warranty if they were in the policy itself: *Merchants' Reserve Life Ins. Co. v. Richardson (Ind. App.)*, 118 N. E. 576; *Prudential Ins. Co. v. Sellers*, 54 Ind. App. 326, 102 N. E. 894.

<sup>8</sup> *National Live Stock Ins. Co. v. Owens (Ind. App.)*, 113 N. E. 1024; *Goldberg v. Massachusetts Bonding & Co.*, 97 Misc. 10, 160 N. Y. S. 1089. See also *Nash v. Eddy*, 184 Ill. App. 375; *Merchants' Reserve Life Ins. Co. v. Richardson (Ind. App.)*, 118 N. E. 576.

<sup>9</sup> A warranty in a life insurance application for reinstatement was held to warrant against conditions impairing applicant's health only to the best of his knowledge and belief in: *Stanyan v. Security Mut. Life Ins. Co. (Vt.)*, 99 Atl. 417. But see post § 4118.

### § 4116. Affirmative and promissory warranties.<sup>10</sup>

§ 4118. **Effect of misrepresentation.**<sup>11</sup> — False material statements in an application for life insurance, known by the applicant to be untrue, avoid the policy,<sup>12</sup> and, as a general rule, at least where they constitute warranties, their falsity will avoid the policy even though they are made in good faith without knowledge that they are untrue.<sup>13</sup> But in some jurisdictions, generally by statute, the question as to whether false representations will avoid a policy is made to depend upon the intention with which they are made.<sup>14</sup>

<sup>10</sup> Where the policy does not provide that the insured shall be in good health at the date of delivery, representations made by an applicant as to his good health are not continuing representations, covering the period between the date of the application and the delivery of the policy: *New York Life Ins. Co. v. Moats*, 207 Fed. 481, 125 C. C. A. 143. It was held in *Wilson v. Commercial Union Assur. Co.*, 90 Vt. 105, 96 Atl. 540, that a promissory warranty in insurance contracts relates to matters arising after the policy is issued, and has the effect of a condition subsequent. The general subject has already been considered, ante § 4107.

<sup>11</sup> [Main section cited in *Supreme Lodge of Mod. American Fraternal Order v. Miller*, 60 Ind. App. 269, 273, 110 N. E. 556.]

<sup>12</sup> *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, 60 L. ed. 1202, 36 Sup. Ct. 676. See also *National Americans v. Ritch*, 121 Ark. 185, 180 S. W. 488; *Cunningham v. National Americans*, 123 Ark. 620, 185 S. W. 786; *Porter v. General Acc. Fire & C. Corp.*, 30 Cal. App. 198, 157 Pac. 825; *Commercial Bank v. American Bonding Co.*, 194 Mo. App. 224, 187 S. W. 99; *Kasprzyk v. Metropolitan Life Ins. Co.*, 79 Misc. 263, 140 N. Y. S. 211; *Gardner v. North State Mut. Life Ins. Co.*, 163 N. Car. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714n, Ann. Cas. 1915B, 652n; *Schas v. Equitable Life Assur. Society*, 166 N. Car. 55, 81 S. E. 1014; *Owen v. United States Surety Co.*, 38 Okla. 123, 131 Pac. 1091; *Sovereign Camp Woodmen of the World v. Lillard* (Tex. Civ. App.), 174 S. W. 619.

<sup>13</sup> *Etna Life Ins. Co. v. Moore*, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. 186; *Prudential Ins. Co. v. Moore*, 231 U. S. 560, 58 L. ed. 367, 34 Sup. Ct. 191; *Wolverine Brass Works v. Pacific Coast Casualty Co.*, 27 Cal. App. 183, 146 Pac. 184; *Germania Life Ins. Co. v. Klein*, 25 Colo. App. 326, 137 Pac. 73; *Grand Fraternity v. Keatley*, 4 Del. 308, 88 Atl. 553; *Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090; *Rakov v. Bankers' Life Ins. Co.*, 162 N. Y. S. 539; *Van Woert v. Modern Woodmen of America*, 29 N. Dak. 441, 151 N. W. 224; *Pacific Mut. Life Ins. Co. v. O'Neil*, 36 Okla. 792, 130 Pac. 270; *Bednarek v. Brotherhood of American Yeomen*, 48 Utah 67, 157 Pac. 884.

<sup>14</sup> *Baltimore Life Ins. Co. v. Floyd*, 5 Del. 431, 94 Atl. 515; *Donahue v. Mut. L. Ins. Co.*, 37 N. Dak. 203, 164 N. W. 50, L. R. A. 1918A, 300; *Post v. American Cent. Ins. Co.*, 51 Pa. Super. Ct. 352; *American Nat. Ins. Co. v. Anderson* (Tex. Civ. App.), 179 S. W. 66. See also *Eminent Household of Columbian Woodmen v. Gallant*, 194 Ala. 680, 69 So. 884; *Afro-American Life Ins. Co. v. Adams*, 195 Ala. 147, 70 So. 119; *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449; *Kentucky Live Stock Ins. Co. v. McWilliams*, 173 Ky. 92, 190 S. W. 697; *Moore v. Prudential Casualty Co.*, 170 App. Div. 849, 156 N. Y. S. 892; *Whinfield v. Massachusetts Bonding & Ins. Co.*, 162 Wis. 1, 154 N. W. 632. It was held in *Groffinger v. Metropolitan Life Ins. Co.*, 183 Ill. App. 618 that the evidence must show not only that the representations were material, but that

§ 4119. **Test of materiality.**—Although, in most jurisdictions, where the rule is not changed by statute, a false statement constituting a warranty may avoid a policy even though not material, it is otherwise where the statement is a mere representation; in such case the general rule is that the false representation must be material in order to avoid the policy.<sup>15</sup> A representation is material when it concerns a fact that would reasonably influence an insurer in determining whether to accept the risk or in fixing the amount of the premium.<sup>16</sup>

they were known by the insured to be false and were made with the intention to deceive, to defeat a recovery for false representations in the application. Unless substantial and material to the risk, a misrepresentation in application for insurance on an animal will not avoid the policy in the absence of bad faith: *National Live Stock Ins. Co. v. Owens* (Ind. App.), 113 N. E. 1024. See also *Murphy v. National Travelers' Benefit Assn.* (Iowa), 161 N. W. 57.

<sup>15</sup> *Atlas Life Assur. Co. v. Moman*, 14 Ala. App. 400, 69 So. 989; *Baltimore Life Ins. Co. v. Floyd*, 5 Del. 201, 91 Atl. 653; *Mutual Life Ins. Co. v. Morgan*, 39 Okla. 205, 135 Pac. 279; *Liverpool & Ins. Co. v. Lester* (Tex. Civ. App.), 176 S. W. 602; *Guarantee Life Ins. Co. v. Evert* (Tex. Civ. App.), 178 S. W. 643; *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498. And it is frequently held that fraud must be shown: *Prudential Ins. Co. v. Sellers*, 54 Ind. App. 326, 102 N. E. 894; *Fidelity Mut. Life Ins. Co. v. Elmore*, 111 Miss. 137, 71 So. 305. Where inquiry as to material matters is closed by false answers, such false answers may themselves be material: *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498. The question of materiality is not open to dispute where false representations are made in written answers to written questions as to prior sickness and treatment, in application, stating the answers are offered as inducement to issuance of policy: *Mutual Life Ins. Co. v. Leaksville Woolen Mills*, 172 N. Car. 534, 90 S. E. 574.

<sup>16</sup> *Empire Life Ins. Co. v. Jones*, 14 Ga. App. 647, 82 S. E. 62; *Schas v. Equitable Life Assur. Society*, 166

N. Car. 55, 81 S. E. 1014; *St. Paul Fire & Ins. Co. v. Huff* (Tex. Civ. App.), 172 S. W. 755. "Every fact which is untruly stated or wrongfully suppressed in an application for insurance must be regarded as material, if knowledge or ignorance thereof would reasonably influence the underwriter in estimating the character of the risk, or in fixing the premium": *Gardner v. North State Mut. Life Ins. Co.*, 163 N. Car. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714n, Ann. Cas. 1915B, 652n. See for representations held material: *Elliot v. Frankfort Marine Ins. Co. of Frankfort-on-the-Main*, 172 Cal. 261, 156 Pac. 481, L. R. A. 1916F, 1026n; *Grand Fraternity v. Keatley*, 4 Del. 308, 88 Atl. 553; *Sowiczki v. Modern Woodmen of America*, 192 Mich. 265, 158 N. W. 891; *Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113; *Commercial Bank v. American Bonding Co.*, 194 Mo. App. 224, 187 S. W. 99; *Goldstein v. New York Life Ins. Co.*, 162 N. Y. S. 1088; *Marshall v. Locomotive Engineers' Mut. Life & Ins. Assn.* (W. Va.), 90 S. E. 847; *Peterson v. Independent Order of Foresters*, 162 Wis. 562, 156 N. W. 951. In the following cases statements were held to be immaterial and not to avoid the policy: *Eureka Life Ins. Co. v. Hawkins*, 39 App. D. C. 329; *Baltimore Life Ins. Co. v. Floyd*, 5 Del. 201, 91 Atl. 653; *Linzee v. Frankfort General Ins. Co.*, 162 App. Div. 282, 147 N. Y. S. 606; *Moore v. Prudential Casualty Co.*, 170 App. Div. 849, 156 N. Y. S. 892; *Vinginer v. Commercial Casualty Ins. Co.*, 156 N. Y. S. 573; *Miller v. National Casualty Co.*, 62 Pa. Super. Ct. 417; *Liverpool & Ins. Co. v. Lester* (Tex. Civ. App.),

§ 4122. Statutory provisions.<sup>17</sup>

176 S. W. 602; *McPherson v. Camden Fire Ins. Co.* (Tex. Civ. App.), 185 S. W. 1055; *Blackstone v. Kansas City Life Ins. Co.*, 107 Tex. 102, 174 S. W. 821; *Peterson v. Time Indemnity Co.*, 152 Wis. 562, 140 N. W. 286; *Pagel v. United States Casualty Co.*, 158 Wis. 278, 148 N. W. 878. Recovery will not be defeated on benefit certificate stipulating that insured be "in good health" when policy is delivered by the fact that he had a slight cold when the certificate was delivered to him, which developed into pneumonia, causing death: *Sovereign Camp of Woodmen of the World v. Jackson* (Okla.), 157 Pac. 92. See also *National Council Knights and Ladies of Security v. Owen* (Okla.), 161 Pac. 178; *Witherow v. Mystic Toilers* (Utah), 161 Pac. 1126.

<sup>17</sup> The provision of the Alabama statute relating to warranties and representations should be liberally construed in favor of the insured so as to avoid forfeiture for breach of immaterial warranties: *Metropolitan Life Ins. Co. v. Goodman*, 196 Ala. 304, 71 So. 409; *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 So. 449. Minnesota Act of 1895 (Rev. Laws 1905, § 1623) makes material representation with intent to defraud avoid a standard insurance policy in the form prescribed by Laws 1907 (Rev. Laws Supp. 1909, § 1695,

subd. 6, par. 4): *Johnson v. National Life Ins. Co.*, 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915A, 458n. Section 3784 of Oklahoma Comp. Laws 1909, which provides that statements made in an application for insurance shall be deemed representations and not warranties, is within the police power of the state: *Continental Casualty Co. v. Owen* (Okla.), 131 Pac. 1084. And said section can not be evaded by indorsing such statements upon the policy, which also contains a provision stating that it is issued in consideration of such statements, and that they are warranted to be true: *Continental Casualty Co. v. Owen* (Okla.), 131 Pac. 1084. See also for other decisions as to effect of provisions in various state statutes: *McAlpine v. Fidelity &c. Co.*, 134 Minn. 192, 158 N. W. 967; *Metropolitan Life Ins. Co. v. Stiewing* (Mo. App.), 155 S. W. 900; *Kribs v. United Order of Foresters*, 191 Mo. App. 524, 177 S. W. 766; *Archer v. Equitable Life Assur. Society*, 169 App. Div. 43, 154 N. Y. S. 519; *Arnold v. New York Life Ins. Co.*, 131 Tenn. 720, 177 S. W. 78; *National Life Assn. v. Hagelstein* (Tex. Civ. App.), 156 S. W. 353; *McPherson v. Camden Fire Ins. Co.* (Tex. Civ. App.), 185 S. W. 1055; *Whinfield v. Massachusetts Bonding & Ins. Co.*, 162 Wis. 1, 154 N. W. 632.

## CHAPTER CXXII

### THE PREMIUM

§ 4131. **Nature of premium.**<sup>1</sup>—After the death of the insured or the happening of the thing insured against no further premiums can be earned.<sup>2</sup>

§ 4132. **Obligation to pay premium.**<sup>3</sup>

§ 4133. **Payment — Condition precedent — Forfeiture.**<sup>4</sup>—Though a policy by its terms is incontestable and does not ex-

<sup>1</sup>The consideration for an insurance contract is generally called a premium, which is payable annually, semiannually, monthly, or weekly: *Commonwealth v. Metropolitan Life Ins. Co.*, 254 Pa. 510, 98 Atl. 1072.

<sup>2</sup>*American Surety Co. v. Cabell* (Okla.), 159 Pac. 352.

<sup>3</sup>A building superintendent who did not order an "owner's indemnity policy" assuring against damages under the Workmen's Compensation Act, and who in no way gave his consent to becoming a party thereto, held not liable for premium thereon. *Standard Acc. Ins. Co. v. Fischel*, 163 N. Y. S. 92.

<sup>4</sup>[Main section cited in *York v. Sun Ins. Office* (Ind. App.), 113 N. E. 1021, 1022, and quoted in *Liverpool &c. Ins. Co. v. Hinton* (Miss.), 77 So. 652, 654, 655.]

A failure to pay an insurance premium unless waived works a forfeiture: *Plumer v. Continental Casualty Co.*, 12 Ga. App. 594, 77 S. E. 917; *Sturm v. Green Bay &c. Fire Ins. Co.*, 154 Wis. 420, 143 N. W. 151. Failure to pay a note given for an insurance premium will not forfeit the policy, where forfeiture is not provided for, though the note stipulates that nonpayment at maturity will avoid the policy: *Columbian Nat. Life Ins. Co. v. Mulkey*, 13 Ga. App. 508, 79 S. E. 482; *Sims v. Jefferson Standard Life Ins. Co.*, 18 Ga. App. 347, 89 S. E. 445; *Shawnee Mut. Fire Ins. Co. v. Cannedy*, 36 Okla.

733, 129 Pac. 865, 44 L. R. A. (N. S.) 376. In the absence of contrary statutory provisions a stipulation in a life policy for its forfeiture for nonpayment of premiums at maturity is enforceable: *Public Savings Ins. Co. v. Coombes*, 59 Ind. App. 523, 108 N. E. 244; *Robinson v. Western Assur. Co.*, 211 Fed. 747; *Mutual Aid Union v. Wadley*, 125 Ark. 449, 188 S. W. 1168; *McEachern v. New York Life Ins. Co.*, 15 Ga. App. 222, 82 S. E. 820; *Miller v. Assured's Nat. Mut. Fire Ins. Co.*, 264 Ill. 380, 106 N. E. 203; *Dibrell v. Citizens' Nat. Life Ins. Co.*, 152 Ky. 208, 153 S. W. 428; *Noble v. Southern States Mut. Life Ins. Co.*, 157 Ky. 46, 162 S. W. 528; *Burke v. Prudential Ins. Co.*, 221 Mass. 253, 108 N. E. 1069; *Rocci v. Massachusetts Accident Co.*, 222 Mass. 336, 110 N. E. 972; *Fidelity Mut. Life Ins. Co. v. Oliver*, 111 Miss. 133, 71 So. 302; *Murphy v. Lafayette Mut. Life Ins. Co.*, 167 N. Car. 334, 83 S. E. 461; *McDonald v. Columbian Nat. Life Ins. Co.*, 253 Pa. 239, 97 Atl. 1086, L. R. A. 1916F, 1244n; *Parry v. Southeastern Life Ins. Co.*, 95 S. Car. 1, 78 S. E. 441; *Davis v. Home Ins. Co.*, 127 Tenn. 330, 155 S. W. 131, 44 L. R. A. (N. S.) 626; *Edington v. Michigan Mut. Life Ins. Co.*, 134 Tenn. 188, 183 S. W. 728; *Goddard v. Northwestern Mut. Fire Assn.*, 85 Wash. 585, 148 Pac. 893. Though the note provided that its nonpayment at maturity should ipso facto render the policy

pressly provide for forfeiture, yet when payment is conditioned on payment of the premiums, such payments are conditions precedent and the incontestability clause does not apply to the failure to pay premiums.<sup>5</sup>

§ 4134. **Manner, time and place of payment.**<sup>6</sup>—Subsequent payment of dues to a bank, which had no knowledge of the loss, after a fire had occurred, and which payment was not accepted by the company, did not render it liable.<sup>7</sup>

§ 4135. **The giving of a promissory note.**<sup>8</sup>—The insured can not defeat recovery in an action on a promissory note where

void, without notice, and the policy contained a general stipulation that it was made in consideration of the payment of the premium in advance the mere nonpayment of a premium note at its maturity did not forfeit the policy of insurance: *Fidelity Mut. Life Ins. Co. v. Goza*, 13 Ga. App. 20, 78 S. E. 735. Contra: *French v. Columbia Life & Co.*, 80 Ore. 412, 156 Pac. 1042. See *United States Annuity & Ins. Co. v. Peak*, 122 Ark. 58, 182 S. W. 565. Where at the time of death of employé the employer owed the employé money in excess of delinquent premium the insurer was not entitled to defeat a recovery for nonpayment of premiums: *Johnson v. Fidelity & Co.*, 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475n. That the premiums were never paid held no defense to a suit on a fire policy: *National Union Fire Ins. Co. v. Baltimore Asbestos Co.*, 122 Md. 121, 89 Atl. 408. The policy was in force when delivered if, though no premium was paid, the company trusted insured to pay the premium: *Pender v. North State Life Ins. Co.*, 163 N. Car. 98, 79 S. E. 293; *State Mut. Fire Ins. Co. v. Taylor* (Tex. Civ. App.), 157 S. W. 950.

<sup>5</sup> *Pope v. New York Life Ins. Co.*, 192 Mo. App. 383, 181 S. W. 1047.

<sup>6</sup> The payment of assessments to the agent of an insurance company who has apparent authority to make collections held sufficient: *McLaughlin v. National Protective Legion*, 184 Ill. App. 597; *Supreme Lodge K. P. v. Connelly*, 185 Ala. 301, 64 So. 362;

*Grand Camp Colored Woodmen v. Ware*, 107 Ark. 102, 153 S. W. 1114. A member of benefit society entitled to sick benefits which exceed overdue assessments held not subject to suspension and the society was bound to apply the benefits to prevent a forfeiture: *National Council & C. Mechanics v. Thomas*, 163 Ky. 364, 173 S. W. 813. Deposit of total amount of assessments collected by officer of mutual benefit society and without retaining commission held to be payment of assessments due on his own policies: *Knights of the Maccabees of the World v. Parsons* (Tex. Civ. App.), 179 S. W. 78. A mutual life insurance policy was held not to have lapsed for nonpayment of premium, where, when premium became due, there was a dividend sufficient to have paid a quarter's premium, which payment was authorized under the policy and before expiration of the quarter, the remainder of the premium was tendered: *Mutual Life Ins. Co. v. Henley*, 125 Ark. 372, 188 S. W. 829.

<sup>7</sup> *Wolff v. German-American Farmers' Mut. Ins. Co. (Okla.)*, 159 Pac. 480.

<sup>8</sup> The custom of an insurance company in dealing with its general agent in the matter of premiums may give the agent a right to accept notes for premium, he becoming liable to the company for its share thereof: *Cranston v. West Coast Life Ins. Co.*, 72 Ore. 116, 142 Pac. 762. Rev. Stat. 1911, art. 4741, requiring all premiums on life policies to be paid in advance, and article 4954, prohibit-

he has retained the policy, the policy being a sufficient consideration for the note."

§ 4136. **Payment after loss or death.**<sup>10</sup>

§ 4138. **Premium notes.**<sup>11</sup>—A policyholder who retains the policy for which he gave premium notes is estopped to claim that the notes were obtained by fraud.<sup>12</sup>

§ 4139. **Notice of time when premium is due.**<sup>13</sup>—A notice to the insured, which demands payment of a single amount,

ing discrimination as to the premiums charged, held not to avoid a policy because the company extended credit for, and received another's obligation as, payment of the first premium: *Amarillo Nat. Life Ins. Co. v. Brown* (Tex. Civ. App.), 166 S. W. 658. There was no liability on the note where an application to change an insurance policy and a note for the premium was subject to the insurer's acceptance, and before acceptance defendant countermanded the application: *Planters' Fire Ins. Co. v. Crockett*, 115 Ark. 606, 170 S. W. 1012. It is no defense to a suit on a premium note that the agent receiving the same had not registered and paid his state license tax: *Loyd v. Pollitt*, 144 Ga. 91, 86 S. E. 233.

<sup>9</sup> *Boykin v. Franklin Life Ins. Co.*, 14 Ga. App. 666, 82 S. E. 60; *Wadsworth v. Walsh*, 128 Minn. 241, 150 N. W. 870. But, where wheat was destroyed before the policy was issued, a note given for premium on a policy of hail insurance held void for want of consideration: *Van Arsdale-Oshourne Brokerage Co. v. Patterson* (Okla.), 154 Pac. 1131.

<sup>10</sup> The rights of the insured, under the policy, are not destroyed because of injury before payment is made where insured has been given an extension of time in which to pay renewal premiums: *West v. National Casualty Co.* (Ind. App.), 112 N. E. 115. It was held that the policy did not take effect, although delivered by the agent, where insured was examined for insurance, he appearing in perfect health, but he was taken with appendicitis before policy was delivered, and note given for premium was not paid before death: *Will-*

*iams v. Empire Life Ins. Co.*, 146 Ga. 246, 91 S. E. 44.

<sup>11</sup> Where fire insurance policy was issued for indivisible period of five years, for an indivisible premium of \$15 and a premium note for \$60, the note was as much a part of the consideration for insurance as the cash, so that it could not be claimed that there was no consideration for the note: *Continental Ins. Co. v. Phipps* (Mo. App.), 190 S. W. 994.

<sup>12</sup> *Northern Assur. Co. v. Meyer*, 194 Mich. 371, 160 N. W. 617.

<sup>13</sup> A forfeiture of the policy could not be declared for failure to pay dues where no notice was given if it was the custom to give insured notice of each demand for expense dues: *Ibs v. Hartford Life Ins. Co.*, 121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798n; *Mutual Life Ins. Co. v. Davis* (Tex. Civ. App.), 154 S. W. 1184. Since the policy, by-laws, and constitution of a mutual fire company required that a notice of advance assessments be made, mailing of notice held a condition precedent to avoiding policy for nonpayment of advance assessments: *Frakes v. Mutual Fire Co.*, 69 Ore. 217, 138 Pac. 224; *Mutual Aid Union v. Wadley*, 125 Ark. 449, 188 S. W. 1168; *Bange v. Supreme Council Legion of Honor of Missouri* (Mo. App.), 161 S. W. 652; *Flint v. Provident Life & Co.*, 215 N. Y. 254, 109 N. E. 248. A fraternal benefit society can not declare a forfeiture without giving such notice if it adopts the practice of doing so and leads its members to believe that notice will be given: *Loyal Protective Ins. Co. v. Walker*, 126 Ark. 296, 189 S. W. 1050. For nonpayment of an assessment notice



including both an illegal assessment and the legal dues, and states that unless such amount is paid by a day stated the policy will be forfeited, is not a sufficient notice as to dues.<sup>14</sup>

**§ 4140. Right to recover premiums paid.**<sup>15</sup>—It was held that where a school district, for the purpose of securing bonds, entered into unlawful contracts for policies on the lives of per-

must be given of the assessment and of the forfeiture, if not paid within five days, to forfeit a mutual fire policy under Code Supp. 1913, § 1759m: *Salmon v. Farm Property Mut. Ins. Assn.*, 168 Iowa 521, 150 N. W. 680; *Liesny v. Metropolitan Life Ins. Co.*, 86 Misc. 650, 148 N. Y. S. 1057. But it was held in New York that under Insurance Law, § 92, there can be no recovery on a life insurance policy where the insured died more than a year after default in paying a premium of which no notice was given, though the action was begun less than two years after default: *Liesny v. Metropolitan Life Ins. Co.*, 166 App. Div. 625, 151 N. Y. S. 1084. The insurer need not give insured notice of amount and when premium is due, in the absence of statute or express or implied agreement to do so, where the policy fixes definitely the amount of the premium and the time of payment: *Mills v. National Life Ins. Co.*, 136 Tenn. 350, 189 S. W. 691; *Loyal Protective Ins. Co. v. Walker*, 126 Ark. 296, 189 S. W. 1050.

<sup>14</sup> Where a notice to insured demanded payment of a single amount, which included an illegal assessment and the legal quarterly dues, and stated that unless such amount was paid by a day stated the policy would be forfeited, held not a sufficient notice as to the dues: *Ibs v. Hartford Life Ins. Co.*, 121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798n; *McCormack v. Security Mutual Life Ins. Co.*, 161 App. Div. 33, 146 N. Y. S. 613.

<sup>15</sup> There was no consideration for the premium paid and the insured was entitled to recover that amount with interest where a policy was void because the minds of the parties never met as to the house to be insured: *Dixie Fire Ins. Co. v. Wallace*, 153

Ky. 677, 156 S. W. 140, Ann. Cas. 1915C, 409n; *Seaback v. Metropolitan Life Ins. Co.*, 274 Ill. 516, 113 N. E. 862; *National Council of Knights and Ladies of Security v. Garber*, 131 Minn. 16, 154 N. W. 512; *Tuite v. Supreme Forest Woodmen Circle*, 193 Mo. App. 619, 187 S. W. 137; *Grabinski v. United States Annuity &c. Ins. Co.*, 33 S. Dak. 300, 145 N. W. 553. It is the settled law of this state that the holder of a policy of life insurance who is induced by fraud and misrepresentation may, by an action brought in due time, recover from the insurance company the amount of premiums paid, with interest, and without deduction for intervening insurance which he has had and enjoyed: *Provident Savings Loan Assur. Co. v. Statler*, 34 Ohio Cir. Ct. 391. Where insured in a fire policy rendered a policy void by breaching a warranty he may not recover any part of the premium: *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655; *Criscuolo v. Società Monarchica Di Mutuo Soccorso Vittoria Emanuele III*, 89 Conn. 249, 93 Atl. 532; *Plummer v. Insurance Co.*, 114 Maine 128, 95 Atl. 605; *Waltz v. Workmen's Sick &c. Benefit Fund*, 141 N. Y. S. 578. The plaintiff was entitled to recover premiums paid as money paid to his use where an insurance company issued a policy for less than the regular premium to plaintiff, who paid the specified premiums for a number of years, when the insurance company canceled the policy as violative of Revisal 1905, § 4775, the parties not being in *pari delicto*: *Robinson v. Security Life &c. Co.*, 163 N. Car. 415, 79 S. E. 681; *Supreme Council Catholic Knights v. Fenwick*, 169 Ky. 269, 183 S. W. 906; *Titlow v. Reliance Life Ins. Co.*, 246 Pa. 503, 92 Atl. 747. Unless the contract has been

sons in which it had no insurable interest, it can not recover the amounts paid from the insurance company.<sup>16</sup>

§ 4141. **Dues and assessments.**<sup>17</sup>—Although the assured pays

rescinded an applicant for life insurance can not recover an advanced premium, where he has refused to submit to a medical examination provided for by the application and requested by the company: *Witt v. Old Line Bankers' Life Ins. Co.*, 94 Nebr. 748, 144 N. W. 801. On the death of insured dues and premiums already paid can not be recovered where insured did not promptly notify a mutual company of his election to rescind, and, subsequent assessments being unpaid, insured's interest as a member was distributed among other members: *West End Trust Co. v. Fidelity Mut. Life Ins. Co.*, 253 Pa. 619, 98 Atl. 768. Unless waived the repayment of the proper proportion of the premium was essential to a valid cancellation under a provision of a policy authorizing cancellation and providing that the unearned portion of the premium should be returned: *Polemanakos v. Austin Fire Ins. Co.* (Tex. Civ. App.), 160 S. W. 1134. Insured, who, paid excessive premiums on his life policy voluntarily and without fraud or duress, though under protest, held unable to recover the excess: *Rosenfeld v. Boston Mut. Life Ins. Co.*, 222 Mass. 284, 110 N. E. 304. Where one, not a beneficiary, makes voluntary payments of premiums he can not recover them: *Lawson v. United Benev. Assn.* (Tex. Civ. App.), 185 S. W. 976. The surrender of the policy was a condition precedent to the return of an unearned premium where an insurance policy provided that it should be void if the premises remained vacant for 10 days, and that in such case the unearned premium should be returned: *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Nebr. 43, 144 N. W. 1044, 51 L. R. A. (N. S.) 261n. The administratrix of decedent's estate could not recover half of the advance premium where the trustee died after six months where the risk attached under a surety bond of a county trustee for one year: *Crouch*

*v. Southern Surety Co.*, 131 Tenn. 260, 174 S. W. 1116, L. R. A. 1915D, 966, Ann. Cas. 1916C, 1220n.

<sup>16</sup> *Security Mut. Life Ins. Co. v. Little*, 119 Ark. 498, 178 S. W. 418, L. R. A. 1917A, 475n; *Dresen v. Metropolitan Life Ins. Co.*, 195 Ill. App. 292.

<sup>17</sup> A suit in equity can be maintained against officers of voluntary insurance association to compel them to levy an assessment for the purpose of paying a loss, duly proved and adjusted, as provided by the contract: *Kimball v. Lower Columbia Fire Relief Assn.*, 67 Ore. 249, 135 Pac. 877. It was held that the executive officers lacked power to levy assessments unauthorized by the directors or the by-laws where an insurance company's charter intrusted all its affairs to a board of directors and the making of by-laws to the stockholders: *Barber v. Hartford Life Ins. Co.*, 269 Mo. 21, 187 S. W. 867, 874. An assessment by a mutual insurance company to pay a loss is not invalid because it has made refunds on premiums paid, but for which the assessment would be unnecessary; and this irrespective of the validity of the refunds, and of the liability of those who have received them to return them and of the directors for having made them: *Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 Conn. 667, 86 Atl. 573. It is proper for a mutual insurance company to include a reasonable estimated sum to cover the cost of collection of assessments and also the expenses incident to adjustment of the amount of the loss in an assessment for losses: *Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 Conn. 667, 86 Atl. 573. A mutual insurance company can make an assessment to cover more than one loss; and where a person having had two policies, one in force a part of the time of the losses, the other another part of such time, it may make a single assessment against him, covering the sum of his liabilities under

one illegal assessment, he is not estopped thereby from refusing to continue to pay the illegal exaction.<sup>18</sup>

**§ 4142. Liability to assessment.**—An assessment to cover a loss which occurred while a policy was in force may be made after the expiration of the term under the charter and policy of a mutual insurance company.<sup>19</sup>

**§ 4143. Effect of nonpayment of assessment.**<sup>20</sup>

**§ 4147. Reinstatement.**<sup>21</sup>

**§ 4148. Waiver—Estoppel.**<sup>22</sup>—The holder of a certificate of a benefit association who pays illegal assessments rather than

the two: *Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 Conn. 667, 86 Atl. 573. Assessments levying a greater rate upon members in one locality than in another can not be enforced where a mutual hail and cyclone insurance company is required by Gen. Stat. 1913, §§ 3307, 3414, to make assessments on all members liable thereto pro rata: *Minnesota Farmers' Mut. Ins. Co. v. Landkammer*, 126 Minn. 245, 148 N. W. 305; *Minnesota Farmers' Mut. Ins. Co. v. Sweet*, 126 Minn. 528, 148 N. W. 306.

<sup>18</sup> *Gibson v. Iowa Legion of Honor (Iowa)*, 159 N. W. 639.

<sup>19</sup> *Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 Conn. 667, 86 Atl. 573; *Patrons' Mut. Fire Ins. Co. v. Butler*, 193 Mich. 648, 160 N. W. 402; *Bennett v. Beavers Reserve Fund Fraternity*, 159 Wis. 145, 150 N. W. 181.

<sup>20</sup> Notice of forfeiture before time for payment has expired is insufficient where the notice required by Laws 1913, ch. 212, of cancellation for forfeiture of life policies, is of intention to forfeit under accrued right: *Priest v. Bankers' Life Assn.*, 99 Kans. 295, 161 Pac. 631. A clause which made a policy incontestable except for failure to pay premiums, and providing that on payment of policy the company may deduct any sums due it, does not authorize forfeiture of the policy for failure to pay an annual premium when due, but the insurance continues subject to the right of the company to determine it

after giving notice: *Friend v. Southern States Life Ins. Co. (Okla.)*, 160 Pac. 457. Policy construed and provisions of policy held to require a month's notice before forfeiture for default of assured in making payment of interest, either upon a loan by premium note or on assignment of the policy: *Mills v. National Life Ins. Co.*, 136 Tenn. 350, 189 S. W. 691. Where insurer knew of the assignment and where the premium was paid within the year the policy was not forfeited under Insurance Law, § 92, providing for forfeiture of life policy if premium is not paid within one year from maturity, unless "insured or assignee" be notified of intended previous forfeiture within 45 days before premium is due, the law not being complied with by notifying insured, and not assignee: *Davis v. Northwestern Mut. Life Ins. Co.*, 98 Misc. 456, 163 N. Y. S. 56.

<sup>21</sup> No reinstatement of policy or medical examination was necessary where, under Insurance Law, § 92, there had been no forfeiture of life policy, and plaintiff's delayed payment of premium was made within allowed time and was not objected to because paid by check: *Davis v. Northwestern Mut. Life Ins. Co.*, 98 Misc. 456, 163 N. Y. S. 56.

<sup>22</sup> The company is bound by the agent's extension of the note where an insurance company authorizes an agent to take a note for a premium in his own name, the company looking to him for the cash: *Hutch-*

take the possible chances of having his certificate forfeited does not estop either himself or his beneficiary from questioning the legality of subsequent similar assessments.<sup>23</sup>

ins v. Globe Life Ins. Co., 126 Ark. 360, 190 S. W. 446. Knights v. Fenwick, 169 Ky. 269, 183 S. W. 906; Supreme Lodge K. P. v.

<sup>23</sup> Supreme Council Catholic Knights v. Logsdon, 183 Ind. 183, 108 N. E. 587; Supreme Council Catholic Mims (Tex. Civ. App.), 167 S. W. 835.

## CHAPTER CXXIII

### INSURANCE AGENTS AND THE GENERAL RULES OF AGENCY

#### § 4155. In general.<sup>1</sup>

#### § 4156. Statutory provisions relating to insurance agents.<sup>2</sup>

—It is held that laws requiring insurance companies to procure certificates of authority from the state before soliciting risks do not apply to agents of a foreign insurance company selling the company's stock.<sup>3</sup>

§ 4158. Evidence of agency.<sup>4</sup>—It is not evidence of a general agency that an insurance agent had business relations with other persons, whereby they solicited insurance for the company and received premiums, the insurance being written through him.<sup>5</sup>

§ 4159. Character of the agency.<sup>6</sup>—Though his powers are not coextensive with those of the insurer, one having all the

<sup>1</sup> The soliciting agent of insurance company is held to be the agent of insurer, and not insured: *Mahoney v. Minnesota Farmers' Mut. Ins. Co.*, 136 Minn. 34, 161 N. W. 217.

<sup>2</sup> The words "suitable person," as used in the Oklahoma statute, do not refer to qualifications required by the statute or those administering the laws of the state, but relate to the right of the foreign insurance company, in the first instance, to appoint some person suitable to it as its agent: *Welch v. Maryland Casualty Co.*, 47 Okla. 293, 147 Pac. 1046, L. R. A. 1915E, 708.

<sup>3</sup> It is held that Revised Stat. 1911, arts. 4960, 4961, which require agents of insurance companies to procure certificates of authority from the commissioner of insurance and banking before soliciting risks and receiving applications, etc., have no application to agents of a foreign insurance company selling the company's stock in Texas: *Hughes v. Four States Life Ins. Co.* (Tex. Civ. App.), 164 S. W. 898.

<sup>4</sup> A certificate of the secretary of state that a certain person was the duly appointed agent of the insurer, which recited that it was issued in compliance with Code 1907, § 4561, and authorized "the said agent to transact the business of fire insurance for said company," was admissible in an action on a parol contract for insurance made by such agent, and prima facie established a general agency: *Sun Ins. Office v. Mitchell*, 186 Ala. 420, 65 So. 143.

<sup>5</sup> *Thompson v. Michigan Mut. Life Ins. Co.*, 56 Ind. App. 502, 105 N. E. 780.

<sup>6</sup> One who dealt with insurance agent without knowledge of limitation of authority, was held entitled to assume that he was authorized to issue a particular policy and company was estopped to assert the contrary: *International Fire Assurance Co. v. Black* (Tex. Civ. App.), 179 S. W. 534; *Fidelity-Phoenix Fire Ins. Co. v. Ray*, 196 Ala. 425, 72 So. 98; *Wilson v. Hartford Fire Ins. Co.*, 188 Ill. App. 181; *Thompson v. Michigan*

powers of an insurer within a specified locality and who has authority to appoint local agents is a "general agent."<sup>7</sup>

### § 4163. Insurance brokers.<sup>8</sup>

§ 4164. Powers of agents.<sup>9</sup>—When an insurance agent writing industrial insurance stated that the policy would be paid to whoever produced it, and that it was unnecessary to designate a beneficiary, such statement was held binding on the insurer.<sup>10</sup> Though supplied by the company with printed blank forms of application, a traveling soliciting agent ordinarily has no implied authority to enter into an insurance contract.<sup>11</sup>

Mut. Life Ins. Co., 56 Ind. App. 502, 105 N. E. 780; *Shea v. Manhattan Life Ins. Co.*, 224 Mass. 112, 112 N. E. 631; *Rankin v. Northern Assur. Co.*, 98 Nebr. 172, 152 N. W. 324; *French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. Dak. 426, 151 N. W. 7, L. R. A. 1915D, 766; *Amarillo Nat. Life Ins. Co. v. Brown* (Tex. Civ. App.), 166 S. W. 658. When a letter from insurance company appointing an agent provided, "Policies will be written at this office," the agent had no authority to make a contract of insurance: *Browne v. Commercial Union Assur. Co.*, 30 Cal. App. 547, 158 Pac. 765. Soliciting agents have only implied authority to do the things directly connected with procuring applications for policies and delivering policies and have no implied authority to make any representations for the company with respect to loans to be made by it: *Burns & Co. Real Estate Co. v. Philadelphia Life Ins. Co.*, 239 Pa. 22, 86 Atl. 642. Unless the language employed clearly indicates that such was the intention of the parties, insurance agent's written authority is to be liberally and fairly construed, and a narrow meaning is not to be given to it: *Continental Ins. Co. v. Bair* (Ind. App.), 114 N. E. 763.

<sup>7</sup> *Porter v. General Acc. & Co. Corp.*, 30 Cal. App. 198, 157 Pac. 825; *Browne v. Commercial Union Assur. Co.*, 30 Cal. App. 547, 158 Pac. 765.

<sup>8</sup> A broker who is employed by the insured to procure insurance for him is the insured's agent and not the agent of the insurer: *Morris v. Home Ins. Co.*, 78 Misc. 303, 139 N. Y. S. 674. Insured was bound by

representations as made to the insurer by the broker who solicited the insurance, since such broker was in that respect the agent of insured, notwithstanding Insurance Law, § 49: *Salzano v. Marine Ins. Co.*, 173 App. Div. 275, 159 N. Y. S. 277.

<sup>9</sup> An agent authorized to solicit and receive applications for fire insurance, and, at his discretion, to countersign and issue policies intrusted to him for that purpose, must be regarded as the general agent of the company: *Sun Ins. Office v. Mitchell*, 186 Ala. 420, 65 So. 143. One holding a contract of insurance for a year can not cancel the same and be rebated for the proportionate part of the year yet to run on the statement of a mere soliciting agent that such could be done, but is liable for the higher rate for short term contracts: *Ætna Life Ins. Co. v. American Zinc & Co. Smelting Co.*, 169 Mo. App. 550, 154 S. W. 827. An insurance company is not bound by a mere soliciting insurance agent's representations or statement as to the legal effect of words describing the property covered: *Murphy v. Continental Ins. Co. (Iowa)*, 157 N. W. 855. A life policy was not varied by representations of a soliciting agent where such representations were not relied upon: *Truly v. Mutual Life Ins. Co.*, 108 Miss. 453, 66 So. 970.

<sup>10</sup> *Lange v. New York Life Ins. Co.*, 254 Mo. 488, 162 S. W. 589; *Wallace v. Prudential Ins. Co.*, 174 Mo. App. 110, 157 S. W. 1028.

<sup>11</sup> *Dorman v. Connecticut Fire Ins. Co.*, 41 Okla. 509, 139 Pac. 262, 51 L. R. A. (N. S.) 873n.

§ 4165. **Restrictions in application or policy.**<sup>12</sup>—It is held in Indiana that the provisions in an insurance policy restricting the authority of agents should not be literally enforced by the courts regardless of attending circumstances.<sup>13</sup>

§ 4166. **Limitation on authority.**<sup>14</sup>

§ 4167. **Limitations contained in application — Preparation of application.**<sup>15</sup>—An insured may show that the answers recorded in an application for insurance, which declared such answers to be a warranty, were placed there by the fraud of the agent.<sup>16</sup>

<sup>12</sup> Where an agent has negligently or fraudulently written untrue answers in the application different from the answers given by applicant, a covenant in an application for life insurance that the agent can not bind the company by "making or receiving any representations or information" will not protect the company from liability: *Suravitz v. Prudential Ins. Co.*, 244 Pa. 582, 91 Atl. 495, L. R. A. 1915A, 273n. When the insured negotiated with the company direct and dealt with one who was termed "manager," a limitation of the authority of agents, indorsed on the policy and on notices and receipts sent to the policy holder, are not available to the company as a defense: *Provident Savings Loan Assur. Co. v. Statler*, 34 Ohio Cir. Ct. 391.

<sup>13</sup> *Public Savings Ins. Co. v. Manning* (Ind. App.), 111 N. E. 945. But see to effect that a limitation in a policy binds the insured: *Great Eastern Casualty Co. v. Reed*, 17 Ga. App. 613, 87 S. E. 904.

<sup>14</sup> A general insurance agent's powers can be limited, and such limitations are binding as between the company and him and as to all persons having notice thereof, but they do not affect third persons relying upon his implied authority without notice of its limitations; his authority as to them is determined by the nature of the business, and is prima facie co-extensive with its requirements: *Sun Ins. Office v. Mitchell*, 186 Ala. 420, 65 So. 143. Notwithstanding the fact that an agent's authority is limited the authority of an insurance agent as to third persons is governed by the

nature of his business, and his acts within the usual scope of such business towards an insured acting in good faith and without negligence or notice that the agent's authority was limited binds the insurer: *Ray v. Fidelity-Phoenix Fire Ins. Co.*, 187 Ala. 91, 65 So. 536.

<sup>15</sup> An insurance company can not claim a forfeiture because insured's age is misstated inadvertently in the policy by its agent: *Fidelity & Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493; *Robson v. Pennsylvania Mut. Live Stock Ins. Co.*, 57 Pa. Super. Ct. 491. Such error is chargeable to the insurer, when a soliciting agent makes out an application incorrectly after the facts are truthfully stated to him: *French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. Dak. 426, 151 N. W. 7, L. R. A. 1915D, 766.

<sup>16</sup> *Farmers' Mut. Ins. Assn. v. Tankersley*, 13 Ala. App. 524, 69 So. 410; *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845; *Scarlett v. National Live Stock Ins. Co.*, 193 Ill. App. 488; *New Amsterdam Casualty Co. v. New Palestine Bank*, 59 Ind. App. 69, 107 N. E. 554; *National Live Stock Ins. Co. v. Simmons*, 62 Ind. App. 15, 111 N. E. 18; *Walrod v. Des Moines Fire Ins. Co.*, 159 Iowa 121, 140 N. W. 218; *Broadly v. Patrons' Fire & Assn.*, 94 Kans. 245, 146 Pac. 343; *General Accident & Assur. Corporation v. Richardson*, 157 Ky. 503, 163 S. W. 482; *Maxwell v. York Mut. Fire Ins. Co.*, 114 Maine 170, 95 Atl. 877; *Simmons v. National Live Stock Ins. Co.*, 187 Mich. 551, 153 N. W. 696, Ann. Cas.

§ 4169. **Notice.**<sup>17</sup>—Agents of an insurance company whose only connection with an insured was that he requested them as agents of the company to issue certain policies to him were not his agents, and their knowledge could not be imputed to him.<sup>18</sup>

§ 4171. **Rights and liabilities of agent.**<sup>19</sup>

1917D, 42n; *Mallen v. National Life Assn.*, 168 Mo. App. 503, 153 S. W. 1065; *Lehmann v. Hartford Fire Ins. Co.*, 183 Mo. App. 696, 167 S. W. 1047; *Wisensine v. Interstate Business Men's Accident Assn.*, 98 Nebr. 365, 152 N. W. 742; *Moore v. Prudential Casualty Co.*, 170 App. Div. 849, 156 N. Y. S. 892; *Carrozza v. National Life Ins. Co.*, 62 Pa. Super. Ct. 153.

<sup>17</sup> The insurer is deemed to know such facts as are known to its general agent and adjuster when the loss is adjusted: *Michigan Idaho Lumber Co. v. Northern Fire & Ins. Co.*, 35 N. Dak. 244, 160 N. W. 130.

<sup>18</sup> *O'Neill v. Union Assur. Society*, 166 Cal. 318, 135 Pac. 1124. But where a person authorizes a broker to secure insurance for him, the broker is the agent of the assured; and if a binder is issued upon such application, and prior to the time that the policies are issued, and prior to the time that the premium or any part thereof is paid, the broker is informed of the names of the companies that have issued the binder and which are to issue the policies, then the knowledge of the broker as to the names of such com-

panies is the knowledge of assured: *Morris & Co. v. Starkweather*, 186 Ill. App. 59.

<sup>19</sup> Insurance agents who had authority to select companies and determine the amount of insurance to be placed in each company on plaintiff's property were held to have no authority to cancel a policy: *C. C. Hendee Co. v. Insurance Co.*, 158 Wis. 521, 149 N. W. 147. The soliciting agent for insurance held under the evidence not chargeable with unpaid premiums on insurance written by him: *Doak-Riddle-Hamilton Co. v. Raabe* (Ind. App.), 114 N. E. 415. In the absence of a showing that none of the company's money was in the hands of the agent in action for insurance agent's failure to cancel a policy, a tender or return of the premium is not necessary: *Westchester Fire Ins. Co. v. Bollin* (S. Car.), 90 S. E. 327. Insurance agents who undertook to cancel policies upon receipt of directions from their company to do so can not, when sued for loss from not doing so, deny it was their duty to do it: *National Union Fire Ins. Co. v. Dickinson*, 92 Wash. 230, 159 Pac. 125.



## CHAPTER CXXIV

### WAIVER AND ESTOPPEL IN INSURANCE CASES

§ 4175. **Definition of waiver.**—Where the company has knowledge of a condition which entitled it to declare forfeitures and fails to assert it, the right is waived.<sup>1</sup>

§ 4176. **Knowledge and intent.**<sup>2</sup>—It may be stated generally, that until the company knows, or is charged with notice of the facts on which a forfeiture is based, there can be no waiver of forfeiture.<sup>3</sup>

§ 4179. **What may be waived.**<sup>4</sup>—But the requirement of a statute that proofs of loss shall be submitted to the insurer

<sup>1</sup>The law will regard the right of a company to forfeit a policy as waived where an insurer knows of a right entitling it to declare forfeiture of a policy, and fails to assert it: *York v. Sun Ins. Office* (Ind. App.), 113 N. E. 1021. See also *O'Connor v. Knights & Ladies of Security* (Iowa), 158 N. W. 761, L. R. A. 1917B, 897. There was a waiver of condition that policy should not become effective unless premium was paid while insured was in good health where soliciting agent of insured delivered policy and received premium knowing that insured was then ill, insurer being charged with his knowledge: *McClelland v. Mutual Life Ins. Co.*, 217 N. Y. 336, 111 N. E. 1062. It being for the benefit of the company alone, a provision in an application which provides that the insurance company shall incur no liability "until the first premium has been paid to and accepted by the company, or its authorized agent," and until the policy has been actually delivered to and accepted by the insured, may be waived by it: *Illinois Life Ins. Co. v. Kennedy*, 191 Ill. App. 29. Where the contract provides that actual manual delivery of a life policy is a condition precedent to liability it may be waived by the insurer: *Yount v. Prudential Life Ins. Co.* (Mo. App.), 179 S. W. 749. Notwithstanding a provision of the policy to the contrary,

where a policy is delivered to insured, insurer is estopped from denying, after a loss that an unsigned supplement attached to it is a part thereof: *Curran v. National Life Ins. Co.*, 251 Pa. 420, 96 Atl. 1041.

<sup>2</sup>Where the insured in the contract of insurance agrees to repair the defect, in spite of knowledge of the insurer of the defect in property insured, no estoppel can arise against him to plead the defect: *Mendenhall v. Farmers' Ins. Co.*, 183 Ind. 694, 110 N. E. 60. Waiver of proofs of loss need not be in writing, but may arise from such acts and conduct on the part of the company as show an intention on the part of the company to relinquish its right to enforce such requirements: *American Nat. Ins. Co. v. Euze*, 2 Ohio App. 299, 35 Ohio Cir. Ct. 169; *Lee v. Casualty Co.*, 90 Conn. 202, 96 Atl. 952.

<sup>3</sup>*Security Ins. Co. v. Laird*, 182 Ala. 121, 62 So. 182; *Wiley v. Rome Ins. Co.*, 12 Ga. App. 186, 76 S. E. 1067; *North British & c. Ins. Co. v. Wright* (Okla.), 154 Pac. 654.

<sup>4</sup>The company may ordinarily waive any of the conditions of its policy unless prohibited by statute or charter provisions: *Shawnee Mut. Fire Ins. Co. v. Cannedy*, 36 Okla. 733, 129 Pac. 865, 44 L. R. A. (N. S.) 376; *Occidental Life Ins. Co. v. Jacobson*, 15 Ariz. 242, 137 Pac. 869;

within a specified time after the insured's death or the loss may be waived by the insurer.<sup>5</sup>

**§ 4180. Waiver of certain defenses.**<sup>6</sup>—When the falsity of warranties is unknown to the insurer, it would seem that acceptance of the last assessment and proofs of death would not be a waiver of the false warranties.<sup>7</sup>

**§ 4181. Power of agent to waive.**<sup>8</sup>—A fire insurance agent

Lee v. Casualty Co., 90 Conn. 202, 96 Atl. 952; Southern States Fire Ins. Co. v. Vann, 69 Fla. 549, 68 So. 647, L. R. A. 1916B, 1189; Cox v. American Ins. Co., 184 Ill. App. 419; Williams v. American Ins. Co., 196 Ill. App. 370; Massock v. Royal Ins. Co., 196 Ill. App. 394; Majestic Life Assur. Co. v. Tuttle, 58 Ind. App. 98, 107 N. E. 22; Continental Ins. Co. v. Bair (Ind. App.), 114 N. E. 763; Winsor v. Mutual Fire &c. Assn., 170 Iowa 521, 153 N. W. 97; Black v. Grain Shippers' Mut. Fire Assn., 171 Iowa 309, 152 N. W. 7; Dolliver v. Granite State Fire Ins. Co., 111 Maine 275, 89 Atl. 8, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765n; Brix v. American Fidelity Co., 171 Mo. App. 518, 153 S. W. 789; Pace v. American Cent. Ins. Co., 173 Mo. App. 485, 158 S. W. 892; Patterson v. American Ins. Co., 174 Mo. App. 37, 160 S. W. 59; McLeod v. John Hancock Mut. Life Ins. Co., 190 Mo. App. 653, 176 S. W. 234; Mun v. New York Life Ins. Co. (Mo. App.), 181 S. W. 606; American Nat. Ins. Co. v. Euce, 2 Ohio App. 299, 35 Ohio Cir. Ct. 169; Mutual Life Ins. Co. v. Chattanooga Savings Bank, 47 Okla. 748, 150 Pac. 190; Scott v. Liverpool &c. Ins. Co., 102 S. Car. 115, 86 S. E. 484; Noem v. Equitable Life Ins. Co., 37 S. Dak. 176, 157 N. W. 308; Hall v. Dakota Mut. Life Ins. Co., 37 S. Dak. 342, 158 N. W. 449; Delaware Ins. Co. v. Wallace (Tex. Civ. App.), 160 S. W. 1130; Mechanics' &c. Ins. Co. v. Dalton (Tex. Civ. App.), 189 S. W. 771; Progress Spinning &c. Mills Co. v. Southern Nat. Ins. Co., 42 Utah 263, 130 Pac. 63, 45 L. R. A. (N. S.) 122n. Parties can not, by contract, waive Insurance Law, § 58, which declares that the policy shall contain the contract and statements by the insured shall, in the absence of fraud, be deemed representations and not warranties: Moore v. Prudential Cas-

ualty Co., 170 App. Div. 849, 156 N. Y. S. 892.

<sup>5</sup> Liebing v. Mutual Life Ins. Co., 269 Mo. 509, 191 S. W. 250; Chandler v. John Hancock Mut. Life Ins. Co., 180 Mo. App. 394, 167 S. W. 1162; Shearlock v. Mutual Life Ins. Co., 193 Mo. App. 430, 182 S. W. 89; Flynn v. Orient Ins. Co., 77 N. H. 431, 92 Atl. 737.

<sup>6</sup> It being assumed that irregularities in countersigning benefit certificate and introduction of member were material, held that they were waived where all payments were made and insured was treated as a member, proofs of death were required, and the expense thereof paid: Sovereign Camp of Woodmen of the World v. Latham, 59 Ind. App. 290, 107 N. E. 749. It must appear that the company expressed an intention to relinquish the defense or that it recognized the validity of the policy after knowledge by its conduct to constitute a waiver of forfeiture of a policy: Seaback v. Metropolitan Life Ins. Co., 274 Ill. 516, 113 N. E. 862. As to waiver by failing to inquire into existing facts, see: Great Southern F. Ins. Co. v. Burres, 118 Ark. 22, 175 S. W. 1161, Ann. Cas. 1917B, 497n.

<sup>7</sup> Van Woert v. Modern Woodmen of America, 29 N. Dak. 441, 151 N. W. 224.

<sup>8</sup> Insurer's local agent who was expressly authorized to countersign, issue, and renew policies and to consent in writing to assignments and transfers thereof, held to have authority to consent to mortgage on insured property and to indorse consent on policy, or to agree to do so: Continental Ins. Co. v. Bair (Ind. App.), 114 N. E. 763. A local insurance agent was not authorized to waive proofs of loss, from the fact that he was authorized to solicit in-

is presumed to be authorized to waive proofs of loss by denying the company's liability.<sup>9</sup>

§ 4182. **Waiver by agent.**<sup>10</sup>—It was held in a North Carolina case that a provision in a policy which restricted the power of an agent to waive conditions and stipulations applied to something occurring after the issuance of the policy and not to conditions existing at its inception.<sup>11</sup>

§ 4183. **Prepayment of premium.**—An unconditional delivery of a policy by the insurer's agent is a waiver of advance payment of the premium and the insured thereupon becomes a debtor for the amount of the premium.<sup>12</sup>

§ 4184. **Waiver in writing only.**<sup>13</sup>—On the question of the sufficiency of the act of waiver it is held in a Kentucky case that any expression of satisfaction on the part of the insurer's agent

insurance, and had received and delivered the policy to insured: *Ferdenando v. Milwaukee Mechanics' Ins. Co.*, 81 Wash. 244, 142 Pac. 693. Where insured relies on the act of an agent as waiver, it is necessary that he show, either that the agent had express authority to make the waiver, or that the insurer, with knowledge of the facts, ratified the agent's act: *Union Mut. Ins. Co. v. Huntsberry* (Okla.), 156 Pac. 327. See also *Security L. Ins. Co. v. Eades*, 152 Ky. 577, 153 S. W. 989, L. R. A. 1917D, 1198.

<sup>9</sup> *Popa v. Northern Ins. Co.*, 192 Mich. 237, 158 N. W. 945; *Milwaukee Mechanics' Ins. Co. v. Fuquay*, 120 Ark. 330, 179 S. W. 497; *Ohio Farmers' Ins. Co. v. Glaze*, 55 Ind. App. 147, 101 N. E. 734; *Teasdale v. New York Ins. Co.*, 163 Iowa 596, 145 N. W. 284, Ann. Cas. 1916A, 591n; *Fisk v. Fire Assn.*, 192 Mich. 243, 158 N. W. 947; *American Nat. Ins. Co. v. Nuckols* (Tex. Civ. App.), 187 S. W. 497. Where an agent authorized to solicit and write fire insurance and who was required to report losses represented to insured that the person whom he introduced was an adjuster, the insurer is bound by the purported adjuster's waiver of proofs of loss other than an itemized list of property destroyed: *Concordia Fire Ins. Co. v. Mitchell*, 122 Ark. 357, 183 S. W. 770.

<sup>10</sup> Knowledge of agent of insurer who issued its policy and delivered it

to insured, that the warehouse was not then inclosed which excepted the risk if warehouse covered thereby was not inclosed, was to be imputed to insurer: *Johnson v. Rhode Island Ins. Co.*, 172 N. Car. 142, 90 S. E. 124; *United States Health & Ins. Co. v. Goin*, 197 Ala. 584, 73 So. 117.

<sup>11</sup> *Johnson v. Rhode Island Ins. Co.*, 172 N. Car. 142, 90 S. E. 124. Where insurer's agent entered into an oral executory agreement to waive any future breaches of the conditions of the policy it is not enforceable, for such an agreement is not a waiver of the effect of an existing condition, but an amendment of the written contract of insurance: *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113.

<sup>12</sup> *York v. Sun Ins. Office* (Ind. App.), 113 N. E. 1021. See as to effect of recital of payment of premium, note in L. R. A. 1918A, 308-312.

<sup>13</sup> A vacancy clause in an insurance policy may be waived by words or conduct of the agent who took the application, issued the insurance, received the premiums, and delivered the policy, though the policy provides that such waiver can be made only by a writing indorsed on the policy: *People's Nat. Fire Ins. Co. v. Jackson*, 155 Ky. 150, 159 S. W. 688; *Caledonian Ins. Co. v. Smith*, 65 Fla. 429, 62 So. 595, 47 L. R. A. (N. S.) 619n; *Southern States Fire Ins. Co. v. Vann*, 69 Fla. 549, 68 So. 647, L. R. A. 1916B, 1189; *Public Savings Ins.*

on being informed that the property is vacant will be sufficient to constitute a waiver of a vacancy condition; but where the agent merely directed the insured to bring the policy in for indorsement there was no waiver.<sup>14</sup>

§ 4185. **Estoppel by act of agent.**<sup>15</sup>—It was held in a Missouri case that an illiterate insured could recover on a fire insurance policy, though a false statement was contained in the application, which was prepared by the insurer's agent, as to a stove-pipe extending through the roof, of which false statement the insured had no knowledge when he signed the application without reading.<sup>16</sup>

§ 4186. **Facts known to company when policy issued.**<sup>17</sup>

Co. v. Manning (Ind. App.), 111 N. E. 945; Continental Ins. Co. v. Bair (Ind. App.), 114 N. E. 763; Dahrooge v. Sovereign Fire Assur. Co., 175 Mich. 248, 141 N. W. 572; Caledonian Fire Ins. Co. v. Shepherd, 111 Miss. 175, 71 So. 314; Nichols v. Prudential Ins. Co., 170 Mo. App. 437, 155 S. W. 478; Springfield Fire & C. Ins. Co. v. Halsey, 52 Okla. 469, 153 Pac. 145; Delaware Ins. Co. v. Wallace (Tex. Civ. App.), 160 S. W. 1130; Reliance Ins. Co. v. Dalton (Tex. Civ. App.), 178 S. W. 966; New Jersey Fire Ins. Co. v. Baird (Tex. Civ. App.), 187 S. W. 356. Contra, Cohen v. Home Ins. Co. (Del. Super.), 97 Atl. 1014; Nowell v. British-American Assur. Co., 17 Ga. App. 46, 85 S. E. 498; Bailey v. First Nat. Fire Ins. Co., 18 Ga. App. 213, 89 S. E. 80; Patterson v. American Ins. Co., 174 Mo. App. 37, 160 S. W. 59; Tilton v. Farmers' Ins. Co., 82 Misc. 79, 143 N. Y. S. 107.

<sup>14</sup> People's Nat. Fire Ins. Co. v. Jackson, 155 Ky. 150, 159 S. W. 688. That insurance company allowed insured to move his building was held not to amount to a waiver of a condition declaring that the policy should be void if the premises were unoccupied for over ten days: Fireman's Fund Ins. Co. v. Lyon (Tex. Civ. App.), 171 S. W. 801. Where the insurer expressly waived a vacancy condition on condition of the insurer's compliance with a watchman's warranty held not a waiver of compliance with such warranty, where the insurer had no knowledge of insured's breach

thereof: Frick v. Miller's Nat. Ins. Co. (Mo.), 184 S. W. 1161. Where a receipt recited a mistake to the effect that an insurance premium was paid for August instead of July, held not a waiver, new agreement, or extension of time of payment: Gardner v. Inter-Ocean Life & C. Co., 93 Kans. 810, 145 Pac. 844.

<sup>15</sup> One procuring a life policy is chargeable only with such fraud or concealment of his physical condition as he knowingly makes with intent to defraud the company, and is not chargeable with fraudulent concealments of the examining physician: McCombs v. Travelers' Ins. Co., 159 Iowa 445, 141 N. W. 327; Hutchins v. Globe Life Ins. Co., 126 Ark. 360, 190 S. W. 446; Le Blanc v. Standard Ins. Co., 114 Maine 6, 95 Atl. 284; Gioia v. Metropolitan Life Ins. Co., 97 Misc. 380, 161 N. Y. S. 234; Collins v. United States Casualty Co., 172 N. Car. 543, 90 S. E. 585.

<sup>16</sup> Turner v. Home Ins. Co., 195 Mo. App. 138, 189 S. W. 626. But see, to effect that a mere soliciting agent of an insurance company can not waive conditions and warranties, and the fact that he, when writing an application, knew that a statement or warranty therein was false did not affect a waiver of the warranty: Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51; Bollard v. New York Life Ins. Co., 98 Misc. 286, 162 N. Y. S. 706.

<sup>17</sup> Johnson v. Rhode Island Ins. Co., 172 N. Car. 142, 90 S. E. 124.

## CHAPTER CXXV

### THE STANDARD POLICY AND ITS PROVISIONS

§ 4204. **The amount.**<sup>1</sup>—The measure of damages under a policy which limits liability to the actual cash value, not to exceed the cost of repairing or replacing it, is the cost of replacing, less the salvage, or, in other words, the difference between the fair and reasonable market value before and after the fire.<sup>2</sup>

§ 4205. **Description of property—In general.**<sup>3</sup>—Under the doctrine of ejusdem generis, in a fire policy on “stock of fruit and vegetables \* \* \* and all other merchandise,” it was

<sup>1</sup> Under a contract insuring household furniture which had been severed from insured's stock and used as household furniture, the valued policy law applied, and insurer could not show that it was not worth amount of insurance: *Ætna Ins. Co. v. Heidelberg*, 112 Miss. 46, 72 So. 552, L. R. A. 1917B, 253n. Under Rev. Stat. 1911, arts. 4874, 4948, a policy for \$4,000 was held a liquidated demand for that amount, where there was a total loss, though property was not worth such amount, where the insurance was induced by no representation by insured: *Drummond v. White-Swearingen Realty Co.* (Tex. Civ. App.), 165 S. W. 20. An insurer could not insist that the loss should be measured by the value of the plant it refused to buy where it refused to replace machinery destroyed by fire with another plant, which was then cheap, or to furnish the money to buy it: *Gulf Compress Co. v. Insurance Co.*, 129 Tenn. 586, 167 S. W. 859. Where local conditions had destroyed any demand for insured personal property at the place it was located at the time of loss it was held that the insurer was not entitled to have it valued at such place, where by moving it to another place its fair market value could be obtained: *Prussian Nat. Ins. Co. v. Lawrence*, 221 Fed. 931, 137 C. C. A. 501, L. R. A. 1915E, 489n.

<sup>2</sup> *Slack v. Milwaukee-Mechanics Ins. Co.*, 186 Ill. App. 565; *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 161 Iowa 5, 141 N. W. 447; *Buse v. National Ben Franklin Ins. Co.*, 96 Misc. 229, 160 N. Y. S. 566. In an action on a policy of wind insurance for destruction of a building, there are two methods to estimate damages; first, the cost of replacing, less depreciation from use or age, and second, the value of the building at destruction less the value of the ruins: *Moulton v. Globe Mut. Ins. Co.*, 36 S. Dak. 339, 154 N. W. 830.

<sup>3</sup> Where there is an inaccuracy in the description of the premises, the erroneous part of the description may be rejected without affecting the policy, if enough remains to identify the premises intended: *Curnen v. Law Union & C. Ins. Co.*, 159 App. Div. 493, 144 N. Y. S. 499; *Exchange Underwriters' Agency v. Bates*, 195 Ala. 161, 69 So. 956. A tornado policy insuring a frame barn building also covers a silo: *Still v. Connecticut Fire Ins. Co.*, 185 Mo. App. 550, 172 S. W. 625. An insurance policy upon household and kitchen furniture includes furniture acquired subsequent to the issuance of the policy: *Delaware Ins. Co. v. Wallace* (Tex. Civ. App.), 160 S. W. 1130. Policies of tornado insurance which did not purport to cover subsequent constructions held to cover property in proc-

held that "all other merchandise" had reference to merchandise of the same kind and did not cover a loss of ice cream.<sup>4</sup>

### § 4212. Description of buildings.<sup>5</sup>

§ 4213. Location of property—In general.<sup>6</sup>—Where there was no other building on either of the four corners, the fact that through inadvertence a policy on the contents of a building described it as situated at the northeast, instead of the northwest,

ess of construction at the time of their issuance, but not property the construction of which was begun after the policies were issued: *Northwestern Fuel Co. v. Boston Ins. Co.*, 131 Minn. 19, 154 N. W. 515. A policy covering varnish warehouse did not include an adjacent building used for the manufacture of varnish: *Leavitt v. National Fire Ins. Co.*, 88 Misc. 563, 151 N. Y. S. 71.

<sup>4</sup> *E. H. Emery & Co. v. American Ins. Co.*, 177 Iowa 4, 158 N. W. 748. A stock scale and a new windmill not erected were within the letter of a policy covering "farming utensils": *Murphy v. Continental Ins. Co. (Iowa)*, 157 N. W. 855. A linotype machine is covered by a fire policy covering printing presses, etc., and such other merchandise, furniture, and "fixtures" as are usually kept and used in printing office: *Review Printing Co. v. Hartford Fire Ins. Co.*, 133 Minn. 213, 158 N. W. 39. A fire policy on a stock of toilet articles, labels, machinery, bottles, and powder also covers cornstarch: *Aachen & Co. v. Arabian Toilet Goods Co.*, 10 Ala. App. 395, 64 So. 635.

<sup>5</sup> Where a policy does not correctly describe the property if insured has not concealed or misrepresented any fact, the misdescription does not render the policy void if it was written and issued by an agent with power to represent the company: *Dodge v. Grain Shippers' Mut. Fire Ins. Assn.*, 176 Iowa 316, 157 N. W. 955; *German-American Fire Ins. Co. v. Messenger*, 25 Colo. App. 153, 136 Pac. 478. The policy covered cotton which was placed upon the ground, but which was intended for immediate shipment, where a fire policy was issued to indemnify a railroad company

on all liability as a common carrier of cotton in bales in transit in cars, or in or on depots, or platforms, on line of assured's road: *Bennettville & Co. v. Glens Falls Ins. Co.*, 96 S. Car. 44, 79 S. E. 717. The word "premises" referred only to the fourth floor and not the entire building in a policy of burglary insurance indemnifying insured against burglary from premises occupied by assured and described as the fourth floor of a certain building: *Axe v. Fidelity & Co.*, 239 Pa. 569, 86 Atl. 1095, 46 L. R. A. (N. S.) 574.

<sup>6</sup> Where a policy insuring chattels does not by express or clearly implied terms restrict the insurer's liability to loss occurring on the premises of the owner in a certain building or place, the insurance follows the property so long as it is put to ordinary use: *Winsor v. Mutual Fire & Co. Assn.*, 170 Iowa 521, 153 N. W. 97. Hay in the mow is not covered by a description of "hay in stack": *Murphy v. Continental Ins. Co. (Iowa)*, 157 N. W. 855. Where a fire policy on horses, in accordance with Stat. 1913, § 1941-43, applied while contained in a described barn, recovery could not be had for their loss while away from the barn, on the theory that the parties contemplated their temporary removal while making repairs to the barn: *Rosenthal v. Insurance Co.*, 158 Wis. 550, 149 N. W. 155, L. R. A. 1915B, 361, Ann. Cas. 1916E, 395n. Where the insurer's agent issued a new policy locating the property in the place to which he knew it was to be removed, policy was held to attach as soon as the property was moved: *Weston v. American Ins. Co.*, 191 Mo. App. 282, 177 S. W. 792.

corner of the intersection of certain streets, did not avoid the policy.<sup>7</sup>

**§ 4215. Location—Materiality—Removal—Illustrations.**<sup>8</sup>—It was held that live stock, temporarily off of insured's farm for purpose of pasturage, was covered by a policy issued by an insurer whose constitution provided that its policies should extend only to live stock on the farm.<sup>9</sup>

**§ 4217. Proximate cause—Electric wires.**<sup>10</sup>—Where concurring causes of the damage appear, the proximate cause to which the loss is to be attributed is the dominant, the efficient one, the one that sets the other causes in operation; and incidental causes are not proximate, though they may be nearer in time and place to the loss.<sup>11</sup>

**§ 4221. Concealment and misrepresentation.**<sup>12</sup>—A policy was not rendered void for fraudulent concealment by the fact

<sup>7</sup> *Curren v. Law Union & C. Ins. Co.*, 159 App. Div. 493, 144 N. Y. S. 499; *French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. Dak. 426, 151 N. W. 7, L. R. A. 1915D, 766. Where there was an error of description in a fire policy describing the property as located on a homestead claim, evidence of the true location of the grant was admissible, though there was an error in the description: *Scottish Union & C. Ins. Co. v. McKone*, 227 Fed. 813, 142 C. C. A. 337. A policy which describes the building insured as situated "on the \* \* \* turnpike, Sissonville, W. Va.," may mean property which is either "near to" or "in" Sissonville: *Fisher v. Sun Ins. Co.*, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619.

<sup>8</sup> The insured can not recover where a fire insurance policy stipulates that the personal property insured is located in a described building, and the property is removed to a different place without consent of the insurer and is there burned: *Black v. Fidelity-Phenix Fire Ins. Co.*, 14 Ga. App. 510, 81 S. E. 584; *Lummus v. Fireman's Fund Ins. Co.*, 167 N. Car. 654, 83 S. E. 688, L. R. A. 1915D, 239n; *Johnson v. Franklin Ins. Co.*, 90 Wash. 631, 156 Pac. 567. A fire policy, insuring goods in a described

building and not elsewhere, held not to cover a loss of goods while outside of the building, and that the policy was not avoided by the removal but was merely suspended: *Steil v. Sun Ins. Office*, 171 Cal. 795, 155 Pac. 72. A mutual insurance association was held not prohibited by statute or its by-laws fixing its place of business from writing an insurance policy which should be valid after the property was removed to another state: *Winsor v. Mutual Fire & C. Assn.*, 170 Iowa 521, 153 N. W. 97.

<sup>9</sup> *Kinney v. Farmers' Mutual Fire & Ins. Society*, 159 Iowa 490, 141 N. W. 706, Ann. Cas. 1915A, 609n.

<sup>10</sup> A provision in a plate glass policy that the insurance company shall not be liable for loss resulting from any inundation held to exempt the company from liability for damages which resulted to the glass by persons using row boats during an inundation: *Feehrer v. Fidelity & C. Co.*, 188 Ill. App. 398.

<sup>11</sup> *Hartford Steam Boiler & C. Ins. Co. v. Pabst Brewing Co.*, 201 Fed. 617, 120 C. C. A. 45, Ann. Cas. 1915A, 637n.

<sup>12</sup> Failure to communicate to the insurance company, insuring a sanitarium, the fact that the cook, merely because of a personal grievance

that the principal stockholder of a mercantile corporation did not reveal to an insurance company that he had previously burned another store to collect insurance thereon.<sup>13</sup>

§ 4222. **Statement of interest.**<sup>14</sup>—There is no breach of warranty of sole and unconditional ownership by the existence of a trust deed on the property insured, it amounting only to an incumbrance.<sup>15</sup>

against the manager, threatened to burn the sanitarium would not avoid a policy as a concealment of a material fact concerning the subject of the insurance: *Washington Fire Ins. Co. v. Cobb* (Tex. Civ. App.), 163 S. W. 608.

<sup>13</sup> *Hamburg-Bremen Fire Ins. Co. v. Ohio Valley Dry Goods Co.*, 160 Ky. 252, 169 S. W. 724, Ann. Cas. 1916B, 944n.

<sup>14</sup> Matches stored with the insured as a bailee for hire are covered by a fire insurance policy on goods held "in trust": *Czerweny v. National Fire Ins. Co.*, 139 N. Y. S. 345; *Sloan v. Boston Ins. Co.*, 186 Ill. App. 81; *Sloan v. Queen Ins. Co.*, 186 Ill. App. 82. Clause of fire insurance policy which provided that if interest of insured was not sole the company should not be liable in sum exceeding cash value of insured's interest, held to relate to case where ownership was less than perfect legal and equitable title, and fact had been noted on policy: *Home Mut. Fire Ins. Co. v. Pittman*, 111 Miss. 420, 71 So. 739; *Fuhrman v. Sun Ins. Office*, 180 Mich. 439, 147 N. W. 618, Ann. Cas. 1916A, 466n. If insured is not the sole owner and there is no indorsement on policy, the policy is void where a provision is contained in a fire insurance policy as required by L. O. L. § 4666, as amended by Laws 1911, pp. 279-284, that the policy would be void if insured was not the sole and unconditional owner in fee simple of the ground, unless otherwise agreed in an indorsement: *Oatman v. Bankers' &c. Fire Relief Assn.*, 66 Ore. 388, 133 Pac. 1183, 134 Pac. 1033; *Home Mut. Fire Ins. Co. v. Pittman*, 111 Miss. 420, 71 So. 739; *Merchants' &c. Fire Underwriters v. Williams* (Tex. Civ. App.), 181 S. W. 859; *Wilson v. Commercial Union*

*Assur. Co.*, 90 Vt. 105, 96 Atl. 540.

<sup>15</sup> *Petello v. Teutonia Fire Ins. Co.*, 89 Conn. 175, 93 Atl. 137, L. R. A. 1915D, 812n; *North River Ins. Co. v. Dyche*, 163 Ky. 271, 173 S. W. 784; *Cummings v. Dirigo Mut. Fire Ins. Co.*, 112 Maine 379, 92 Atl. 298; *First Nat. Bank v. Aetna Ins. Co.*, 188 Mich. 251, 153 N. W. 1063; *First Nat. Bank v. Caledonian Ins. Co.*, 188 Mich. 254, 153 N. W. 1064; *Teter v. Franklin Fire Ins. Co.*, 74 W. Va. 344, 82 S. E. 40. A provision avoiding policy if building was on ground not owned by insured in fee simple, held not satisfied by ownership of undivided five-sixths interest: *Scott v. Liverpool &c. Ins. Co.*, 102 S. Car. 115, 86 S. E. 484; *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 S. E. 404. Insured held not entitled to recover under a fire policy requiring his ownership to be sole and unconditional, where he had contracted to sell the property on time payments and had put the purchaser into possession: *French v. Delaware Ins. Co.*, 167 Ky. 176, 180 S. W. 85; *Merchants' Ins. Co. v. Brown*, 35 Ohio Cir. Ct. 69. A statement in a policy that the insured was the "unconditional and sole" owner is satisfied when it is shown that insured was equitably entitled to immediate and absolute legal ownership: *Exchange Underwriters' Agency v. Bates*, 195 Ala. 161, 69 So. 956; *Hankins v. Williamsburg City Fire Ins. Co.*, 96 Kans. 706, 153 Pac. 491. Where insurer, before issuing a policy to a partnership, made inquiry as to the persons constituting the partnership, the company was entitled to this information, and it was insured's duty to give it: *Jacobs v. Queen Ins. Co.*, 183 Mich. 512, 150 N. W. 147. A policy is not breached by the existence of mortgage liens if it fails to mention in-



§ 4223. Fraud and false swearing.<sup>10</sup>

cumbrances, but provides for fee simple ownership: *Terminal Ice &c. Co. v. American Fire Ins. Co.* (Mo. App.), 187 S. W. 564; *Terminal Ice &c. Co. v. Home Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Lumbermen's Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Security Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Commercial Fire Ins. Co.* (Mo. App.), 187 S. W. 569; *Terminal Ice &c. Co. v. Stuyvesant Ins. Co.* (Mo. App.), 187 S. W. 569. There is no breach of condition of a policy requiring

sole and unconditional ownership where there was an option or invalid or conditional contract of sale of personalty with reservation of title, though possession is transferred: *Houseman v. Home Ins. Co.*, 78 W. Va. 203, 88 S. E. 1048.

<sup>10</sup> A sworn statement falsely including a claim for damages to a boiler deprived the insured of his right to recover in an action on fire insurance policy: *Arel v. First Nat. Fire Ins. Co.*, 195 Mo. App. 165, 190 S. W. 78; *Arel v. Girard Fire &c. Ins. Co.* (Mo. App.), 190 S. W. 81.

## CHAPTER CXXVI

### PROVISIONS OF THE STANDARD POLICY RELATING TO INTEREST AND CARE OF PROPERTY.

§ 4240. **Other insurance.**<sup>1</sup>—It has been held that a contract of insurance upon a house in a certain amount, and upon household furniture in another amount, is divisible, and the validity of the insurance upon the house was not affected by additional insurance taken out upon the furniture.<sup>2</sup> It seems that a notice of a mere intention to take out other insurance in the future does not comply with a condition requiring notice of additional insurance.<sup>3</sup>

§ 4241. **Definition—Different interests.**<sup>4</sup>

§ 4248. **Increase of risk.**<sup>5</sup>—A policy was not avoided by the fact that the insured's son-in-law attempted, without his

<sup>1</sup> When violated, the insurer, when loss occurs, may defend for breach of contract where policy stipulates that it shall be void if insured has other insurance, such stipulation being valid and reasonable: *Ohio Farmers' Ins. Co. v. Williams* (Ind. App.), 112 N. E. 556; *Home Ins. Co. v. Williams*, 237 Fed. 171, 150 C. C. A. 317; *Life Ins. Co. v. Fitzgerald*, 143 Ga. 725, 85 S. E. 913; *Hughes v. Hartford Fire Ins. Co.*, 144 Ga. 740, 87 S. E. 1042; *Gould v. Maine Farmers' Mut. Fire Ins. Co.*, 114 Maine 416, 96 Atl. 732, L. R. A. 1917A, 604n; *Harwood v. National Union Fire Ins. Co.*, 170 Mo. App. 298, 156 S. W. 475; *Kring v. Globe Farmers' Town Mut. Fire &c. Ins. Co.*, 195 Mo. App. 133, 189 S. W. 628; *Tilton v. Farmers' Ins. Co.*, 82 Misc. 79, 143 N. Y. S. 107; *Roper v. National Fire Ins. Co.*, 161 N. Car. 151, 76 S. E. 869; *Wynn v. Caledonian Ins. Co.*, 100 S. Car. 47, 84 S. E. 306; *Ætna Ins. Co. v. Waco Co.* (Tex. Civ. App.), 189 S. W. 315; *Mechanics' &c. Ins. Co. v. Dalton* (Tex. Civ. App.), 189 S. W. 771. Plaintiff was held not to have forfeited his policy because he did not

notify the insurer and obtain its consent to additional insurance under Pub. Acts 1911, No. 128, as provided by insurer's by-laws: *Lagden v. Concordia Mut. Fire Ins. Co.*, 188 Mich. 689, 154 N. W. 87, 158 N. W. 848.

<sup>2</sup> *Ætna Ins. Co. v. Dancer* (Tex. Civ. App.), 181 S. W. 772.

<sup>3</sup> *Anderson v. Interstate Business Men's Accident Assn.*, 38 S. Dak. 105, 160 N. W. 522.

<sup>4</sup> Where a mortgagee procures a fire policy contrary to the terms of the mortgage, held not to avoid a policy procured by the mortgagor: *Kelley v. People's Nat. Fire Ins. Co.*, 262 Ill. 158, 104 N. E. 188, 50 L. R. A. (N. S.) 1164n; *Hackett v. Cash* (Ala.), 72 So. 52. The fact that a purchaser of a dwelling house attempted to procure insurance on the property without the knowledge of the owner would not affect insurance held by the owner on the property: *Smith v. American Ins. Co.*, 177 Mich. 123, 143 N. W. 54; *Dumphy v. Commercial Union Assur. Co.* (Tex. Civ. App.), 174 S. W. 814.

<sup>5</sup> A policy is not avoided under a claim prohibiting an alteration of sit-

knowledge, to smoke meat in a shed, which caused a fire, as this did not amount to an alteration or increase of the risk with the plaintiff's consent.<sup>6</sup>

**§ 4251. Repairs—Employment of mechanics.**—The employment of mechanics in making alterations was held not to forfeit the policy unless the risk was actually increased thereby, under a policy of fire insurance which provided that it should be void if, without the insurer's consent, the circumstances affecting the risk should be so altered as to increase the risk.<sup>7</sup>

**§ 4253. Incumbrances.**—But a provision of a standard policy that it should be void if the property be mortgaged was held to be a promissory warranty, and that its violation would void the policy unless the insurer had notice or waived the incumbrance.<sup>8</sup>

uation so as to increase the risk by the use of a gasoline engine in an insured barn, to drive a threshing machine: *Bouchard v. Dirigo Mut. Fire Ins. Co.*, 113 Maine 17, 92 Atl. 899, L. R. A. 1915D, 187n. It was held that the keeping of gasoline which was prohibited by a policy on a stock of goods did not avoid the policy, as the breach did not contribute to bring about the loss, under Acts 33d Leg. ch. 105 (*Vernon's Sayles' Ann. Civ. Stat.* 1914, arts. 4874a, 4874b) providing that no breach by the insured of any fire insurance policy on personalty shall avoid it unless contributing to cause the loss: *Commonwealth Ins. Co. v. Finegold* (Tex. Civ. App.), 183 S. W. 833. A stipulation attached to a policy of fire insurance requiring the insured "to use coal only for fuel when steam power is used" must be limited to the building insured, or anything attached to it in such manner that it might be said to be a part of it, and the provision is not applicable to a portable steam engine using wood as a fuel for the purpose of sawing wood, which was located temporarily on the premises about 28 feet from the dwelling house insured: *Cramer v. Blooming Grove Mut. Fire Ins. Co.*, 63 Pa. Super. Ct. 276. A fire policy which stipulated that insured warrants that the automobile covered by the policy shall not be

used for carrying passengers, or the policy shall be void, is breached where, with insured's knowledge and consent, his son for compensation which he received and retained, made trips with the automobile for passengers, and it was immaterial whether the risk was increased or not: *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655.

<sup>6</sup> *Andrews v. Dirigo Mut. Fire Ins. Co.*, 112 Maine 258, 91 Atl. 978.

<sup>7</sup> *Gilman v. Commonwealth Ins. Co.*, 112 Maine 528, 92 Atl. 721, L. R. A. 1915C, 758n.

<sup>8</sup> *North British &c. Ins. Co. v. Wright* (Okla.), 154 Pac. 654. The condition in a fire policy prohibiting incumbrance and liens without the consent of the insurer, and making the policy void for breach of such conditions, not only legal and conformable to public policy, but is reasonable and proper: *St. Paul Fire &c. Ins. Co. v. Peck*, 37 Okla. 85, 130 Pac. 805. It is a valid provision in a policy of insurance on an automobile, that if the property insured "be or become incumbered by a chattel mortgage" the policy shall be void: *Springfield Fire &c. Ins. Co. v. Chandler*, 41 App. D. C. 209; *Roper v. National Fire Ins. Co.*, 161 N. Car. 151, 76 S. E. 869; *Oliker v. Williamsburgh City Fire Ins. Co.*, 72 W. Va. 436, 78 S. E. 746, Ann. Cas. 1915D, 914n. The mortgaging of insured personalty

is an increase of the risk within a policy clause declaring the insurance void if the subject of insurance is personalty and becomes incumbered by a chattel mortgage: *Security Ins. Co. v. Laird*, 182 Ala. 121, 62 So. 182. Execution of deed of trust to insure property held to render void an insurance policy which provides that it should be void if the property be or become incumbered by a chattel mortgage: *Roper v. National Fire Ins. Co.*, 161 N. Car. 151, 76 S. E. 869. A policy of insurance on dwelling house and furniture was avoided as to both dwelling house and furniture by giving a chattel mortgage on the furniture: *McKernan v. North River Ins. Co.*, 206 Fed. 984. A corporation, issuing bonds by a deed of trust on all its property to secure a renewal note, was held to have incumbered its personal property, within a fire policy declaring that the same should be void on the property becoming incumbered: *Hartford Fire Ins. Co. v. Downey*, 223 Fed. 707, 139 C. C. A. 237. Execution of a chattel mortgage renders it void where a fire policy provides that it shall be void unless otherwise provided if the subject of insurance be personal property and be incumbered by chattel mortgage: *Georgia Home Ins. Co. v. Hoskins*, 71 Fla. 282, 71 So. 285. If without regard to form the instrument has the legal effect of a chattel mortgage, it will avoid fire policy containing provision that, if insured property is or becomes incumbered by chattel mortgage, policy shall be void: *Georgia Home Ins. Co. v. Hoskins*, 71 Fla. 282, 71 So. 285. A fire policy, which stipulates that any subsequent mortgage shall annul it, or, if the subject of insurance be personalty, it be or become incumbered by chattel mortgage, etc., is annulled only in case of a subsequent real estate mortgage or by an existing or subsequent chattel mortgage: *Manufacturers' Mut. Fire Ins. Co. v. Swaney*, 53 Ind. App. 429, 101 N. E. 843. A transaction, whereby personal property was conveyed as security for a debt, was held not to be a chattel mortgage, and so not to avoid an insurance policy which provided that, if the subject-matter of the insurance should be mortgaged,

the policy should be void: *Monongahela Ins. Co. v. Batson*, 111 Ark. 167, 163 S. W. 510. When the policy provided that it should be void if the subject of the insurance "be or become incumbered by a chattel mortgage," the fact that the insured lumber was subject to a mortgage authorizing the mortgagee to sell and replace same with new, which it was doing, was held not to invalidate the insurance: *Ensel v. Lumber Ins. Co.*, 88 Ohio 269, 102 N. E. 955. Where insured is asked nothing, and states nothing, respecting incumbrances on the property, and pays the premium, the existence of incumbrances in violation of an incumbrance clause will not invalidate the policy: *Humble v. German Alliance Ins. Co.*, 92 Kans. 486, 141 Pac. 243. A bill of sale was held as not within the condition of an insurance policy avoiding it should the property be incumbered by a chattel mortgage: *Petello v. Teutonia Fire Ins. Co.*, 89 Conn. 175, 93 Atl. 137, L. R. A. 1915D, 812n. There is no forfeiture because of a mortgage on land "with all improvements thereon situate," if the insured property is a fixture, within the clause of a fire policy providing for a forfeiture, "if the subject of insurance be personal property, and becomes incumbered by a chattel mortgage": *Rawls v. American Central Ins. Co.*, 97 S. Car. 189, 81 S. E. 505. A mortgage or deed was held not to be an incumbrance avoiding a policy which covered the insured property and purporting to secure an obligation not yet effective at time of loss: *Downey v. National Fire Ins. Co. (W. Va.)*, 87 S. E. 487. Where a live stock policy provided that it should be void in case of mortgage without permission, it was sufficient that insurer gave permission by notice to its local agent, though it was not indorsed on the policy: *National Live Stock Ins. Co. v. Jackson*, 160 Ky. 228, 169 S. W. 695. Under a policy of insurance prohibiting incumbrances or changes in title or interest, chattel mortgage held merely to have the effect of suspending the insurance, which, therefore, revived upon payment and cancellation of the mortgage: *Cottingham v. Maryland Motor Car Ins. Co.*,

§ 4254. **Illustrations.**<sup>9</sup>—The liability of the insurer was held, by an equally divided court, to be unaffected by a conveyance as security only as this did not amount to an absolute defeasance.<sup>10</sup>

§ 4260. **Change in interest, title or possession—Scope of provision.**<sup>11</sup>—It is held in recent cases that the insurer is liable to the mortgagee where the policy is payable to the mortgagee,

168 N. Car. 259, 84 S. E. 274, L. R. A. 1915D, 344, Ann. Cas. 1917B, 1237n. A fire policy, issued without a written application, although it contained a condition that it should be void if the property should be incumbered, held valid, though the property was subject to a chattel mortgage: *Great Southern Fire Ins. Co. v. Burns*, 118 Ark. 22, 175 S. W. 1161, L. R. A. 1916B, 1252, Ann. Cas. 1917B, 497n. Insured was held entitled to show that, under the laws of the state where the trust deed was executed and delivered, a trust deed was not a chattel mortgage, within the meaning of the clause which forbade such incumbrances: *Lambert v. Security Mut. Fire Ins. Co.*, 58 Pa. Super. Ct. 624. The fact that the application for a fire policy stated falsely that the property was not incumbered was no defense to an action on the policy, if the insured did not know that the application contained such question and answer: *Warner v. Narragansett Mut. Fire Ins. Co.*, 111 Maine 590, 90 Atl. 706.

<sup>9</sup> In a policy insuring a dwelling house, provisions that it should be void if the interest of the insured was other than an unconditional ownership, or if the dwelling was on ground not owned by the insured, had reference to the date of the policy, and it was not avoided by a subsequent sale of the ground: *Insurance Co. v. O'Bannon* (Tex. Civ. App.), 170 S. W. 1055.

<sup>10</sup> *Houran v. Ætna Ins. Co.*, 183 Mich. 418, 150 N. W. 137.

<sup>11</sup> A provision avoiding a fire policy in case of change of the insured's interest is valid, being reasonable, because it affects the moral hazard: *Wiley v. London & Co. Fire Ins. Co.*, 89 Conn. 35, 92 Atl. 678. The rendition of a judgment against the

owner of insured property will avoid the policy, under a condition providing that it should be void if any change should take place in the interest, title, or possession of the insured: *Kelley v. People's Nat. Fire Ins. Co.*, 262 Ill. 158, 104 N. E. 188, 50 L. R. A. (N. S.) 1164n. A provision in a policy against changes in title or interest is not breached by the giving of a mere option, not exercised, on insured property: *Terminal Ice & Co. v. American Fire Ins. Co.* (Mo. App.), 187 S. W. 564; *Terminal Ice & Co. v. Home Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice & Co. v. Lumbermen's Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice & Co. v. Security Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice & Co. v. Commercial Fire Ins. Co.* (Mo. App.), 187 S. W. 569; *Terminal Ice & Co. v. Stuyvesant Ins. Co.* (Mo. App.), 187 S. W. 569. Where title is regained before loss a clause of an insurance policy on a stock of goods, providing for avoidance of the policy in case of change of ownership, does not apply: *Weisberger v. Western Reserve Ins. Co.*, 250 Pa. 155, 95 Atl. 402. A purchaser paying the price of property increased his interest therein, but did not increase the risk of the insurer: *Houran v. Ætna Ins. Co.*, 183 Mich. 418, 150 N. W. 137. The execution of a mortgage on insured property does not constitute a change of title or interest, within a provision for forfeiture in such event: *Seyler v. British America Assur. Co.*, 72 W. Va. 120, 77 S. E. 555; *Germania Fire Ins. Co. v. Turley*, 167 Ky. 57, 179 S. W. 1059, Ann. Cas. 1917C, 931n; *Foiles v. Detroit Fire & Co. Ins. Co.*, 175 Mich. 716, 141 N. W. 879; *Foiles v. Dixie Fire Ins. Co.*, 175 Mich. 723, 141 N. W. 882; *Foiles v. Michigan Commercial*

though the policy provided that it should be forfeited on foreclosure.<sup>12</sup>

§ 4261. **Transfer of part interest.**<sup>13</sup>—The remaining tenant or tenants in common are not affected by a sale by one of them of his interest under a policy voidable by change of title and covering property of tenants in common.<sup>14</sup>

§ 4262. **Executory contract of sale.**<sup>15</sup>

§ 4263. **Mortgages on premises.**<sup>16</sup>—A trust deed was held not to be a chattel mortgage within the provision of a Wisconsin

Ins. Co. (Mich.), 141 N. W. 882. A tenant's going into possession of premises insured by his landlord does not breach a policy provision against "change of possession": *Terminal Ice &c. Co. v. American Fire Ins. Co.* (Mo. App.), 187 S. W. 564; *Terminal Ice &c. Co. v. Home Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Lumbermen's Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Security Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Commercial Fire Ins. Co.* (Mo. App.), 187 S. W. 569; *Terminal Ice &c. Co. v. Stuyvesant Ins. Co.* (Mo. App.), 187 S. W. 569. It is held in Louisiana that a policy is breached by the commencement of foreclosure proceedings against the insured property, the policy providing that it should be void in case of such proceedings, though the fire did not result from the seizure, and the premises were released from seizure prior to the fire: *Jones v. Michigan Fire &c. Ins. Co.*, 132 La. 847, 61 So. 846.

<sup>12</sup> *Rostetter v. American Ins. Co.*, 184 Ill. App. 157; *Citizens' State Bank v. Shawnee Fire Ins. Co.*, 91 Kans. 18, 137 Pac. 78, 49 L. R. A. (N. S.) 972n. See also and compare *Hamburg-Bremen Fire Ins. Co. v. Ohio Valley Dry Goods Co.*, 160 Ky. 252, 169 S. W. 724, Ann. Cas. 1916B, 944n; *Terminal Ice &c. Co. v. American Fire Ins. Co.* (Mo. App.), 187 S. W. 564; *Terminal Ice &c. Co. v. Home Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Lumbermen's Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Security Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice &c. Co. v. Commercial Fire Ins. Co.* (Mo.

App.), 187 S. W. 569; *Terminal Ice &c. Co. v. Stuyvesant Ins. Co.* (Mo. App.), 187 S. W. 569; *O'Neil v. Franklin Fire Ins. Co.*, 159 App. Div. 313, 145 N. Y. S. 432; *Mechanics' &c. Ins. Co. v. Davis* (Tex. Civ. App.), 167 S. W. 175.

<sup>13</sup> Since a new party is brought into contractual relations with an insurer, where an insurance policy covering partnership property is voidable by change of title, a sale of his interest by one partner to a third person affects the risk: *Firemen's Ins. Co. v. Larey*, 125 Ark. 93, 188 S. W. 7, L. R. A. 1917A, 29n, Ann. Cas. 1917B, 1225.

<sup>14</sup> *Firemen's Ins. Co. v. Larey*, 125 Ark. 93, 188 S. W. 7, L. R. A. 1917A, 29n, Ann. Cas. 1917B, 1225.

<sup>15</sup> Where the vendee is placed in possession a proviso of a fire insurance contract against change or alienation of interest is breached by contract of sale of insured property: *Cardwell v. Virginia State Ins. Co.* (Ala.), 73 So. 466. Contract of sale which acknowledged receipt of part payment and providing for delivery of warranty deed upon other payments being made held an unconditional contract of sale which violated provisions of insurance policy: *Cardwell v. Virginia State Ins. Co.* (Ala.), 73 So. 466.

<sup>16</sup> Provision in fire insurance policy that mortgage or incumbrance should avoid it relates to liens placed voluntarily on the property by the insured, and does not apply to judgment obtained against him or other liens upon the property created by law: *Continental Ins. Co. v. Bair* (Ind. App.), 114 N. E. 763.

statute providing that an insurance policy shall be void if the property is subsequently incumbered by a chattel mortgage.<sup>17</sup>

§ 4273. **Assignment and bankruptcy proceedings.**<sup>18</sup>—To avoid a policy which provides for forfeiture on change of interest, the entire ownership and right of possession must be transferred to the assignee in case of an assignment for the benefit of creditors.<sup>19</sup>

§ 4277. **Assignment of policy.**<sup>20</sup>—A policy was not rendered void where the insured, at the time he mortgaged the property, wrote on the policy, "in case of loss of fire proceeds of policy to be paid to" mortgagee "as his interest may appear."<sup>21</sup>

§ 4278. **Use of property—Prohibited articles.**<sup>22</sup>—When a fire policy on an automobile provides that it shall not be used for

<sup>17</sup> *Stocker v. Dubuque Fire & C. Ins. Co.*, 164 Wis. 614, 160 N. W. 1035.

<sup>18</sup> The execution of an irrevocable deed of assignment for creditors was held to render void an insurance policy providing that it shall be void if the insured shall not be and remain the unconditional owner in fee simple: *Roper v. National Fire Ins. Co.*, 161 N. Car. 151, 76 S. E. 869; *Firemen's Ins. Co. v. Larey*, 125 Ark. 93, 188 S. W. 7, L. R. A. 1917A, 29n, Ann. Cas. 1917B, 1225; *Louisville German Mut. Fire Ins. Assn. v. Schneider*, 165 Ky. 285, 176 S. W. 1154; *Swaine v. Teutonia Fire Ins. Co.*, 222 Mass. 108, 109 N. E. 825; *Marcus v. Rhode Island Ins. Co.*, 187 Mo. App. 134, 173 S. W. 30; *Plockzek v. St. Paul Fire & C. Ins. Co. (N. J. Ch.)*, 91 Atl. 812; *Smith v. Security Mut. Fire Ins. Co.*, 37 S. Dak. 418, 158 N. W. 991; *Hamilton v. Fireman's Fund Ins. Co. (Tex. Civ. App.)*, 177 S. W. 173; *Fire Assn. v. Perry (Tex. Civ. App.)*, 185 S. W. 374.

<sup>19</sup> *Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)*, 160 N. W. 24.

<sup>20</sup> Assignment of policy, dated before fire, and deed reserving title till date after fire, held breaches of conditions in policy against change of title or assignment of policy: *Moore v. St. Paul Fire & C. Ins. Co.*, 176 Iowa 549, 156 N. W. 676. The assignment of fire policy after fire,

though it was dated before the fire, did not defeat the policy: *Moore v. St. Paul Fire & C. Ins. Co.*, 176 Iowa 549, 156 N. W. 676; *Manufacturers' Mut. Fire Ins. Co. v. Swaney*, 53 Ind. App. 429, 101 N. E. 843.

<sup>21</sup> *Henderson v. Abbeville-Greenwood Mut. Ins. Assn.*, 96 S. Car. 430, 81 S. E. 171.

<sup>22</sup> Under the provision of the policy which suspended the liability of the company while the risk is increased by presence of prohibited gasoline, liability is not affected by prior presence of gasoline removed before the fire: *O'Neil v. Caledonian Ins. Co.*, 166 Cal. 310, 135 Pac. 1121; *Central Market Street Co. v. North British & C. Ins. Co.*, 245 Pa. 272, 91 Atl. 662. Where such article is customarily a part of the goods insured or is in customary use in the business conducted in the insured building the use of an article prohibited by the printed clause will not avoid the policy: *McClure v. Mutual Fire Ins. Co.*, 242 Pa. 59, 88 Atl. 921, 48 L. R. A. (N. S.) 1221n; *Ertischek v. New Hampshire Fire Ins. Co.*, 98 Misc. 279, 162 N. Y. S. 1047. The use of a gasoline engine in an insured barn which was for driving threshing machinery, does not forfeit the policy under a clause prohibiting the keeping or using of combustible fluids: *Bouchard v. Dirigo Mut. Fire Ins. Co.*, 113 Maine 17, 92 Atl. 899, L. R.

carrying passengers for hire, it is held to only prohibit the use of the machine regularly for carrying passengers as a business.<sup>23</sup>

§ 4279. **Prohibited articles.**—Apparently it is not a violation of a clause of a policy preventing the keeping of benzine on the premises to keep dyestuffs which contain benzine as an ingredient.<sup>24</sup>

§ 4280. **Vacancy—In general.**<sup>25</sup>—If the company knows when the policy is issued that the buildings are vacant, although the policy provides that the company will not be liable in case of vacancy, the company will be liable.<sup>26</sup> Under a policy insuring a

A. 1915D, 187n. Gasoline was not "stored," within the terms of an insurance policy and the policy was not avoided by the keeping of a small quantity thereof in a closed retainer for occasionally cleaning wearing apparel: *Hanover Fire Ins. Co. v. Eisman*, 45 Okla. 639, 146 Pac. 214; *Home Ins. Co. v. Bridges*, 172 Ky. 161, 189 S. W. 6, L. R. A. 1917C, 276n; *Gump v. National Union Fire Ins. Co.*, 34 Ohio Cir. Ct. 36.

<sup>23</sup> *Commercial Union Assur. Co. v. Till* (Tex. Civ. App.), 167 S. W. 1095. Where it was so used but once without the owner's knowledge, and the forbidden use had ceased when the liability arose, forfeiture of an insurance policy was not authorized under a clause forbidding renting or using the car for passenger service for hire: *Crowell v. Maryland Motor Car Ins. Co.*, 169 N. Car. 35, 85 S. E. 37, Ann. Cas. 1917D, 50n. But it is held that such a clause is binding where insured makes a business of hauling passengers for hire and a provision in a fire policy warranting that the automobile insured should not be leased or used for carrying passengers for compensation is a promissory warranty, a breach of which prevents recovery: *Orient Ins. Co. v. Van Zandt-Bruce Drug Co.*, 50 Okla. 558, 151 Pac. 323; *O'Neill v. Caledonian Ins. Co.*, 166 Cal. 310, 135 Pac. 1121.

<sup>24</sup> *Ertischek v. New Hampshire Fire Ins. Co.*, 98 Misc. 279, 162 N. Y. S. 1047.

<sup>25</sup> Merely because the occupant was temporarily absent an insured building was not vacant at the time of a fire: *Walrod v. Des Moines Fire Ins.*

*Co.*, 159 Iowa 121, 140 N. W. 218; *Tracy v. Queen City Fire Ins. Co.*, 132 La. 610, 61 So. 687, Ann. Cas. 1914D, 1145n. A clause in an insurance policy that liability of insurer shall cease if building becomes vacant or unoccupied for ten days held applicable even though building becomes vacant by reason of fire: *Kupfersmith v. Delaware Ins. Co.*, 84 N. J. L. 271, 86 Atl. 399, 45 L. R. A. (N. S.) 847n, Ann. Cas. 1914C, 1172n; *Robinson v. Mennonite Mut. Fire Ins. Co.*, 91 Kans. 850, 139 Pac. 420. *Contra*: *Schmidt v. Williamsburg City Fire Ins. Co.*, 98 Nebr. 61, 151 N. W. 920. A subsequent occupancy did not revive the policy under Rev. Stat. ch. 1, § 6, par. 1, relative to the construction of words and phrases, where a fire policy provided that it should become void in case of vacancy or a breach of the condition: *Dolliver v. Granite State Fire Ins. Co.*, 111 Maine 275, 89 Atl. 8, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765n; *Planters' Fire Ins. Co. v. Steele*, 119 Ark. 597, 178 S. W. 910, Ann. Cas. 1917B, 667n. *Contra*: *Beecher v. Vermont Mut. Fire Ins. Co.*, 90 Vt. 347, 98 Atl. 917. Although the policy provided that insurance will not be carried on unoccupied buildings unless covered by vacancy permit, insurer held liable where tenant moved out on Saturday evening and another tenant was to move in on Monday, and the building was burned early Monday morning: *Farmers' Mut. Equity Ins. Society v. Smith*, 158 Ky. 459, 165 S. W. 675, L. R. A. 1915B, 844n.

<sup>26</sup> *Maxwell v. York Mut. Fire Ins. Co.*, 114 Maine 170, 95 Atl. 877; *Law*



building "occupied as a contagious hospital," the insurer was held liable, although it had no patients, and had no caretaker, in the absence of any evidence that its condition increased the risk.<sup>27</sup>

§ 4282. "Vacant" and "unoccupied" not synonymous.<sup>28</sup>—It is held that the term "occupied" implies an actual use by some person according to the purpose for which the property is designed, and does not imply that some one shall remain in the building all of the time and without interruption, but merely that there shall not be a cessation of occupancy for any considerable length of time.<sup>29</sup>

§ 4283. Construction when applied to dwelling-house.<sup>30</sup>—It was held that a policy of insurance on a house insured as a dwelling-house was not voided by the insured keeping private boarders therein.<sup>31</sup>

§ 4288. Renewal of contract—In general.<sup>32</sup>—An agent of an insurance company, who has full power to renew policies, has

v. Home Mut. Fire Ins. Co., 56 Pa. Super. Ct. 527.

<sup>27</sup> Fall River v. Aetna Ins. Co., 219 Mass. 454, 107 N. E. 367; Washington Fire Ins. Co. v. Cobb (Tex. Civ. App.), 163 S. W. 608.

<sup>28</sup> "Vacant" in a fire policy means empty, while cessation of "occupancy" means change of use: Southern Nat. Ins. Co. v. Cobb (Tex. Civ. App.), 180 S. W. 155; Gump v. National Union Fire Ins. Co., 34 Ohio Cir. Ct. 36.

<sup>29</sup> Washington Fire Ins. Co. v. Cobb (Tex. Civ. App.), 163 S. W. 608.

<sup>30</sup> A burglary policy covering the apartment which was procured by such misrepresentation was void where plaintiff represented he was a mining promoter, when in fact he was a clairvoyant, and used his apartment for telling fortunes: Reese v. Fidelity & Co., 93 Misc. 31, 156 N. Y. S. 408. A policy was avoided when plaintiff's premises were insured as a private dwelling, and insured failed to continue using them as such and he rented the property: Planters' Fire Ins. Co. v. Steele, 119

Ark. 597, 178 S. W. 910, Ann. Cas. 1917B, 667n.

<sup>31</sup> A policy on a house insured as a dwelling house was not voided by insured keeping private boarders therein: Milwaukee Mechanics' Ins. Co. v. Fuquay, 120 Ark. 330, 179 S. W. 497.

<sup>32</sup> As defined by Rev. Civ. Stat. 1911, art. 4691, an agent of an insurance company who has authority to issue and deliver policies, has authority to bind his company by the redelivery of a policy theretofore canceled: Austin Fire Ins. Co. v. Sayles (Tex. Civ. App.), 157 S. W. 272. On an agreement to renew a policy the insured may take it for granted that the terms of the renewal policy would be the same as the original: Roberts v. National Ins. Co., 2 Ohio App. 463, 35 Ohio Cir. Ct. 212; Aetna Ins. Co. v. Short, 124 Ark. 505, 187 S. W. 657. Unless an insurance agent has authority from the company to do so, he can not bind the company by an agreement to extend a standard policy on its expiration: Oklahoma Fire Ins. Co. v. Fay Mercantile Co., 52 Okla. 446, 153 Pac. 127.

power to bind the company by a parol agreement to renew a policy.<sup>33</sup>

§ 4290. **Reformation of the policy.**<sup>34</sup>—Equity will reform the instrument when a policy of insurance does not conform to the contract which it purports to evidence.<sup>35</sup> And a policy may be reformed when there is a mutual mistake or a mistake on one side and fraud on the other.<sup>36</sup>

§ 4291. **Cancellation of policy—In general.**<sup>37</sup>—Though he had not delivered the policies to the insured, an insurance broker

<sup>33</sup> *Hawthorne v. German Alliance Ins. Co.*, 181 Ill. App. 88; *Gresham v. Norwich Union Fire Ins. Society*, 157 Ky. 402, 163 S. W. 214; *Fireman's Fund Ins. Co. v. Searcy*, 157 Ky. 749, 163 S. W. 1103. The parties to a fire insurance contract may make an oral agreement to renew it on the same terms for another year: *Willson v. German American Ins. Co.*, 95 Nebr. 774, 146 N. W. 945.

<sup>34</sup> That the original company had paid a loss on buildings not specifically covered by the policy held not to estop defendant from objecting to the reformation in a suit to reform a fire policy for mutual mistake as to the buildings insured, against a company reinsuring: *Vial v. Norwich Union Fire Ins. Society*, 172 Ill. App. 134. Where a local insurance agent who issued a fire policy on the separate property of a wife in the name of her husband, knowing that the property belonged to the wife and by inadvertence inserted the name of the husband and there was no fraud, the policy could be reformed: *Gaskill v. Northern Assur. Co.*, 73 Wash. 668, 132 Pac. 643. Where insured was advised by insurer that his automobile policy did not cover loss by direct collision, nevertheless elected to retain it, he accepted the policy as complying with his application, and could not have it reformed to cover such loss: *Browne v. Commercial Union Assur. Co.*, 30 Cal. App. 547, 158 Pac. 765. The mistake of the agents of an insurance company in putting the old form of rider on a renewal policy instead of the new form, of which latter form insured did not know, was not imputable to

insured, so as to render the mistake mutual, and so permit of reformation for the company after a fire: *O'Neill v. Caledonian Ins. Co.*, 166 Cal. 310, 135 Pac. 1121; *Decker v. Scottish Union & C. Ins. Co.*, 83 N. J. Eq. 531, 91 Atl. 94; *Salomon v. North British & C. Ins. Co.*, 215 N. Y. 214, 109 N. E. 121, L. R. A. 1917C, 106n.

<sup>35</sup> *Fidelity Phenix Fire Ins. Co. v. Hilliard*, 65 Fla. 443, 62 So. 585; *Southern States Fire Ins. Co. v. Vann*, 69 Fla. 544, 68 So. 645; *Salomon v. Farm Property Mut. Ins. Assn.*, 168 Iowa 521, 150 N. W. 680; *Palin v. Insurance Co.*, 92 Kans. 401, 140 Pac. 886; *Hayes v. Penn Mut. Life Ins. Co.*, 222 Mass. 382, 111 N. E. 168; *Seymour v. German Ins. Co.*, 84 N. J. Eq. 206, 90 Atl. 674. *Seymour v. German Ins. Co.*, 84 N. J. Eq. 206, 93 Atl. 1086; *Britton v. Metropolitan Life Ins. Co.*, 165 N. Car. 149, 80 S. E. 1072, Ann. Cas. 1915D, 363n; *French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. Dak. 426, 151 N. W. 7, L. R. A. 1915D, 766; *Phenix Ins. Co. v. Ceaphus (Okla.)*, 151 Pac. 568; *Carlton Lumber Co. v. Lumber Ins. Co.*, 81 Ore. 396, 158 Pac. 807, 159 Pac. 969.

<sup>36</sup> *National Union Fire Ins. Co. v. Light*, 163 Ky. 169, 173 S. W. 365; *Springfield Fire & C. Ins. Co. v. Snowden*, 173 Ky. 664, 191 S. W. 439; *Great Eastern Casualty Co. v. Thomas (Tex. Civ. App.)*, 178 S. W. 603.

<sup>37</sup> Where the assessment on a particular building was omitted from an assessment sent to the member before the fire a mutual fire insurance policy held canceled as to one building under Ky. Stat., § 712, although entry

acting for the insured, who procured the policies of insurance, had no authority to waive or receive notice of cancellation.<sup>38</sup>

was not made on the books of the company for more than 30 days after notice of the cancellation: *German Mut. Fire Ins. Co. v. Weikel*, 153 Ky. 288, 155 S. W. 373. Provisions in a fire policy that it shall be void upon breach of certain conditions merely allow it to be avoided at the option of the insurer, who must, after having notice of the breach, act with reasonable promptness, notify the insured of its election, and tender back the unearned premium: *Western Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45. Until brought to the notice of the insured no attempted cancellation by the insurer will be effective: *New Amsterdam Casualty Co. v. New Palestine Bank*, 59 Ind. App. 69, 107 N. E. 554; *Farmers' Mut. Ins. Assn. v. Tankersley*, 13 Ala. App. 524, 69 So. 410; *Davis v. Continental Ins. Co.*, 60 Pa. Super. Ct. 341; *Tacoma Lumber & Co. v. Fireman's Fund Ins. Co.*, 87 Wash. 79, 151 Pac. 91. A fire insurance policy which provided that it could be canceled at any time at the request of the insured or by the company by giving five days' notice, could be canceled by the insured or by the company as provided by the policy, or by agreement of the parties: *Cohn v. Mechanics' & Ins. Co.*, 175 Ill. App. 594; *Cohn v. North British & Ins. Co.*, 175 Ill. App. 612; *Commercial Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S. W. 445; *Warren v. Franklin Fire Ins. Co.*, 161 Iowa 440, 143 N. W. 554; *German Mut. Fire Ins. Co. v. Weikel*, 153 Ky. 288, 155 S. W. 373; *Fritz v. Pennsylvania Fire Ins. Co.*, 85 N. J. L. 171, 88 Atl. 1065, 50 L. R. A. (N. S.) 35n; *Roberta Mfg. Co. v. Royal Exchange Assur. Co.*, 161 N. Car. 88, 76 S. E. 865; *Rawl v. American Cent. Ins. Co.*, 94 S. Car. 299, 77 S. E. 1013, 45 L. R. A. (N. S.) 463n, Ann. Cas. 1915A, 1231n; *Glens Falls Ins. Co. v. Walker* (Tex. Civ. App.), 166 S. W. 122. The policy may be canceled by mutual consent regardless of the provisions of a policy as to cancellation: *Polemanakos v. Austin Fire Ins. Co.* (Tex. Civ. App.), 160 S. W. 1134;

*Westchester Fire Ins. Co. v. McMinn* (Tex. Civ. App.), 188 S. W. 25; *Ralston v. Royal Ins. Co., Ltd.*, 79 Wash. 557, 140 Pac. 552. It was held sufficient to effect cancellation by mailing a proper notice of cancellation of a policy and the return premium in a letter, postpaid and addressed to the insured, a foreign corporation, at its postoffice address, or delivering a copy of the notice and return premium to the agent in charge of its office and business: *Liverpool & Ins. Co. v. Harding*, 201 Fed. 515, 119 C. C. A. 611; *Commercial Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S. W. 445. Except upon strict compliance with conditions of contract where policy had become effective between parties, neither could cancel or terminate it without the other's consent: *Continental Ins. Co. v. Phipps* (Mo. App.), 190 S. W. 994. An insurance policy can not be canceled without placing insured in statu quo by returning or offering to return the unearned premium: *Payne v. President & Directors of Ins. Co.*, 170 Mo. App. 85, 156 S. W. 52. The company was relieved from giving notice of cancellation where insured's agent telegraphed that the insured would not accept a change in the rate, and asked if the policies would stand, to which the reply was that the companies demanded a higher rate, whereupon the insured's agent wrote back that there was nothing to do but cancel the policies, there being an agreement for the cancellation: *Northern Assur. Co. v. J. J. Newman Lumber Co.*, 105 Miss. 688, 63 So. 209. Under the provisions of a mutual fire policy it was held that a member who had not paid premiums was not entitled to cancel it except by special agreement: *Farmers' Mut. Ins. Assn. v. Tankersley*, 13 Ala. App. 524, 69 So. 410.

<sup>38</sup> *Cheshire Brass Co. v. Wilson*, 86 Conn. 551, 86 Atl. 26; *National Union Fire Ins. Co. v. Baltimore Asbestos Co.*, 122 Md. 121, 89 Atl. 408; *Condon v. Exton-Hall Brokerage & C. Agency*, 80 Misc. 369, 142 N. Y. S. 548.

§ 4293. Return of premium.<sup>39</sup>

§ 4294. What amounts to a cancellation.<sup>40</sup>—When the premium was not paid, there was a cancellation where insured was notified that if the premium was not paid by a certain date the policy would stand canceled without further notice, and the manager of the company directed the policy to be canceled on the books of the company.<sup>41</sup>

<sup>39</sup> It is necessary for the company to pay or tender to the policy holder the unearned premium before an insurance policy can be canceled upon notice, unless otherwise expressly provided by its terms: *Hansell-Elcock Co. v. Frankfort Marine Accident &c. Ins. Co.*, 177 Ill. App. 500; *Hartford Fire Ins. Co. v. Stephens*, 18 Ariz. 339, 161 Pac. 684; *National Hotel Co. v. Merchants' Fire Assur. Corp.*, 183 Ill. App. 71; *C. A. Smith Lumber Co. v. Colonial Assurance Co.*, 172 App. Div. 149, 158 N. Y. S. 198; *St. Paul Fire &c. Ins. Co. v. Peck*, 40 Okla. 396, 139 Pac. 117. The insured may waive stipulation in a fire policy, authorizing insurer to cancel the policy on tendering the pro rata unearned premium, it being for his benefit: *Hancock v. Hartford Fire Ins. Co.*, 81 Misc. 159, 142 N. Y. S. 352. Under the provision of a fire insurance policy in the New York standard form relating to cancellation, held that insurer's giving of the prescribed five days' notice was sufficient to cancel the policy, without a return of or offer to return the unearned portion of the premium: *Mangrum v. Law Union &c. Ins. Co.*, 172 Cal. 497, 157 Pac. 239, L. R. A. 1916F, 440n; *Westchester Fire Ins. Co. v. McMinn* (Tex. Civ. App.), 188 S. W. 25. It is held that a legal tender of the unearned premium is necessary to effect a cancellation under a provision of a fire policy authorizing cancellation, and providing that the unearned premium should be returned: *Niagara Fire Ins. Co. v. Mitchell* (Tex. Civ. App.), 164 S. W. 919.

<sup>40</sup> The right to cancel a policy can

be exercised only in the manner provided in the policy: *Commercial Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S. W. 445. Insured held not to have waived notice and tender and not to have consented to cancellation where a letter written insured did not cancel policy because there was no tender of the unearned premium and no unequivocal notice of cancellation: *Payne v. President & Directors of Ins. Co.*, 170 Mo. App. 85, 156 S. W. 52. It is not a cancellation where a notice to a holder of an insurance policy stated that "we shall cancel the policy": *McNellis v. Aetna Ins. Co.*, 176 Ill. App. 575. There was no rescission of the contract of insurance when there was a surrender of old policy and issuance of new one in place thereof, unearned premium on the old having been applied on the new: *Hicks v. Grimley*, 213 N. Y. 447, 107 N. E. 1037. While mere return of policy by mail to insurer's agent does not amount to a cancellation under the insured's right to cancel, yet, if returned with the obvious purpose of cancellation, receipt by the insurer's agent would be a cancellation: *York v. Sun Ins. Office* (Ind. App.), 113 N. E. 1021. The policies were still in force where insured gave notice of the cancellation of fire insurance policies, but did not surrender the policies, and the company did not acknowledge receipt of the notice, or offer to return the unearned premium before the building was burned: *Gately-Haire Co. v. Niagara Fire Ins. Co.*, 162 N. Y. S. 473.

<sup>41</sup> *Ralston v. Royal Ins. Co., Ltd.*, 79 Wash. 557, 140 Pac. 552.

## CHAPTER CXXVII

### PROVISIONS OF THE STANDARD POLICY RELATING TO MATTERS SUBSEQUENT TO LOSS

§ 4300. Notice and proof of loss—Generally.<sup>1</sup>—As regards proof of loss, all that is required of the insured is a reason-

<sup>1</sup> Technical "proof of loss" held a requirement arising out of a policy for insurer's benefit and distinguished from the proof of loss in court before the jury pursuant to the rules of evidence, to make a liability on the policy: *Padgett v. North Carolina Home Ins. Co.*, 98 S. Car. 244, 82 S. E. 409. A provision in a fire policy was reasonable and valid which required proof of loss and a signed and sworn statement by insured showing the property lost or damaged and his knowledge and belief as to the time and origin of the fire, and failure to make such proof will defeat recovery: *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Tex. Civ. App.), 167 S. W. 334; *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848; *Miller v. Milwaukee Mechanics' Ins. Co.*, 181 Ill. App. 133; *Edelson v. Norwich Union Fire Ins. Co.*, 59 Pa. Super. Ct. 379; *Fidelity Phenix Fire Ins. Co. v. Sadau* (Tex. Civ. App.), 178 S. W. 559. But it is held that failure to make proofs of loss within a specified time does not forfeit the rights of the insured, unless there is an express provision in the policy imposing such forfeiture: *Wilson v. German-American Ins. Co.*, 90 Kans. 355, 133 Pac. 715. In some cases it is held that while the furnishing of proofs of loss within the period stipulated in a contract of fire insurance is a condition precedent to insured's right to sue on the policy, failure to furnish is not a ground for defeating recovery: *Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090. Under the circumstances under which the goods were acquired, the failure of insured on demand after loss to fur-

nish, as required by the policy bills covering household goods destroyed by fire, held not to defeat recovery on the policy: *Fidelity Phenix Fire Ins. Co. v. Sadau* (Tex. Civ. App.), 178 S. W. 559. Insured is not concluded by the amount of a fire loss stated in proofs of loss: *Frees v. National Ben Franklin Fire Ins. Co.*, 163 App. Div. 57, 148 N. Y. S. 790; *Fidelity-Phenix Fire Ins. Co. v. Friedman*, 117 Ark. 71, 174 S. W. 215; *Phenix Ins. Co. v. Jones*, 16 Ga. App. 261, 85 S. E. 206; *Carroll v. Hartford Fire Ins. Co.*, 28 Idaho 466, 154 Pac. 985; *Cole v. North British Mercantile Ins. Co.*, 113 Maine 512, 95 Atl. 217; *Harmon v. Stuyvesant Ins. Co.*, 170 Mo. App. 309, 156 S. W. 87; *Laurenzi v. Atlas Ins. Co.*, 131 Tenn. 644, 176 S. W. 1022; *Teter v. Franklin Fire Ins. Co.*, 74 W. Va. 344, 82 S. E. 40; *Downey v. National Fire Ins. Co.*, 77 W. Va. 386, 87 S. E. 487. In the absence of fraud or of any showing that insurer was deceived or deprived of knowledge supposed to be afforded by proofs of loss, statement in proof of loss under a fire policy that cause of fire was unknown, without stating facts, did not avoid policy: *Marx v. Williamsburgh City Fire Ins. Co.*, 192 Mich. 497, 158 N. W. 1052. Where the company's adjuster declared the loss to be total, it was not material that insured furnished no proofs within 60 days, as required by policy, where company had full information, and no demand was made for formal proof: *Livingstone v. Boston Ins. Co.*, 255 Pa. 1, 99 Atl. 212. Regardless of stipulations as to notice and proof of loss under *Vernon's Sayles' Ann. Civ. Stat. 1914*, art. 4874, where

able and substantial compliance with the requirements of the policy.<sup>2</sup>

§ 4301. **"Immediate" notice.**<sup>3</sup>—Where immediate written notice was required by a policy the insured, being without knowledge, was under no duty to report to the insurer.<sup>4</sup>

§ 4302. **Separation of goods "forthwith."**<sup>5</sup>—Unless compliance with the policy is waived, there can be no recovery, where insured, after a loss, fails to separate the damaged from the undamaged goods and to place them in the best possible order, as required by the policy, and sells the goods before the insurer can inspect them or appraise the damage.<sup>6</sup>

§ 4303. **Who may make proof—Excuses for failure to furnish proofs.**<sup>7</sup>—The refusal of the mortgagor to make

property insured is totally destroyed by fire, the liability of the insurance company accrues immediately after the occurrence of the fire: *Fire Assn. of Philadelphia v. Richards* (Tex.

<sup>2</sup> *Globe &c. Ins. Co. v. Prairie Oil &c. Co.*, 248 Fed. 452; *Continental Ins. Co. v. Bair* (Ind. App.), 114 N. E. 763; *Insurance Co. of North America v. Cochran* (Okla.), 159 Pac. 247; *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 E. E. 404.

<sup>3</sup> "Immediate notice" of loss under an insurance policy means no more than that degree of promptitude which is reasonable under the circumstances: *National Surety Co. v. Western Pac. R. Co.*, 200 Fed. 675, 119 C. C. A. 91; *A. M. Forbes Cartage Co. v. Frankfort Marine &c. Ins. Co.*, 195 Ill. App. 75; *Curran v. National Life Ins. Co.*, 251 Pa. 420, 96 Atl. 1041; *Schambelan v. Preferred Accident Ins. Co.*, 62 Pa. Super. Ct. 445. Where the adjusters acted, immediate notice in writing of loss under insurance policies held not required: *Fidelity-Phenix Fire Ins. Co. v. Friedman*, 117 Ark. 71, 174 S. W. 215. An unexplained and unexcused delay of three months in furnishing a sworn statement of loss will prevent recovery: *Swaine v. Teutonia Fire Ins. Co.*, 222 Mass. 108, 109 N. E. 825.

<sup>4</sup> *Employers' Liability Assur. Corp. v. Jones County Lumber Co.*, 111 Miss. 759, 72 So. 152; *Melcher v.*

*Ocean Accident &c. Corp.*, 175 App. Div. 77, 161 N. Y. S. 586; *Lucas v. New Amsterdam Casualty Co.*, 97 Misc. 618, 162 N. Y. S. 191; *Curran v. National Life Ins. Co.*, 251 Pa. 420, 96 Atl. 1041; *Shafer v. United States Casualty Co.*, 90 Wash. 687, 156 Pac. 861.

<sup>5</sup> "Forthwith" means within a reasonable time, considering all the circumstances under a policy requiring insured after a loss forthwith to separate the damaged and undamaged goods and put them in the best possible order: *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 161 Iowa 5, 141 N. W. 447. It is enough that there is such a separation that insurer can estimate the loss; and a condition for separation by insured after a fire of the damaged goods from the undamaged is given a liberal construction in favor of insured: *Greengrass v. North River Ins. Co.*, 79 Misc. 237, 139 N. Y. S. 937.

<sup>6</sup> *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 161 Iowa 5, 141 N. W. 447; *Johnson v. Hartford Fire Ins. Co.*, 94 Misc. 163, 157 N. Y. S. 893. By removing and disposing of its damaged goods the insured did not forfeit its rights after giving the insurers a reasonable opportunity to examine same, of which opportunity they took advantage: *Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N. W. 650.

<sup>7</sup> It is held that insanity of insured

proofs of loss does not affect the rights of a mortgagee in an insurance policy.<sup>8</sup>

§ 4305. **What is compliance with this provision.**<sup>9</sup>—So long as the proof is ample to enable the insurer to consider its rights and liabilities, no particular form of proof of loss is required.<sup>10</sup>

§ 4306. **Certificate of magistrate.**<sup>11</sup>

§ 4308. **Waiver.**<sup>12</sup>—The provision for proof of loss was

at time of loss, continued during limitation period prescribed by policy for action thereon, exempts insured from compliance with requirement for proof of loss: *Houseman v. Home Ins. Co.*, 78 W. Va. 203, 88 S. E. 1048. Although the insured was living and conscious for a long time after receiving the injury and gave no notice to company, when an accident insurance policy required notice of the disability or death to be given as soon as reasonably possible after the accident, a beneficiary, on giving the required notice can recover for the accidental death: *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845. Proofs of loss made out and verified by an attorney at law for a nonresident client, for whom he had negotiated the policy in question, are sufficient, especially since assured had no knowledge of the transaction, and could not reasonably be expected to make such proofs: *Gump v. National Union Fire Ins. Co.*, 34 Ohio Cir. Ct. 36.

<sup>8</sup> *Alezunas v. Granite State Fire Ins. Co.*, 111 Maine 171, 88 Atl. 413; *McDowell v. St. Paul Fire & Ins. Co.*, 207 N. Y. 482, 101 N. E. 457.

<sup>9</sup> Fire insurance policy construed, and held to require insured to furnish a statement of the property damaged and remaining after the fire, but not to make a complete inventory of articles in the store before the fire occurred: *Bingell v. Royal Ins. Co.*, 240 Pa. 412, 87 Atl. 955; *Weiman v. National Ben Franklin Fire Ins. Co.*, 159 N. Y. S. 698; *Weisberger v. Western Reserve Ins. Co.*, 250 Pa. 155, 95 Atl. 402. Where a policy provided for notice and proof of loss, held, that a sworn subscribed statement by insured claiming a total loss, stating that the origin of the fire was

unknown, and that all terms of the policy had been complied with, was a reasonably full and exact compliance with the provision: *Padgett v. North Carolina Home Ins. Co.*, 98 S. Car. 244, 82 S. E. 409.

<sup>10</sup> *O'Brien v. North River Ins. Co.*, 212 Fed. 102; *Globe & Ins. Co. v. Prairie Oil & Co.*, 248 Fed. 452.

<sup>11</sup> There being no question as to the good faith of insured under Act April 2, 1913 (Acts 33d Leg., ch. 105), § 1 (Vernon's Sayles' Ann. Civ. Stat. 1914, art. 4874a), and § 3, insurer of personalty destroyed by fire held unable to escape liability for failure of insured to comply with provision of policy that he would furnish a certificate of the magistrate nearest the fire as to the circumstances and the loss: *Springfield Fire & Ins. Co. v. Nelms* (Tex. Civ. App.), 184 S. W. 1094.

<sup>12</sup> *Globe & Ins. Co. v. Prairie Oil & Co.*, 248 Fed. 252. A condition in a policy which required steps to be taken by insured after a loss, such as to furnish to insurer a proof of loss, are not within the limitation of another provision of such a policy that provides that no officer, agent, or other representative of insurer shall have power to waive any provision of the policy except in writing upon or attached to the policy: *Massock v. Royal Ins. Co.*, 196 Ill. App. 394. Formal proof of loss is not waived by the fact that insured personally notified agent of insurer and the agent visited the scene of the fire, and had full notice thereof: *Styles v. American Home Ins. Co.*, 146 Ga. 92, 90 S. E. 718. A denial of liability by insurer waives proof of loss where a fire policy requires preliminary proofs of loss:

held to be waived by executing a form of proof of loss as required by an adjuster who knew the facts.<sup>13</sup>

§ 4309. **To whom notice must be given.**<sup>14</sup>—Notice of injury given to a local agent was held sufficient under a Texas statute, providing that a notice of claim for damages required by the contract may be given to the nearest or other convenient local agent of the company.<sup>15</sup>

§ 4310. **Exhibition of property and records—Examination of party.**<sup>16</sup>—The insured's right to recover is not barred by failure to produce for examination, as required, all books of

Springfield Fire &c. Ins. Co. v. Fields (Ind.), 113 N. E. 756; Gibson v. Iowa Legion of Honor (Iowa), 159 N. W. 639; Lloyd v. North British &c. Ins. Co., 174 App. Div. 371, 161 N. Y. S. 271; Pauley v. Sun Ins. Office (W. Va.), 90 S. E. 552; Kutschenreuter v. Providence Washington Ins. Co., 164 Wis. 63, 159 N. W. 552. Insured was not required to furnish further proof when insurer, after full proofs of loss, had denied liability, so that further proofs pursuant to Burns' Ann. St. 1914, § 4622g, would not have changed attitude of parties as to liability: Continental Ins. Co. v. Bair (Ind. App.), 114 N. E. 763. Defects were waived by the insurer where proof of loss, though defective, was retained by insurer and no complaint made or notice given insured: Insurance Co. of North America v. Cochran (Okla.), 159 Pac. 247. The insurer's waiver of formal proof of loss dates from time of examination of the insured: Merchants' &c. Fire Underwriters v. Brooks (Tex. Civ. App.), 188 S. W. 243. An agent of a fire insurance company has power to waive a condition in a policy which requires proofs of loss as a prerequisite to the liability of insurer thereon, where such agent has authority to solicit insurance and negotiate contracts therefor within a named territory, although his authority may be local as to such territory: Massock v. Royal Ins. Co., 196 Ill. App. 394.

<sup>13</sup> Williams v. American Ins. Co., 196 Ill. App. 370; Massock v. Royal Ins. Co., 196 Ill. App. 394.

<sup>14</sup> A notice of illness of an insured animal given to the insurer's agent was held a sufficient compliance with the contract provision that notice be given the company at its home office, where the notice was immediately forwarded to and received by the insurer's home office: National Live Stock Ins. Co. v. Henderson (Tex. Civ. App.), 164 S. W. 852; Blunt v. National Fidelity &c. Co., 93 Nebr. 685, 141 N. W. 1033.

<sup>15</sup> Royal Casualty Co. v. Nelson (Tex. Civ. App.), 153 S. W. 674. But where the local agent of defendant casualty company was also a stockholder and general manager of plaintiff corporation which defendant had insured against injuries to employes, such agent's knowledge of an accident within the policy was not imputable to defendant so as to relieve plaintiff from the duty to give immediate notice as required by the policy: Utica Sanitary Milk Co. v. Casualty Co. of America, 210 N. Y. 399, 104 N. E. 918.

<sup>16</sup> A provision of a fire insurance policy is valid which requires insured to submit to examination under oath and to subscribe same: Liverpool &c. Ins. Co. v. Cargill, 44 Okla. 735, 145 Pac. 1134. Where no person was designated by the insurer to make such examination insured held not to have breached a requirement to attend for examination concerning a loss: Central Nat. Fire Ins. Co. v. Black, 220 Fed. 8, 135 C. C. A. 584. The right to the examination is abandonment where insurer gives notice of an examination pursuant to the policy, and



account, etc., or certified copies thereof, where all books of account, bills, invoices, etc., are destroyed in the fire which burned the insured's property.<sup>17</sup>

§ 4311. **False swearing.**<sup>18</sup>—It is held that insured's claim for actual loss will not be defeated by a discrepancy between the amount of loss fixed by the insured in his claim of loss and the amount awarded by the appraisers, it not being of itself proof of fraudulent intent.<sup>19</sup>

§ 4313. **The iron safe clause.**<sup>20</sup>—It was held that there was a substantial compliance with the iron safe clause in a stand-

the insurer's representative excuses the insured from attendance, and no further notice is given: *Liverpool &c. Ins. Co. v. Cargill*, 44 Okla. 735, 145 Pac. 1134. The insured has a right to be represented by an attorney at an examination of insured under a provision of a fire insurance policy: *Liverpool &c. Ins. Co. v. Cargill*, 44 Okla. 735, 145 Pac. 1134.

<sup>17</sup> *Central Nat. Fire Ins. Co. v. Black*, 220 Fed. 8, 135 C. C. A. 584.

<sup>18</sup> Where the insured parties, in their proofs of loss and in their testimony, in an action thereon, falsely and fraudulently misstated the quantity and value of the goods destroyed no recovery could be had under a fire policy: *Pottle v. Liverpool &c. Ins. Co.*, 109 Maine 584, 85 Atl. 1058. Under the provisions of a policy under *L. O. L.*, § 4666, that it shall be void in case of fraud or false swearing, the false swearing must have been knowingly and wilfully false, with the effect of deceiving and misleading: *Willis v. Horticultural Fire Relief*, 69 Ore. 293, 137 Pac. 761, Ann. Cas. 1916A, 449n; *Connecticut Fire Ins. Co. v. Union Mercantile Co.*, 161 Ky. 718, 171 S. W. 407; *Warner v. Narragansett Mut. Fire Ins. Co.*, 111 Maine 590, 90 Atl. 706; *Fuhrman v. Sun Ins. Office*, 180 Mich. 439, 147 N. W. 618, Ann. Cas. 1916A, 466n; *Orient Ins. Co. v. Van Zandt-Bruce Drug Co.*, 50 Okla. 558, 151 Pac. 323; *Royal Ins. Co. v. Scritchfield (Okla.)*, 152 Pac. 97; *Ward v. Queen City Fire Ins. Co.*, 69 Ore. 347, 138 Pac. 1067; *Fidelity-Phenix Fire Ins. Co. v. Sadau (Tex. Civ. App.)*, 167 S. W. 334; *Fidelity Phenix Fire Ins. Co. v.*

*Sadau (Tex. Civ. App.)*, 178 S. W. 559. The fact that a false inventory was not made to deceive the insurer does not prevent it being a breach of a condition of the policy barring recovery: *Richard D'Aigle Co. v. Western Ins. Co.*, 136 La. 777, 67 So. 827. A false overvaluation in the statement of the loss avoided the policy under a provision that the policy should be void upon any attempt to defraud, and, that it was not essential that the fraud be consummated: *Follett v. Standard Fire Ins. Co.*, 77 N. H. 457, 92 Atl. 956.

<sup>19</sup> *L. N. Gross Co. v. Westchester Fire Ins. Co.*, 88 Misc. 327, 151 N. Y. S. 945; *Goldberg v. Provident Washington Ins. Co.*, 144 Ga. 783, 87 S. E. 1077; *Simon Cloak &c. Co. v. Aetna Ins. Co.*, 141 N. Y. S. 553; *Willis v. Horticultural Fire Relief*, 77 Ore. 621, 152 Pac. 259.

<sup>20</sup> No recovery can be had where insured, after an iron safe clause is attached to a fire insurance policy, breaches the condition: *Royal Exch. Assur. v. Gilmore*, 18 Ga. App. 515, 89 S. E. 1047. Books produced by insured being insufficient to show amount of goods on hand at time of fire, there was no compliance with iron safe clause requiring keeping of books sufficient to show such facts in an iron safe clause: *Home Ins. Co. v. Williams*, 237 Fed. 171, 150 C. C. A. 317. The breach of a provision of a fire insurance policy, which requires the insured to take an annual inventory and to keep a complete record of his business, bars a recovery; the provisions of *Vernon's Sayles' Ann. Civ. Stat. 1914*, art. 4874a, providing

ard fire policy where a set of books was kept showing a complete inventory before the date of the policy, goods purchased thereafter, and an account of daily sales, though not showing items sold nor distinguishing between cash and credit sales.<sup>21</sup>

§ 4317. **Demand for arbitration.**—It was held in a California case that a notice mailed within ninety days but received on the ninety-first day was too late under a fire policy requiring demand for appraisal to be made by the insurer within ninety days after submission of proof of loss.<sup>22</sup>

§ 4318. **Condition precedent.**<sup>23</sup>—After a fire and the appointment of appraisers in good faith, if the appraisers are un-

that recovery shall not be defeated by breach of provisions which did not contribute to the loss or destruction of the insured property, not applying: *Westchester Fire Ins. Co. v. McMinn* (Tex. Civ. App.), 188 S. W. 25.

<sup>21</sup> *Pauley v. Sun Ins. Office* (W. Va.), 90 S. E. 552.

<sup>22</sup> *Covey v. National Union Fire Ins. Co.*, 31 Cal. App. 579, 161 Pac. 35.

<sup>23</sup> Proof of compliance with a stipulation to arbitrate a loss, or of excuse for noncompliance, is a condition precedent to the right to recover for a partial loss on a valued fire insurance policy on real estate: *Teter v. Norfolk Fire Ins. Corporation*, 74 W. Va. 461, 82 S. E. 201; *Commercial Union Assur. Co. v. Dalzell*, 210 Fed. 605; *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N. E. 384; *Messler v. Williamsburg City Fire Ins. Co.* (R. I.), 95 Atl. 601. A covenant in a policy of fire insurance that any disagreement as to the amount of a loss shall be referred to two appraisers chosen by the parties, and to an umpire selected by the appraisers may be revoked, and the insured may bring an action at law on the policy without taking any steps to have a dispute between himself and the company as to the amount of the loss referred to the appraisers: *Rubenstein v. Dixie Fire Ins. Co.*, 51 Pa. Super. Ct. 447. No arbitration was necessary to maintain an action for failure to replace the property in as good condition as before the accident

where the insurer undertook to replace the damaged property: *Beyer v. Minnesota Farmers' Mut. Ins. Co.*, 125 Minn. 518, 145 N. W. 376. If insured fails to comply with a demand by the company for arbitration of the loss pursuant to an arbitration clause, he can not bring a suit on the policy; and, if the company refuses such a demand, insured may sue on the policy at once: *St. Paul Fire & Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S. W. 1186. Arbitration is not a condition precedent to a suit on a policy under Rev. Stat. 1909, § 868, and provisions in insurance policies which enforce arbitration or settlement are unenforceable: *Young v. Pennsylvania Fire Ins. Co.*, 269 Mo. 1, 187 S. W. 856. Plaintiff must prove a valid award as a condition precedent to recovery under Stat. 1907, ch. 576, § 60, as amended by Stat. 1911, ch. 406, in an action on insurance policies to recover the amount fixed by an award: *Doherty v. Phoenix Ins. Co.*, 224 Mass. 310, 112 N. E. 940. Where the mortgagee did not know of the failure on the part of the mortgagor and owner to have a valid appraisal and award made as required by a fire policy, held that such neglect would not prevent mortgagee from suing on the policy, which provided that loss should be payable to him as his interest appeared and that the insurance should not be invalidated as to his interest by any neglect of the mortgagor and required "the insured" to make proofs of loss: *Riddell v. Rochester German Ins. Co.*,

able to agree upon an umpire, it seems that the insured may maintain an action at law on the policy notwithstanding the arbitration clause, where the policy provides that each party may select appraisers, and if the appraisers fail to agree, they shall submit their differences to an umpire.<sup>24</sup>

§ 4321. Invalidity of the award.<sup>25</sup>

§ 4326. Right to repair, rebuild or replace.<sup>26</sup>

§ 4328. Time of bringing suit—Generally.<sup>27</sup>—Some pol-

36 R. I. 240, 89 Atl. 833. Where an insurance company appoints as appraiser one who is not a disinterested person it violates the policy stipulation for the appointment of competent and disinterested appraisers, and insured need not appoint an appraiser, but may sue on the policy for the loss sustained: *Pierce v. Sun Ins. Office*, 86 Misc. 1, 147 N. Y. S. 947; *Wilbisky v. German Alliance Ins. Co.*, 90 Misc. 335, 152 N. Y. S. 1048. Where a policy provides for an appraisal, and such appraisal is a condition precedent to an action, and neither party requests an arbitration, and the company denies liability, the insured is not precluded from recovering for failure to demand an appraisal: *Oklahoma Fire Ins. Co. v. Mundel*, 42 Okla. 270, 141 Pac. 415; *Kelly v. Supreme Court of Independent Order of Foresters*, 195 Ill. App. 501. A provision that the loss "shall" be ascertained by appraisers does not make an appraisal a condition precedent to a recovery, in the absence of a demand for appraisal, nor make it the duty of insured to seek an appraisal: *Goldberg v. Provident Washington Ins. Co.*, 144 Ga. 783, 87 S. E. 1077; *Williams v. American Ins. Co.*, 196 Ill. App. 370. While provisions in an insurance policy for an appraisal may be made a condition precedent to suit, they can not oust the courts of their jurisdiction as to the insurer's legal liability; and where an insurer's attitude was a denial of all liability, a demand for an appraisal did not oust the court's jurisdiction: *Harowitz v. Concordia Fire Ins. Co.*, 129 Tenn. 691, 168 S. W. 163; *De Paola*

*v. National Ins. Co. (R. I.)*, 94 Atl. 700.

<sup>24</sup> *Post v. American Cent. Ins. Co.*, 51 Pa. Super. Ct. 352. *Contra: Mesler v. Williamsburgh City Fire Ins. Co. (R. I.)*, 94 Atl. 875.

<sup>25</sup> Partiality on the part of the appraiser or arbitrator selected by insurer invalidates the award, and is a defense against it: *Fass v. Liverpool & C. Ins. Co.*, 105 S. Car. 364, 89 S. E. 1040.

<sup>26</sup> Provision of policy limiting liability to the cost to insured of repairing or replacing the property loss does not entitle the insurer to repair or replace the property in lieu of paying the loss: *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 161 Iowa 5, 141 N. W. 447. Where they refused to receive her back after the insurer had repaired a prior injury in accordance with the terms of the policy, the owners of a vessel were not entitled to recover for her loss: *Kahmann v. Aetna Ins. Co.*, 236 Fed. 430.

<sup>27</sup> Where a policy provided that no suit shall be brought thereon after 12 months from the fire, an action after that time was held to be barred, though purporting to be a renewal of a prior action in another court, which was dismissed and renewed after payment of all costs within 6 months from the dismissal: *Gross v. Globe & C. Fire Ins. Co.*, 140 Ga. 531, 79 S. E. 138; *Harvey v. Fidelity & C. Co.*, 200 Fed. 925, 119 C. C. A. 221; *MacDonald v. Aetna Indemnity Co.*, 90 Conn. 226, 96 Atl. 926; *Maxwell v. Liverpool & C. Ins. Co.*, 12 Ga. App. 127, 76 S. E. 1036; *Dahrooge v. Rochester-German Ins. Co.*, 177 Mich. 442, 143 N. W. 608, 48 L. R. A. (N. S.) 906n; *Philadelphia Pickling Co. v.*

icies and certain codes contain a provision that a specified time shall elapse after a loss or after submission of proof of loss before instituting suit and these provisions are generally upheld.<sup>28</sup>

Maryland Casualty Co. (N. J. Sup.), 94 Atl. 889; Automatic Sprinkler Co. v. Employers' Liability Assur. Corporation, 163 App. Div. 671, 148 N. Y. S. 1013; Holly v. London Assur. Corporation, 170 N. Car. 4, 86 S. E. 694; Wever v. Pioneer Fire Ins. Co. (Okla.), 153 Pac. 1146; Dalzell v. London &c. Fire Ins. Co., 252 Pa. 265, 97 Atl. 452; Bates v. German Commercial Accident Co., 87 Vt. 128, 88 Atl. 532, Ann. Cas. 1916C, 447n. Such provision is held contrary to statute in the following cases: Douville v. Pacific Coast Casualty Co., 25 Idaho 396, 138 Pac. 506, Ann. Cas. 1917A, 112n; Flynn v. Orient Ins. Co., 77 N. H. 431, 92 Atl. 737; Keys v. Mechanics' &c. Ins. Co., 37 Okla. 480, 132 Pac. 819; Keys v. Williamsburg City Fire Ins. Co., 37 Okla. 482, 132 Pac. 818; Keys v. Phoenix Ins. Co., 37 Okla. 514, 132 Pac. 820; Oklahoma Fire Ins. Co. v. Wagester, 38 Okla. 291, 132 Pac. 1071; Seay v. Commercial Union Assur. Co., 42 Okla. 83, 140 Pac. 1164; Fire Assn. v. Richards (Tex. Civ. App.), 179 S. W. 926. A New York standard fire policy construed, and it was held that a clause declaring that suit thereon must be brought within 12 months was not applicable to the claim of a mortgagee: O'Neil v. Franklin Fire Ins. Co., 159 App. Div. 313, 145 N. Y. S. 432. Where a stipulation in an insurance contract which limits time to sue is coupled with a provision which suspends the right to sue for an indefinite period after the loss, depending on some action of the insurance company over which insured has no control, the contract limitation period commences to run from the time the suspension of the right to sue terminates: Stewart v. National Council of Knights and Ladies of Security, 125 Minn. 512, 147 N. W. 651. Where an insurer, by negotiating for a settlement or by promising to pay, has led the insured to believe that he will be paid without suit, the insurer can not take advantage of a provision which requires action on the policy to be

brought within a stated time: Stanley v. Sterling Mut. Life Ins. Co., 12 Ga. App. 475, 77 S. E. 664; Clark v. Pacific Mut. Life Ins. Co., 185 Ill. App. 580; Continental Casualty Co. v. Hunt, 53 Ind. App. 657, 101 N. E. 519; Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395; Wondra v. National Life Ins. Co., 126 Minn. 136, 147 N. W. 961; Northwestern Nat. Life Ins. Co. v. Ward (Okla.), 155 Pac. 524; Bates v. German Commercial Accident Co., 87 Vt. 128, 88 Atl. 532, Ann. Cas. 1916C, 447n. So it is held in several states that a provision that suit shall not be brought before a certain time has elapsed may be waived by acts of insurer: National Live Stock Ins. Co. v. Wolfe, 59 Ind. App. 418, 106 N. E. 390; New Amsterdam Casualty Co. v. New Palestine Bank, 59 Ind. App. 69, 107 N. E. 554; Popa v. Northern Ins. Co., 192 Mich. 237, 158 N. W. 945; Atlantic Horse Ins. Co. v. Nero, 108 Miss. 321, 66 So. 780; Young v. Pennsylvania Fire Ins. Co., 269 Mo. 1, 187 S. W. 856; Reese v. Fidelity &c. Co., 93 Misc. 31, 156 N. Y. S. 408; American Assurance Co. v. Dickson, 34 Ohio Cir. Ct. 313; Northwestern Nat. Life Ins. Co. v. Ward (Okla.), 155 Pac. 524; Curran v. National Life Ins. Co., 251 Pa. 420, 96 Atl. 1041; Northern Assur. Co. v. Morrison (Tex. Civ. App.), 162 S. W. 411; Western Indemnity Co. v. MacKechnie (Tex. Civ. App.), 185 S. W. 615.

<sup>28</sup> St. Paul Fire &c. Ins. Co. v. Womack, 122 Ark. 396, 183 S. W. 203; Borger v. Connecticut Fire Ins. Co., 24 Cal. App. 696, 142 Pac. 115; Borger v. Connecticut Fire Ins. Co., 29 Cal. App. 476, 156 Pac. 70; Lagudis v. London Assur. Corp., 29 Cal. App. 482, 156 Pac. 68; Styles v. American Home Ins. Co., 146 Ga. 92, 90 S. E. 718; Salmon v. Farm Property Mut. Ins. Assn., 168 Iowa 521, 150 N. W. 680; Young v. Pennsylvania Fire Ins. Co., 299 Mo. 1, 187 S. W. 856; Oklahoma Fire Ins. Co. v. Mundel, 42 Okla. 270, 141 Pac. 415.

## CHAPTER CXXVIII

### OTHER PROVISIONS OF THE STANDARD POLICY

§ 4335. **Measure of damages—Valued-policy legislation.**<sup>1</sup>—It was held in a Missouri case that the valued policy law fixes the value of the property at the time the policy was issued and not at the time the property was destroyed.<sup>2</sup>

§ 4338. **Amount of recovery—Illustrations.**<sup>3</sup>—Recovery on the policy is not limited to the value of the husband's insurable

<sup>1</sup>Unless the insured has been guilty of fraud in fixing the value, the three-fourths value clause in fire policies does not apply to the estimated value of real estate insured: *Henry Clay Fire Ins. Co. v. Barkley*, 160 Ky. 153, 169 S. W. 747; *Farber v. American Automobile Ins. Co.*, 191 Mo. App. 307, 177 S. W. 675; *Fadden v. Phoenix Ins. Co.*, 77 N. H. 392, 92 Atl. 335. A three-fourths value clause attached to a valued fire insurance policy, is inconsistent with the statute, and void: *Teter v. Norfolk Fire Ins. Corporation*, 74 W. Va. 461, 82 S. E. 201; *Darden v. Liverpool &c. Ins. Co.*, 109 Miss. 501, 68 So. 485; *Alsop Process Co. v. Continental Ins. Co.*, 175 Mo. App. 317, 162 S. W. 313; *Aurora v. Firemen's Fund Ins. Co.*, 180 Mo. App. 263, 165 S. W. 357; *Weston v. American Ins. Co.*, 191 Mo. App. 282, 177 S. W. 792; *La Font v. Home Ins. Co.*, 193 Mo. App. 543, 182 S. W. 1029. Where structures, at the time they were insured, were so far completed that the partitions were set, floors laid, roofs completed, and outside walls practically finished, they were "buildings" within Pub. Stat. 1901, ch. 170, § 5, providing for the issuance of valued policies on buildings: *Tomuschat v. North British &c. Ins. Co.*, 77 N. H. 388, 92 Atl. 329, Ann. Cas. 1915D, 1155n.

<sup>2</sup>*Strawbridge v. Standard Fire Ins. Co.*, 193 Mo. App. 687, 187 S. W. 79.

<sup>3</sup>Where the total value of the property destroyed was largely in ex-

cess of the amount of the policy, under Rev. Stat. 1911, art. 4949, the fact that an insured in her proof of loss misrepresented the value of a stove could not affect the liability of the company: *Camden Fire Ins. Assn. v. Puett* (Tex. Civ. App.), 164 S. W. 418. A false statement in the application to the effect that the insured property cost \$1,200 in cash, whereas it cost only \$250 not in cash, held to invalidate the policy: *Craddock & Co. v. Connecticut Fire Ins. Co.*, 160 Ky. 519, 169 S. W. 1015; *Indiana &c. Stock Ins. Co. v. Smith* (Tex. Civ. App.), 157 S. W. 755. Fraudulent overvaluation by insured in a fire policy is not available to insurer as a defense to an action on the policy under Rev. Stat. 1909, § 7030: *Farber v. American Automobile Ins. Co.*, 191 Mo. App. 307, 177 S. W. 675. Though not specifically claimed in the declaration, interest may be recovered on an amount found due on a policy of insurance: *McNellis v. Aetna Ins. Co.*, 176 Ill. App. 575. The measure of damages is not the original value of the goods insured, but the amount or extent of the loss or damage occasioned by the fire in an action on a fire policy: *Security Ins. Co. v. Slack*, 183 Ill. App. 579. Insured was entitled to full indemnity where a vacancy permit, limiting a loss during vacancy to three-fourths of the insurance, was not attached to the policy, which contained no such provision, and plaintiff was permitted to recover on the theory that the for-

interest in his wife's property, he having had an insurable interest, and recovery of the full amount of the policy is proper, where it is less than the value of the property insured.\*

### § 4340. Subrogation.<sup>5</sup>

feiture for vacancy was waived: *Patterson v. American Ins. Co.*, 174 Mo. App. 37, 160 S. W. 59.

<sup>4</sup> *Kludt v. German Mut. Fire Ins. Co.*, 152 Wis. 637, 140 N. W. 321, 45 L. R. A. (N. S.) 1131n, Ann. Cas. 1914C, 609n.

<sup>5</sup> Without disputing whether or not it falls within the terms of the policy, an insurer of property may pay the loss and thereby become subrogated to all the rights of the policy holder to recover from the wrongdoer: *Maryland Casualty Co. v. Cherryvale Gas &c. Power Co.*, 99 Kans. 563, 162 Pac. 313, L. R. A. 1917C, 487; *Michigan Mut. Home Ins. Co. v. Pere Marquette R. Co.*, 193 Mich. 429, 160 N. W. 599. Where an insurance company paid for a loss by fire caused by defendant's negligence, such com-

pany became subrogated to the rights and remedies of owner as against defendant, to extent necessary to reimburse itself for such payment: *Moore v. Taylor*, 175 App. Div. 37, 161 N. Y. S. 480. There being other insurance and the insurer having failed to provide for contribution as against the mortgagee in a policy of insurance, with agreement to pay loss to mortgagee as his interest might appear, held to give insurer no right to recover from the owner and mortgagor the amount paid the mortgagee on his judgment, in excess of its proportionate share: *Palmer v. McFadden*, 86 N. J. Eq. 377, 98 Atl. 462. See also *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 234 Fed. 273, 148 C. C. A. 175.

## CHAPTER CXXIX

### LIFE INSURANCE AND STIPULATIONS IN POLICIES

§ 4352. **The beneficiary—Manner of designation—Right to fund.**<sup>1</sup>—A policy naming the insured's "dependents" as

<sup>1</sup> Plaintiff held member of same family, and entitled to recover as beneficiary under the certificate where she had taken the holder of a mutual benefit certificate into her household without charge, though not dependent on him as stated in the certificate: *Peterson v. National Council of Knights and Ladies of Security*, 189 Mo. App. 662, 175 S. W. 284. One described as a wife could recover on the certificate though another was the member's lawful wife where the rules of a fraternal insurance order permitted a member to designate another as beneficiary, though he had a wife and children, and there was no rule of the order or statute restricting the beneficiary to a lawful wife, the allusion to a beneficiary in the certificate as the member's wife being mere descriptio personæ, and not a warranty: *Slaughter v. Slaughter*, 186 Ala. 302, 65 So. 348; *Mutual Benefit Life Ins. Co. v. Cummings*, 66 Ore. 272, 126 Pac. 892, 133 Pac. 1169, Ann. Cas. 1915B, 535n. It was held that the beneficiary named was "dependent" within the constitution and laws of the society and the statute, and the benefit certificate payable to her where a member of a fraternal benefit society designated the beneficiary as his wife. The person so designated had married the member with knowledge that he had a wife then living. Such person lived with him 12 years before the certificate was issued and 26 years thereafter until his death. She was supported during the whole period as his wife, and was dependent upon him for support. The constitution and laws of the society provided that the benefit might be paid to "persons dependent upon such member," and, further, "to any person

who is dependent on such member for maintenance." Section 1 of the statute relating to such societies provides that payment may be made to persons dependent on the member: *Duenser v. Supreme Council of Royal Arcanum*, 178 Ill. App. 648. It was held that the beneficiary was entitled to recover where a benefit certificate named one as beneficiary as the wife of the insured, whereas she was affianced but not married to him and ineligible as beneficiary under the laws of the insurer, and after her marriage to the insured, a change in the laws rendered affianced wives eligible: *Burr v. Royal League*, 193 Ill. App. 238. But under a certificate of membership in defendant fraternal benefit association, which limited beneficiaries to relatives by blood, marriage, or legal adoption, and persons dependent upon member, the bigamous wife of the deceased, not being related or legally dependent, is not entitled to be a beneficiary and can not recover: *Applebaum v. Order of United Commercial Travelers*, 171 N. Car. 435, 88 S. E. 722. A divorced wife can not claim the proceeds of an insurance policy, paid up at the time of the divorce, in which she was named as beneficiary under Civ. Code Prac., § 425, and Ky. Stat., § 2121, providing for the restoration of property upon the granting of a divorce: *Sea v. Conrad*, 155 Ky. 51, 159 S. W. 622, 47 L. R. A. (N. S.) 1074, Ann. Cas. 1915C, 318n; *Guthrie v. Guthrie*, 155 Ky. 146, 159 S. W. 710. It is also held in Kansas that unless she was dependent upon him at the time of his death under Gen. Stat. 1909, § 4303, a death benefit was not payable to the divorced wife of insured: *Johnson v. Grand Lodge*

beneficiaries does not include a creditor of the insured, though creditors have an insurable interest in the lives of their debtors.<sup>2</sup>

§ 4354. **Rights of beneficiary.**<sup>3</sup>—Where the insured in a mutual benefit association changed the beneficiary in considera-

A. O. U. W., 91 Kans. 314, 137 Pac. 1190, 50 L. R. A. (N. S.) 461. Contra: *Filley v. Illinois Life Ins. Co.*, 91 Kans. 220, 137 Pac. 793, L. R. A. 1915D, 130n; *Filley v. Illinois Life Ins. Co.*, 93 Kans. 193, 144 Pac. 257, L. R. A. 1915D, 134n; *Salvin v. Salvin*, 165 App. Div. 362, 151 N. Y. S. 60; *Christman v. Christman*, 163 Wis. 433, 157 N. W. 1099.

<sup>2</sup> *Finch v. Bond*, 158 Ky. 389, 165 S. W. 400.

<sup>3</sup> Where a husband insures his life for the benefit of his wife by an ordinary life policy, the property in the policy vests at once in the beneficiary: *Jacobs v. Strumwasser*, 84 Misc. 28, 145 N. Y. S. 916; *In re Dreuil & Co.*, 221 Fed. 796; *Mutual Ben. Life Ins. Co. v. Swett*, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298n; *Arnold v. Equitable Life Assur. Soc.*, 228 Fed. 157; *Missouri State Life Ins. Co. v. Crabtree*, 124 Ark. 214, 187 S. W. 173; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Johnson v. New York Life Ins. Co.*, 56 Colo. 178, 138 Pac. 414; *O'Donnell v. Metropolitan Life Ins. Co. (Del. Ch.)*, 95 Atl. 289; *Mutual Life Ins. Co. v. Devine*, 180 Ill. App. 422; *Order of Columbian Knights v. Matzel*, 184 Ill. App. 15; *Women's Catholic Order of Foresters v. Hill*, 191 Ill. App. 629; *Filley v. Illinois Life Ins. Co.*, 93 Kans. 193, 144 Pac. 257, L. R. A. 1915D, 134n; *Mutual Life Ins. Co. v. Spohn*, 170 Ky. 721, 186 S. W. 633; *Succession of Desforges*, 135 La. 49, 64 So. 978, 52 L. R. A. (N. S.) 689n; *Breard v. New York Life Ins. Co.*, 138 La. 774, 70 So. 799; *McManus v. Peerless Casualty Co.*, 114 Maine 98, 95 Atl. 510; *Tnite v. Supreme Forest Woodmen Circle*, 193 Mo. App. 619, 187 S. W. 137; *Wachtel v. Harrison*, 84 Misc. 76, 145 N. Y. S. 982; *Tepper v. New York Life Ins. Co.*, 89 Misc. 224, 151 N. Y. S. 1049; *Grems v. Traver*, 148 N. Y. S. 200; *Mutual Benefit Life Ins. Co. v. Cummings*, 66 Ore. 272, 126 Pac. 982, 133 Pac.

1169, Ann. Cas. 1915B, 535n; *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749n, Ann. Cas. 1915B, 677n; *Boehmer v. Kalk*, 155 Wis. 156, 144 N. W. 182, 49 L. R. A. (N. S.) 487n; *National Life Ins. Co. v. Brautigan*, 163 Wis. 270, 154 N. W. 839, 157 N. W. 782. But a beneficiary under a life policy which provides that insured might change the beneficiary has no vested interest preventing insured from changing the beneficiary whenever he desires to do so and the beneficiary has a mere expectancy: *John Hancock Mut. Life Ins. Co. v. Bedford (R. I.)*, 89 Atl. 154; *New York Life Ins. Co. v. Daley*, 25 Cal. App. 376, 143 Pac. 1033; *O'Donnell v. Metropolitan Life Ins. Co. (Del. Ch.)*, 95 Atl. 289; *Indiana Nat. Life Ins. Co. v. McGinnis (Ind.)*, 101 N. E. 289; *Modern Brotherhood of America v. Matkovitch*, 56 Ind. App. 8, 104 N. E. 795; *Townsend v. Fidelity & Co.*, 163 Iowa 713, 144 N. W. 574, L. R. A. 1915A, 109n; *New York Life Ins. Co. v. Murtagh*, 137 La. 760, 69 So. 165; *Rosman v. Travelers' Ins. Co.*, 127 Md. 689, 96 Atl. 875; *Orthwein v. Germania Life Ins. Co.*, 261 Mo. 650, 170 S. W. 885; *Robinson v. New York Life Ins. Co.*, 168 Mo. App. 259, 153 S. W. 534; *Clarkston v. Metropolitan Life Ins. Co.*, 190 Mo. App. 624, 176 S. W. 437; *Jacobs v. Strumwasser*, 84 Misc. 28, 145 N. Y. S. 916; *John Hancock Mut. Life Ins. Co. v. Bedford*, 36 R. I. 116, 89 Atl. 154; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893; *National Life Ins. Co. of United States v. Brautigan*, 163 Wis. 270, 157 N. W. 782. The rights of a beneficiary named in an insurance policy which was issued by a fraternal society attach immediately upon the death of the insured but do not vest during the life of insured: *Hodalski v. Hodalski*, 181 Ill. App. 158; *Slaughter v. Grand Lodge*, 192 Ala. 301, 68



tion of the new beneficiary's promise to marry him, and in pursuance of such agreement she did marry him, she acquired a vested interest in the policy which could not be divested without her consent.<sup>4</sup>

§ 4355. **Reservation of a right to change beneficiary.**<sup>5</sup>—It was held in a recent Iowa case that where the policy authorized

So. 367; Sovereign Camp Woodmen of the World v. Israel, 117 Ark. 121, 173 S. W. 855; Supreme Lodge of Fraternal Brotherhood v. Price, 27 Cal. App. 607, 150 Pac. 803; Vawter v. Purdy, 29 Cal. App. 623, 157 Pac. 556; Order of Scottish Clans v. Reich, 90 Conn. 511, 97 Atl. 863; Mitchell v. Langley, 143 Ga. 827, 85 S. E. 1050, Ann. Cas. 1917A, 469n; National Union v. Keefe, 172 Ill. App. 101; Goyt v. National Council, Knights and Ladies of Security, 178 Ill. App. 377; Order of Columbian Knights v. Matzel, 184 Ill. App. 15; Schiller-Bund v. Knack, 184 Mich. 95, 150 N. W. 337; Ladies Auxiliary of Ancient Order of Hibernians v. Flanigan, 190 Mich. 675, 157 N. W. 355; New Era Assn. v. Kuyat, 191 Mich. 646, 158 N. W. 119; Hughes v. Modern Woodmen of America, 124 Minn. 458, 145 N. W. 387; Tierney v. Modern Woodmen of America, 124 Minn. 540, 145 N. W. 390; Sykes v. Armstrong, 111 Miss. 44, 71 So. 262; Alexander v. Sovereign Camp of Woodmen of the World, 193 Mo. App. 411, 186 S. W. 2; Tuite v. Supreme Forest Woodmen Circle, 193 Mo. App. 619, 187 S. W. 137; Baker v. Hardy, 96 Nebr. 377, 148 N. W. 80; Hines v. Modern Woodmen of America, 41 Okla. 135, 137 Pac. 675, L. R. A. 1915A, 264n; Stemler v. Stemler, 31 S. Dak. 595, 141 N. W. 780; Christenson v. El Riad Temple, Ancient Arabic Order Nobles of Mystic Shrine, 37 S. Dak. 68, 156 N. W. 581; Modern Woodmen of America v. Headle, 88 Vt. 37, 90 Atl. 893. No one other than the persons designated in a policy can assign or surrender it: Breard v. New York Life Ins. Co., 138 La. 774, 70 So. 799. An assignment by a wife of her interest in a life policy is void under the act of 1840 (Laws 1840, ch. 80), referring to life policies in favor of the wife

upon the life of her husband: Grems v. Traver, 148 N. Y. S. 200. An assignment of an insurance policy is invalid when made by the beneficiary prior to the insured's death and without his consent: Lesem v. Mutual Life Ins. Co., 164 App. Div. 507, 149 N. Y. S. 559.

<sup>4</sup> Supreme Lodge, Knights & Ladies of Honor v. Ulanowsky, 246 Pa. 591, 92 Atl. 711. And where the beneficiary under agreement with insured pays the dues and assessments, he acquires a vested equitable interest in the benefits of the certificate: Royal Arcanum v. Riley, 143 Ga. 75, 84 S. E. 428.

<sup>5</sup> The beneficiary acquires no vested interest before the death of the insured which she could surrender to the insurer where a life policy reserved to the insured the right to change the beneficiary: Hicks v. Northwestern Mut. Life Ins. Co., 166 Iowa 532, 147 N. W. 883, L. R. A. 1915A, 872n. A member's right to change beneficiary is absolute and can be made at any time upon substantial compliance with by-laws where the by-laws of a benefit society authorizes a change at any time: Wilkes v. Hicks, 124 Ark. 192, 186 S. W. 830. In the absence of restrictive provisions in the charter, by-laws or rules, a member of a mutual benefit insurance association may revoke his designation of a beneficiary and substitute a different one: Vawter v. Purdy, 29 Cal. App. 623, 157 Pac. 556; Supreme Colony United Order of Pilgrim Fathers v. Towne, 87 Conn. 644, 89 Atl. 264, Ann. Cas. 1916B, 181n; Estes v. Local Union, No. 43, United Brotherhood of Carpenters and Joiners of America, 90 Conn. 426, 97 Atl. 326; Wherry v. Latimer, 103 Miss. 524, 60 So. 563, 642; Gibbs v. Knights of Pythias of Missouri, 173 Mo. App. 34, 156 S.

the insured to change the beneficiary at any time, insanity of the insured did not vest the beneficiary with an interest in the policy.<sup>6</sup>

§ 4356. **Manner of changing beneficiary.**<sup>7</sup>—Where a by-law provided that no change of beneficiary should be effective until the old certificate had been surrendered and a new one de-

W. 11; *Lentz v. Fritter*, 92 Ohio St. 186, 110 N. E. 637; *Modern Woodmen of America v. Terry* (Okla.), 153 Pac. 1124; *Ormond v. McKinley*, 163 Wis. 205, 157 N. W. 786. And it is held in New Jersey that where a fraternal beneficial association, for a valuable consideration, has issued a benefit certificate payable to a stated beneficiary, the legislature can not, without the member's consent, deprive him of his right to designate the beneficiary: *Coghlan v. Supreme Conclave Improved Order Heptasophs*, 86 N. J. L. 41, 91 Atl. 132. But it is held in Colorado that while the objects of fraternal insurance associations are different from those of ordinary life insurance companies, the assured has no greater power to change the beneficiary in one case than in the other, except as reserved to him by the laws of the state under which the insurance was written, or the by-laws of the association, or the terms of the certificate: *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Knights of Pythias of North America v. Long*, 117 Ark. 136, 174 S. W. 1197. And it has been held in Mississippi that the original beneficiaries in certificates of a mutual benefit company may maintain a suit to cancel new certificates induced by the undue influence and persuasion of the new beneficiary therein: *Wherry v. Latimer*, 103 Miss. 524, 60 So. 563, 642.

<sup>6</sup>*Hicks v. Northwestern Mutual Life Ins. Co.*, 166 Iowa 532, 147 N. W. 883, L. R. A. 1915A, 872n.

<sup>7</sup>The beneficiary in the original certificate will be entitled to the insurance unless the provision of a fraternal benefit certificate, governing the manner of changing the beneficiary be substantially complied with: *Stemler v. Stemler*, 31 S. Dak. 595, 141 N. W. 780; *Slaughter v. Slaughter*, 186 Ala. 302, 65 So. 348; *Sovereign Camp, Woodmen of the*

*World v. Israel*, 117 Ark. 121, 173 S. W. 855; *Supreme Lodge of Fraternal Brotherhood v. Price*, 27 Cal. App. 607, 150 Pac. 803; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Hodalski v. Hodalski*, 181 Ill. App. 158; *Almy v. Commercial Travelers' Assn.*, 59 Ind. App. 249, 106 N. E. 893; *Vanasek v. Western Bohemian Fraternal Assn.*, 122 Minn. 273, 142 N. W. 333, 49 L. R. A. (N. S.) 141n, Ann. Cas. 1914D, 1123n; *Grant v. Faires*, 253 Pa. 232, 97 Atl. 1060; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893; *Dean v. Dean*, 162 Wis. 303, 156 N. W. 135. A fraternal beneficiary association may stipulate the conditions under which a change of beneficiary may be effected, and the methods adopted must be complied with unless the member does all that lies within his power to comply with the requirements, in which case the courts will recognize the change: *Stemler v. Stemler*, 31 S. Dak. 595, 141 N. W. 780; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Modern Brotherhood of America v. Matkovitch*, 56 Ind. App. 8, 104 N. E. 795; *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346. Where assured has done all the things required to make a change of beneficiary and dies before the issuance of a new certificate, will not defeat such change, in the absence of an express contract provision specifying when the change shall take effect: *Hughes v. Modern Woodmen of America*, 124 Minn. 458, 145 N. W. 387; *Tierney v. Modern Woodmen of America*, 124 Minn. 540, 145 N. W. 390; *Estes v. Local Union, No. 43, United Brotherhood of Carpenters and Joiners of America*, 90 Conn. 426, 97 Atl. 326; *Hayden v. Modern Brotherhood of America*, 173 Iowa 395, 155 N. W. 830; *Supreme Court I. O. F. v. Frise*, 183 Mich. 186, 150 N. W. 110. A member designating in the certificate a beneficiary

livered during the lifetime of the member, the new certificate changing the beneficiary did not become effective where the member died before the new certificate was delivered.<sup>8</sup>

§ 4361. Statement of age.<sup>9</sup>

§ 4362. Assignment of policy.<sup>10</sup>—It is held that an assignment of a policy may be required to be according to the laws of

may, by will and declaration in extremis, name his mother as sole beneficiary under Civ. Code 1912, § 2752, and by-laws of a fraternal benefit association: *Hunter v. Hunter*, 100 S. Car. 517, 84 S. E. 180. A member of a fraternal benefit association may make an agreement to change beneficiaries in consideration of sums advanced and thus preclude his beneficiary or heirs from claiming the proceeds against the person making the advancements, though complete change of beneficiary was not made according to the association's constitution and by-laws: *Brown v. Modern Woodmen of America*, 97 Kans. 665, 156 Pac. 767. The fact that the defendant fraternal insurance order failed to record change of beneficiary and issue a new certificate showing such change during the lifetime of insured held not to defeat the change of beneficiary which was duly applied for by insured: *Modern Woodmen of America v. Terry* (Okla.), 153 Pac. 1124. In the matter of a change of beneficiary by a member of a mutual benefit association, the association may waive the prescribed mode for effecting such change: *Supreme Lodge of Fraternal Brotherhood v. Price*, 27 Cal. App. 607, 150 Pac. 803; *Modern Woodmen of America v. Terry* (Okla.), 153 Pac. 1124.

<sup>8</sup> *Wilkes v. Hicks*, 124 Ark. 192, 186 S. W. 830; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893.

<sup>9</sup> An applicant for insurance, by misrepresenting his true age, imposes upon the company in such a material matter as to invalidate the policy: *Logia Suprema de La Alianza Hispano-Americana v. Aguirre*, 14 Ariz. 390, 129 Pac. 503; *Marbut v. Empire Life Ins. Co.*, 143 Ga. 654, 85 S. E. 834. But it has been held in Colorado that a misrepresentation as to

age by representing that applicant was 50 years old at her nearest birthday, while in fact 63, defeats only the policy pro tanto, and that the insurer is liable to the amount of the insurance which the premium paid would have purchased at the age of 63: *Germania Life Ins. Co. v. Klein*, 25 Colo. App. 326, 137 Pac. 73. And under the express provisions of Code 1906, § 2676, misstatement of insured's age does not invalidate the contract of insurance, but merely limits the recovery to the amount which the premiums would have purchased at insured's actual age: *Coplin v. Woodmen of the World*, 105 Miss. 115, 62 So. 7, Ann. Cas. 1916D, 1295n.

<sup>10</sup> Under Rev. Stat. 1895, art. 308, which permits the obligee of any written instrument not negotiable by the law merchant to assign his interest therein, insurance policies are assignable in the same manner as other choses in action: *Prentice v. Security Ins. Co.* (Tex. Civ. App.), 153 S. W. 925. And an endowment policy, which provides for payment at maturity to the insured, his executors or assigns, is assignable: *Eisenbach v. Mutual Life Ins. Co.*, 162 App. Div. 595, 147 N. Y. S. 962; *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S. W. 1195; *Foryciarz v. Prudential Ins. Co.*, 95 Misc. 306, 158 N. Y. S. 834; *Doscher v. Vanderbilt*, 160 N. Y. S. 871. While, in the absence of a contrary provision in a life policy, the beneficiary has a vested right therein which can not be impaired by assignments, without his consent, the policy may be assigned without the beneficiary's consent if it provides for assignment or change of beneficiary: *Cornell v. Mutual Life Ins. Co.*, 179 Mo. App. 420, 165 S. W. 858. Where no written consent to the assignment was indorsed on the policy and the charter

the state where the assignment is made, though the contract be executed in another state.<sup>11</sup>

§ 4364. **Manner of making assignment.**<sup>12</sup>—It is held that authorization to pay the amount of a policy to a mortgagee was a conditional assignment of an interest in a policy.<sup>13</sup>

§ 4366. **Incontestable clause.**<sup>14</sup>

§ 4369. **Suicide—Sane or insane.**<sup>15</sup>

of the insurer required the written indorsement of consent of its president and secretary to all assignments there could be no recovery on the theory that plaintiff was the assignee: *Leonard v. Farmers' Mut. Fire Ins. Co.*, 192 Mich. 230, 158 N. W. 1041. The contract of an insurer with stranger to insure another's life is void as against public policy, and the rule applies with equal force to an assignment of policy: *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S. W. 1195. But it is held that in the absence of any evidence which indicates a wagering contract, it is not necessary that assignee of a policy should have an insurable interest: *Potvin v. Prudential Ins. Co.*, 225 Mass. 247, 114 N. E. 292.

<sup>11</sup> *Northwestern Mut. Life Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108, 52 L. R. A. (N. S.) 275n.

<sup>12</sup> In the absence of a prohibition by the company of such assignment to transfer a beneficial interest to exclusion of personal representatives of insured an unqualified oral assignment of insurance policies, accompanied by delivery was sufficient: *Potvin v. Prudential Ins. Co.*, 225 Mass. 247, 114 N. E. 292.

<sup>13</sup> *Continental Ins. Co. v. Bair* (Ind. App.), 114 N. E. 763.

<sup>14</sup> Provisions in policies of life insurance that after a named time the policy shall be incontestable are reasonable and must be strictly construed against insurer, as such provisions inure to the benefit of insured and are intended to induce persons to become policy holders: *Fairfield v. Union Life Ins. Co.*, 196 Ill. App. 7. Where a life insurance policy by its terms provided that the period of incontestability shall be calculated

"from the date" of the policy, the year of incontestability will be calculated from that date, and not from the date it was delivered to insured: *Meridian Life Ins. Co. v. Milam*, 172 Ky. 75, 188 S. W. 879, L. R. A. 1917B, 103n. Where a life policy provides that it shall be incontestable after two years from the date of issue, such provision is not a waiver, but a condition: *Mutual Life Ins. Co. v. Buford* (Okla.), 160 Pac. 928. It has been held in Texas that under Rev. Stat. 1911, art. 4741, a life policy which provided, "This policy shall be incontestable after it has been in force one year, providing premiums have been duly paid," was not contestable four years after it was issued, on the ground that it was obtained by fraudulent representations of the insured as to his health and use of alcoholic drinks: *Southern Union Life Ins. Co. v. White* (Tex. Civ. App.), 188 S. W. 266. See as to effect of this clause on defense of fraud, note in L. R. A. 1917E, 338.

<sup>15</sup> There may be a recovery on a policy of insurance against death from bodily injuries "by violent and accidental means, suicide (sane or insane) not included," if the insured was so insane that he did not know that he was taking his life, or that his act would probably result in death: *Vicars v. Aetna Life Ins. Co.*, 158 Ky. 1, 164 S. W. 106; *Sovereign Camp Woodmen of the World v. Landrum*, 158 Ky. 841, 166 S. W. 598; *Sovereign Camp, Woodmen of the World v. Ethridge*, 166 Ky. 795, 179 S. W. 1022. Where insured shot himself and understood the nature of his act, provision in policy against liability in case of suicide, sane or insane, prevents recovery: *Power v. Modern Brotherhood of America*, 98 Kans. 487, 701, 158

§ 4371. **Suicide—Construction.**<sup>16</sup>—The Indiana Supreme Court, in construing a Missouri statute providing that suicide shall not defeat recovery on a life policy, held that the term “suicide” was not used in its technical sense, but that it means death by one’s own hand, irrespective of mental condition.<sup>17</sup>

§ 4374. **Death in violation of law or at the hands of justice.**<sup>18</sup>—It is held that it must appear that the insured would not have been killed if he had not been violating the law to be a defense to a suit on the policy.<sup>19</sup>

§ 4375. **Habits.**<sup>20</sup>—It was held in an Oklahoma case that a statement that the applicant for accident insurance was of good

Pac. 870. Where insurer, when sued on a life policy, proved that the insured was sane at the time of his suicide, the beneficiary could prove that insured was insane and thereby defeat the defense: *Security Life Ins. Co. of America v. Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187n. Under a mutual benefit association’s general power to contract with its members for death benefits, it has authority to provide for forfeiture in case of suicide, where such clause was authorized by a by-law regularly adopted: *Pold v. North American Union*, 261 Ill. 433, 104 N. E. 4.

<sup>16</sup> A life insurance policy which contains a provision limiting recovery in case of suicide while sane or insane within one year from the date thereof, is reasonable: *Silliman v. International Life Ins. Co.*, 131 Tenn. 303, 174 S. W. 1131, L. R. A. 1915F, 707. Suicide of insured while sane defeats a recovery on the policy: *Security Life Ins. Co. of America v. Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187n. Where a policy of life insurance provided that if a member should die by his own hand, sane or insane, certificate should be void, if an insured voluntarily and intentionally drank carbolic acid, when he knew the probable consequence of his act, the certificate was forfeited, but not if taken by accident or mistake: *Sovereign Camp of Woodmen of the World v. Valentine*, 173 Ky. 182, 190 S. W. 712.

<sup>17</sup> *Travelers’ Protective Assn. v.*

*Smith*, 183 Ind. 59, 107 N. E. 283.

<sup>18</sup> A difficulty between decedent and L., as the result of which decedent was killed, was held not a “duel,” within the terms of a limitation in a policy on the life of decedent: *Baker v. Supreme Lodge K. of P.*, 103 Miss. 374, 60 So. 333, Ann. Cas. 1915B, 547n. Where no reason except anger appears why a slayer killed insured, a recovery of the full amount of insured’s policy is not barred by a provision limiting recovery in case his death was the result of a violation of the law: *Empire Life Ins. Co. v. Einstein*, 12 Ga. App. 380, 77 S. E. 209.

<sup>19</sup> *Baker v. Supreme Lodge K. of P.*, 103 Miss. 374, 60 So. 333, Ann. Cas. 1915B, 547n.

<sup>20</sup> A question which called for the practice of an applicant for insurance as to the use of alcoholic liquors, was held to inquire as to his custom or habit; and an answer that he did not drink was not false where it appeared that he had been seen two or three times to take a drink in a period covering several years: *Columbia Life Ins. Co. v. Tousey*, 152 Ky. 447, 153 S. W. 767. It was held that under the express provision of Rev. Stat. 1909, § 6937, a misrepresentation as to the correct and temperate habits of insured would not render the policy void unless the matter misrepresented actually contributed to the death of insured: *Harms v. Fidelity & Co.*, 172 Mo. App. 241, 157 S. W. 1046. A statement by insured as to his habits with reference to the use

habits is a material misrepresentation where he was living with a woman other than his wife.<sup>21</sup>

§ 4376. **Health and freedom from disease.**<sup>22</sup>—A misrepresentation in the application that the insured was then in good health will not avoid the policy unless he was then suffering from

of intoxicants must be construed as to his habits at the time of his application, not before or after: *Order of United Commercial Travelers v. Simpson* (Tex. Civ. App.), 177 S. W. 169.

<sup>21</sup> *Elliott v. Frankfort Marine & C. Ins. Co.*, 172 Cal. 261, 156 Pac. 481, L. R. A. 1916F, 1026n.

<sup>22</sup> In an action on a policy, a statement contained in the application, made January 28, 1910, that insured was in good health was not falsified by proof that in the middle of April following he was suffering from nephritis and died because of it in December following: *Columbia Life Ins. Co. v. Tousey*, 152 Ky. 447, 153 S. W. 767; *Columbus Mut. Life Ins. Co. v. Ford*, 2 Ohio App. 410, 34 Ohio Cir. Ct. 479. There was not a material false representation that the insured had not had dropsy, when, on the examination she described to the insurer's physician her symptoms and treatment, including "tapping" of her limbs. This information was sufficient to indicate to a physician that she had had dropsy: *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 112 N. E. 350. An answer in the negative to a question which is part of the contract of insurance as to whether the applicant had, so far as she knew, ever had any serious illness was made with an intention to deceive, where the applicant had left a hospital after an operation for appendicitis only ten days before the application was made: *Kennedy v. Prudential Ins. Co.*, 177 Ill. App. 50. Recovery could not be had against life insurance company on policy providing that no obligation was assumed unless, on date of issuance, the insured was alive and in sound health, where insured then had diabetes of a year's standing, dying a month and a half thereafter: *Holloway v. Metropolitan Life Ins. Co.*, 90 Misc. 697, 154 N. Y. S. 194; *Podlesak v. Royal Neighbors of*

*America*, 192 Ill. App. 73. A false answer in the application which is made a part of the policy as to whether the insured had, so far as she knew, ever had any serious illness and fraudulent answers to the questions of the medical examiner concerning whether she ever had had appendicitis or had had an operation, are available in defense in an action on the policy which is not incontestable at the time of the death of the insured: *Kennedy v. Prudential Ins. Co.*, 177 Ill. App. 50. A predisposition to hernia or a weakening of the inguinal ring causing the hernia to subsequently develop was not a breach of a warranty that insured was free from any functional or organic disease, mental or physical disorder, defect, etc., where a policy insured against a hernia requiring a surgical operation: *Hilts v. United States Casualty Co.* (Mo. App.), 159 S. W. 771. Under Code 1907, § 4572, the execution by insured on delivery of the policy of a certificate stating that he was in good health, will not avoid the same where, though he was suffering from incipient brain tumor, the fact was not known and the certificate was not made with intent to deceive: *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 So. 768. Representation by insured in his application that he had had no "serious illness" meant more than temporary illness, and not attended or likely to be attended by permanent or material impairment of health: *Schas v. Equitable Life Assur. Society*, 170 N. Car. 420, 87 S. E. 222. If insured was given credit for the first premium and was in good health at the time, so as to operate as a constructive delivery of the policy, his subsequent illness would not defeat a recovery on the policy: *Amarillo Nat. Life Ins. Co. v. Brown* (Tex. Civ. App.), 166 S. W. 658. Answer, "No," to a question, "Have you ever been an inmate of, or have

an infirmity which contributed to his death.<sup>23</sup> The answer "none" to the question, "Have you had insanity \* \* \* or any other disorder of the brain or nervous system," was held not falsified by evidence showing that the insured had complained of dizziness and deafness in connection with a perforated eardrum.<sup>24</sup>

§ 4379. **Family relationship.**<sup>25</sup>—Where an applicant failed to include half-brothers and half-sisters in stating the number of

you ever attended for treatment, an asylum, hospital or sanitarium? If yes, when, how long and for what?" construed as not constituting a false representation, since the question embraced three questions, and the answer was correct as to two of them: *Van Wormer v. Metropolitan Life Ins. Co.*, 188 Ill. App. 166. A policy reinstated after it had lapsed, upon the false statement of the insured that he was suffering from no disease and had consulted no physician for a year previous, held unenforceable: *Thorner v. John Hancock Mut. Life Ins. Co.*, 164 App. Div. 34, 149 N. Y. S. 345; *New York Life Ins. Co. v. Franklin*, 118 Va. 418, 87 S. E. 584, Ann. Cas. 1915A, 741n. A temporary indisposition at the time of application is made which states that the insured is in good health, will not avoid the policy: *Mutual Life Ins. Co. v. Morgan*, 39 Okla. 205, 135 Pac. 279; *McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, 139 Pac. 242; *Van Wormer v. Metropolitan Life Ins. Co.*, 188 Ill. App. 166; *Suravitz v. Prudential Ins. Co.*, 244 Pa. 582, 91 Atl. 495, L. R. A. 1915A, 273n; *Horne v. John Hancock Mut. Life Ins. Co.*, 53 Pa. Super. Ct. 330. The questions and answers in the application for insurance must be construed liberally in favor of the insured in determining the question of falsity: *Great Eastern Casualty Co. v. Smith* (Tex. Civ. App.), 174 S. W. 687. It was held in Kentucky that a condition in a life policy that it shall not be binding unless at its delivery insured was in sound health applies only to unsoundness of health arising after the application and examination, and is no defense unless the disease developed between the application and the time when the policy was delivered: *Modern Woodmen of America v. Atkin-*

*son*, 153 Ky. 527, 155 S. W. 1135. Where insured in his application answered falsely that he had not suffered from renal colic, and between the application and the delivery of the policy he suffered a severe attack of renal colic, his failure to inform the insurer thereof was ground for voiding the policy: *Harris v. Security Mut. Life Ins. Co.*, 130 Tenn. 325, 170 S. W. 474, L. R. A. 1915C, 153, Ann. Cas. 1916B, 380n; *Westphall v. Metropolitan Life Ins. Co.*, 27 Cal. App. 734, 151 Pac. 159.

<sup>23</sup> *Porter v. General Acc. Fire & C. Corp.*, 30 Cal. App. 198, 157 Pac. 825; *Newton v. New York Life Ins. Co.*, 95 Kans. 427, 148 Pac. 619; *Massachusetts Bonding & Ins. Co. v. Duncan*, 166 Ky. 515, 179 S. W. 472; *Roedel v. John Hancock Mut. Life Ins. Co.*, 176 Mo. App. 584, 160 S. W. 44; *Dodd v. Prudential Ins. Co.*, 186 Mo. App. 168, 171 S. W. 655; *Bruck v. John Hancock Mut. Life Ins. Co.*, 194 Mo. App. 529, 185 S. W. 753; *American Nat. Ins. Co. v. Anderson* (Tex. Civ. App.), 179 S. W. 66.

<sup>24</sup> *Ideal Electric Co. v. Penn Mutual Life Ins. Co.*, 189 Ill. App. 331; *Hanmore v. Metropolitan Life Ins. Co.*, 137 La. 137, 68 So. 385.

<sup>25</sup> Where, as part of family history, application called for a number of brothers, an answer which apparently included the applicant as one of the brothers in the family, held not to invalidate the policy: *Blackstone v. Kansas City Life Ins. Co.*, 107 Tex. 102, 174 S. W. 821. When the proof failed to show that insured knew that the insanity was hereditary, and that the answers were wilfully false, fraud in obtaining life insurance was not established by untrue answers in the application failing to disclose that insured's uncle was afflicted with hereditary insanity: *South Atlantic Life*

brothers and sisters living and dead, it was held not to invalidate the policy.<sup>26</sup>

§ 4381. Rejection of former application.<sup>27</sup>

§ 4382. Proof of death.<sup>28</sup>—Proof of death made under one policy sufficed for another policy under which no such proof was made when none of the several policies issued by the insurer upon the life of the insured required separate proof of death.<sup>29</sup>

*Ins. Co. v. Hurt*, 115 Va. 398, 79 S. E. 401.

<sup>26</sup> *Blackstone v. Kansas City Life Ins. Co.*, 107 Tex. 102, 174 S. W. 821.

<sup>27</sup> A clause of a printed statement contained in an insurance application, that no application ever made by the applicant for insurance has been declined, being of doubtful meaning, will not be construed to include a prior rejection for life insurance, where the remaining clause of such statement, and other statements in the application, relate solely to accident, disease, or illness insurance: *Mays v. New Amsterdam Casualty Co.*, 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108. Though insured had withdrawn a prior application to another court after being rejected by its medical examiner, the answer, "No," to the question whether the applicant had applied for other insurance and had been rejected, constituted a misstatement under Civ. Code Ga. 1910, §§ 2479, 2480: *Ætna Life Ins. Co. v. Moore*, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. 186; *Prudential Ins. Co. v. Moore*, 231 U. S. 560, 58 L. ed. 367, 34 Sup. Ct. 191. A false representation by an applicant for life insurance that he had never been examined for insurance and rejected is material, and avoids the policy: *Hardy v. Phoenix Mutual Life Ins. Co.*, 167 N. Car.

22, 83 S. E. 5. Though his application for a second certificate in the endowment rank of the Knights of Pythias had been rejected, a statement that applicant had not previously applied for insurance and been rejected, not being false in view of Rev. Laws 1910, §§ 3402, 3486, did not avoid the policy: *Shawnee Life Ins. Co. v. Watkins (Okla.)*, 156 Pac. 181.

<sup>28</sup> Beneficiary's statement in proofs of death that insured had committed suicide did not estop her to sue on certificate of life insurance expressly exempting risk of suicide: *Michalek v. Modern Brotherhood of America (Iowa)*, 161 N. W. 125. Proof of death in accordance with rules of the association is sufficient and the officers may not require additional proofs: *Haskew v. Knights of Modern Maccabees (Okla.)*, 159 Pac. 493. Where an accident policy required proof of claims on blanks furnished by the company, insured's failure to furnish an employer's affidavit, as required by one blank, because of his refusal to make it, does not defeat recovery: *Constantino v. Massachusetts Accident Co.*, 221 Mass. 464, 109 N. E. 447.

<sup>29</sup> *Bohles v. Prudential Ins. Co.*, 84 N. J. L. 315, 86 Atl. 438.



## CHAPTER CXXX

### ACCIDENT INSURANCE

§ 4385. **Definition of accident—Proximate cause.**<sup>1</sup>—Accidental means are those which produce unforeseen, unexpected or unusual effects.<sup>2</sup>

§ 4386. **Construction of policy—External violent or acci-**

<sup>1</sup> Death resulting from an accident, or unnaturally, implies an external and violent agency as its cause: *Pixley v. Illinois Commercial Men's Assn.*, 195 Ill. App. 135; *Travelers' Protective Assn. v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991; *Riley v. Interstate Business Men's Accident Assn. (Iowa)*, 152 N. W. 617. If the insured's act was attended with an unexpected and unusual result, which was not natural or probable, and was not the result of design, the injury was caused by accidental means within the meaning of policies of accident insurance: *Robison v. United States Health &c. Ins. Co.*, 192 Ill. App. 475. It has been held in Missouri that under a policy of accident insurance not covering injury, fatal or otherwise, intentionally inflicted on insured by another, insurer was not liable for death of insured which resulted proximately from an intentional blow from wooden bar: *Strother v. Business Men's Accident Assn.*, 193 Mo. App. 718, 188 S. W. 314. Policy insuring against bodily injury sustained through accident resulting directly and exclusively of other causes in death held not to cover death resulting from reopening of incision to remove the appendix, which was caused by a fit of coughing: *Stokely v. Fidelity &c. Co.*, 193 Ala. 90, 69 So. 64, L. R. A. 1915E, 955. Death from apoplexy, resulting from the excitement caused by seeing a man being burned to death in an accidental fire, held death by accident within the terms of an accident certificate, and

not from disease: *International Travelers' Assn. v. Branum (Tex. Civ. App.)*, 169 S. W. 389. Death from ptomaine poisoning from eating mushrooms, supposed to be edible, is from accidental means: *United States Casualty Co. v. Griffis (Ind.)*, 114 N. E. 83. Accident insurer held liable for death resulting from cut in lip received while shaving or being shaved, the cut becoming infected: *National Life &c. Ins. Co. v. Singleton*, 193 Ala. 84, 69 So. 80. Death from ptomaine poisoning is accidental: *Johnson v. Fidelity &c. Co.*, 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475n. An injury caused by slipping and falling while cranking an automobile, is accidental: *Preferred Accident Ins. Co. v. Patterson*, 213 Fed. 595, 130 C. C. A. 175. Where insured brought on a difficulty with a third person who insured knew to be armed and the third person killed insured in self-defense, the death was not by accidental means: *Prudential Casualty Co. v. Curry*, 10 Ala. App. 642, 65 So. 852.

<sup>2</sup> *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175; *Postler v. Travelers' Ins. Co.*, 173 Cal. 1, 158 Pac. 1022; *Newsome v. Travelers' Ins. Co.*, 143 Ga. 785, 85 S. E. 1035; *Wright v. Order of United Commercial Travelers*, 188 Mo. App. 457, 174 S. W. 833; *Stone v. Fidelity & Casualty Co. of New York*, 133 Tenn. 672, 182 S. W. 252, Ann. Cas. 1917A, 86n. See also *Lewis v. Iowa State &c. Assn.*, 248 Fed. 602.

**dental injuries.**<sup>3</sup>—Death in an affray with a burglar is acci-

<sup>3</sup> An instruction is proper that, if insured was injured by violent and accidental means and blood poisoning resulted and contributed to or hastened the death of insured, it was not such disease or bodily infirmity as would prevent recovery under an accident insurance policy: *Rathjen v. Woodmen Accident Assn.*, 93 Nebr. 629, 141 N. W. 815; *New Amsterdam Casualty Co. v. Mays*, 43 App. D. C. 84. See also *Lewis v. Iowa State &c. Assn.*, 248 Fed. 602. It has been held in Kentucky that a sunstroke received while at work in the ordinary course of employment is an unexpected event not according to the usual course of things within the meaning of the word "accident" as used in the policy insuring against accidents: *Pack v. Prudential Casualty Co.*, 170 Ky. 47, 185 S. W. 496, L. R. A. 1916E, 952n; *Gallagher v. Fidelity &c. Co.*, 163 App. Div. 556, 148 N. Y. S. 1016. Contra: *Elsey v. Fidelity &c. Co.* (Ind. App.), 109 N. E. 413; *Semancik v. Continental Casualty Co.*, 56 Pa. Super. Ct. 392. But where an accident policy insures against death through accidental means, which includes death resulting from sunstroke independently of other causes, "sunstroke" is to be deemed a form of personal injury rather than a disease: *Bryant v. Continental Casualty Co.*, 107 Tex. 582, 182 S. W. 673. But it has been held that an accident policy, which provides for payment of the principal sum in case of death from sunstroke due to external, violent, or accidental means, does not cover death of a fireman from sunstroke which resulted from exposure and heat while in performance of his ordinary duties: *Continental Casualty Co. v. Pittman*, 145 Ga. 641, 89 S. E. 716. In Indiana it has been held that an accident policy does not provide for indemnity for sunstroke not suffered through accidental means: *Elsey v. Fidelity &c. Co.* (Ind. App.), 109 N. E. 413. No recovery can be had under a policy providing for payment if the insured "should receive bodily injury which was effected directly and independently of all other causes through external, violent, and purely accidental means resulting in death of insured necessarily and solely from

such injury", when the insured dies from the contributory causes of choking on food and a pre-existing abscess in the œsophagus; and it is immaterial whether the abscess alone was necessarily fatal, when recovery is sought on a policy providing for payment in case of death from bodily injury effected directly and independently of all other causes through external, violent, and purely accidental means: *Crandall v. Continental Casualty Co.*, 179 Ill. App. 330; *Maryland Casualty Co. v. Morrow*, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. (N. S.) 1213. Death of insured, who shot an officer and was pursued by the officer for the purpose of avenging his own injury and shot, held not the natural and proximate result of insured's own vicious conduct, and the insurer was therefore liable: *Railway Mail Assn. v. Moseley*, 211 Fed. 1, 127 C. C. A. 427; *Bohaker v. Travelers' Ins. Co.*, 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543n. And under a policy covering death by external, violent, "or" accidental means, it was held that insurer was liable where insured was killed by gun by another, whether the fatal injury was accidental or not: *Oklahoma Nat. Life Ins. Co. v. Norton*, 44 Okla. 783, 145 Pac. 1138, L. R. A. 1915E, 695n. It is held that there can be no recovery under a policy insuring against death from injuries effected through external, violent, and accidental means where a person, in using nasal douche, sniffed more violently than usual, drawing germs into the middle ear, whence they penetrated into the brain, causing spinal meningitis: *Smith v. Travelers' Ins. Co.*, 219 Mass. 147, 106 N. E. 607, L. R. A. 1915B, 872. Death from over-exertion in removing a tire from an automobile held not accidental: *Lickleider v. Iowa State Traveling Men's Assn.* (Iowa), 151 N. W. 479; *Rock v. Travelers' Ins. Co.* (Cal.), 156 Pac. 1029. But it has been held in Illinois that an injury from the act of lifting a stove which was claimed to have caused valvular trouble of the heart, subsequently resulting in death, was an accidental injury within the terms of an accident policy: *Robinson v. United States*

dental within the meaning of that term in accident insurance policies.<sup>4</sup>

§ 4387. **Risks of travel.**<sup>5</sup>—An accident policy was held not to cover the death of one killed while attempting to board a street car, but who had not become a passenger.<sup>6</sup> In construing another policy, however, it was held that a train run on schedule time carrying passengers and freight was a “passenger train” and within the provisions of the policy.<sup>7</sup>

Health &c. Ins. Co., 192 Ill. App. 475. The word “means” qualified by the adjective “accidental,” in an accident insurance policy, is to be considered in a liberal and popular, rather than a strict and philosophical, sense; if the effect of the act from which injury results has the characteristics of an accident, it is proper to so characterize the means producing it; it follows that dilation of the heart, caused by taking a cold plunge bath, is properly characterized as effected by accidental means, especially since insured was an apparently healthy and vigorous man of military activities, who was accustomed to such baths, and had never previously experienced any bad effects therefrom: *New Amsterdam Casualty Co. v. Johnson*, 1 Ohio App. 22, 34 Ohio Cir. Ct. 76. *Contra*: *New Amsterdam Casualty Co. v. Johnson*, 91 Ohio St. 155, 110 N. E. 475, L. R. A. 1916B, 1018n.

<sup>4</sup> *Allen v. Travelers' Protective Assn.*, 163 Iowa 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600; *Interstate Business Men's Accident Assn. v. Ford*, 161 Ky. 163, 170 S. W. 525.

<sup>5</sup> Plaintiff, holding an accident policy which insured her against a Pott's fracture while a passenger in a public conveyance, including the platform, steps, or running board, can recover for such an injury received while alighting from a public conveyance: *Gibson v. Casualty Co.*, 156 App. Div. 144, 140 N. Y. S. 1045. An accident policy which insured against injuries while riding as a passenger, held not to cover injury to a switchman while riding on the platform of a coach in the discharge of his duties: *Ward v. North American Ac-*

*cident Ins. Co.*, 182 Ill. App. 317. Under policy insuring against accident while “in a railway car,” insurer held not liable where insured was injured by being thrown from an unclosed platform of railway car: *Schmohl v. Travelers' Ins. Co.* (Mo. App.), 177 S. W. 1108; *National Life Ins. Co. v. Fleming*, 127 Md. 179, 96 Atl. 281. But under a policy insuring against accidental loss of life while riding as passenger “in a railway passenger car,” insurer held liable for death caused by falling or being thrown from platform of passenger train while attempting to pass between two cars: *Schmohl v. Travelers' Ins. Co.* (Mo. App.), 189 S. W. 597. It has been held in Oklahoma that where insured, in an accident policy which provided that no benefit should be paid for injuries received while in a caboose used for passenger service, was killed while on a caboose attached to a stock train, he being in charge of cattle, the caboose on which he was riding was not “used for passenger service”: *Standard Accident Ins. Co. v. Hite*, 37 Okla. 305, 132 Pac. 333, 46 L. R. A. (N. S.) 986.

<sup>6</sup> *Mitchell v. German Commercial Accident Co.*, 179 Mo. App. 1, 161 S. W. 362. But under the provisions of accident insurance policy, insured, who while attempting to board a subway express train fell partly on platform and with his feet hanging between car and track, held a passenger “in or on” a conveyance entitled to indemnity for injury: *Rosenfeld v. Travelers' Ins. Co.*, 96 Misc. 672, 161 N. Y. S. 12.

<sup>7</sup> *Nadler v. Illinois Commercial Men's Assn.*, 188 Ill. App. 459.

**§ 4388. Inhaling gas—Poison.<sup>8</sup>**

**§ 4389. Occupation or employment.<sup>9</sup>**—Where one was insured as a financial reporter and was injured while testing, in the air, an aeroplane which he had built, he was not engaged in "recreation" within a provision of the policy as to change of occupation and engaging in recreation.<sup>10</sup>

**§ 4390. External signs.<sup>11</sup>**

<sup>8</sup> Death of insured which resulted from coming in contact with poison ivy while in the woods held within the terms of an accident policy: *Railway Mail Assn. v. Dent*, 213 Fed. 981, 130 C. C. A. 387, L. R. A. 1915A, 314. Recovery may be had, whether the escape of the gas was caused by insured's own accident or that of another where the insured was suffocated in a room in a hotel by gas: *Travelers' Ins. Co. v. Allen*, 237 Fed. 78, 150 C. C. A. 280. Held that death from poison may result from external, violent, and accidental means within the terms of an accident insurance policy: *Riley v. Interstate Business Men's Accident Assn. (Iowa)*, 152 N. W. 617. Under an accident policy excepting liability for death from voluntary or involuntary taking of poison, the insurer is not liable for death from strychnine, contained in medicine given insured by a doctor: *Riley v. Interstate Business Men's Accident Assn. (Iowa)*, 152 N. W. 617. Where it was stipulated in an action on an accident policy that insured's death was due to "an overdose of morphine," held that such stipulation precluded plaintiff from recovering, as it appeared that the application for such insurance, signed by plaintiff, expressly excepted, as grounds of liability of defendant thereunder, such injuries as insured might receive "while under the influence of \* \* \* narcotics, or in consequence thereof": *Pixley v. Illinois Commercial Men's Assn.*, 195 Ill. App. 135.

<sup>9</sup> The words "injured in an occupation," used in a clause changing the indemnity if the assured changes his occupation, are construed to mean "while engaged in an occupation" in the sense that it was his regular oc-

cupation when he was injured in an action for an injury: *McCarthy v. Pacific Mut. Life Ins. Co.*, 178 Ill. App. 502. An accident policy held to cover a fatal injury while engaged in a more hazardous occupation: *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509. Where the foreman of a bridge construction crew dived occasionally, it was held not to be a change of occupation, within an accident insurance policy: *Southern Ins. Co. v. Anderson*, 130 Tenn. 482, 172 S. W. 318. A claim in an insurance policy is valid which provides that in case insured shall change his occupation the "latest" manual of the company shall be referred to, to determine whether the newly adopted occupation is more hazardous and what amount of indemnity is the basis of liability: *McCarthy v. Pacific Mut. Life Ins. Co.*, 178 Ill. App. 502. It was held in a New York case that a warranty in a life policy that insured would not "engage" in any of the extrahazardous "occupations" or employments named, including that of retailing intoxicating liquors, was violated by owning an interest in a retail liquor business, though insured did not physically participate in the business: *Rauber v. Mutual Life Ins. Co.*, 156 App. Div. 446, 141 N. Y. S. 997.

<sup>10</sup> *Ridgely v. Aetna Life Ins. Co.*, 160 App. Div. 719, 145 N. Y. S. 1075.

<sup>11</sup> The word "wound" as used in an accident policy insured against injuries by accident leaving marks of a "wound" is to be given its legal definition as any lesion of the body, rather than its meaning in surgery; the legal definition including bruises, contusions, fractures, dislocations, and the like: *Robinson v. Masonic Protective Assn.*, 87 Vt. 138, 88 Atl.

§ 4391. **Excepted risks—Effect of negligence.**<sup>12</sup>—Where an accident policy excepted injuries received while riding a motorcycle, it is a good defense that the injuries were so received.<sup>13</sup>

§ 4392. **Voluntary exposure to unnecessary danger.**<sup>14</sup>—By going onto the platform of a moving train preparatory to getting off at the station, a passenger did not as a matter of law

531, 47 L. R. A. (N. S.) 924n. The "visible mark upon the body" required by a casualty insurance policy need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of internal injury or any physical effect observable from an outward indication which reveals an injured condition of the internal organs: *Royal Casualty Co. v. Nelson* (Tex. Civ. App.), 153 S. W. 674. Where a locomotive engineer sustained only slight external injuries, but became mentally deranged and unfit for duty for nearly two years, he could recover for a "visible injury": *Peterson v. Locomotive Engineers' Mut. Life & Ins. Assn.*, 123 Minn. 505, 144 N. W. 160, 49 L. R. A. (N. S.) 1022n, Ann. Cas. 1915A, 536n. A felon on insured's finger which was the direct and natural consequence of an accidental bruise is within the meaning of an accident insurance policy which insures against accidental injuries from external causes, leaving "external and visible marks" of a wound: *Robinson v. Masonic Protective Assn.*, 87 Vt. 138, 88 Atl. 531. But the provision is reasonable and where the policy so provides, recovery can not be had on an accident policy, unless there were external or visible evidence of accident or marks on decedent's body: *Goodes v. Order of United Commercial Travelers*, 174 Mo. App. 330, 156 S. W. 995. Where blood issued from insured's ear and nostril after his death it was held to be a "visible sign" of external injury, under an accident policy: *Goodes v. Order of United Commercial Travelers*, 174 Mo. App. 330, 156 S. W. 995.

<sup>12</sup> Provisions contained in accident insurance policies, excepting certain classes and kinds of injuries and causes of death, are valid and bind-

ing: *Scales v. National Life & Ins. Co.* (Mo. App.), 186 S. W. 948.

<sup>13</sup> *International Travelers' Assn. v. Peterson* (Tex. Civ. App.), 183 S. W. 1196. An accident policy which excepted injuries incurred while on a railway grade or roadbed did not except injuries where insured was necessarily on a railway roadbed in attempting to enter a train: *Travelers' Ins. Co. v. Harris* (Tex. Civ. App.), 178 S. W. 816.

<sup>14</sup> As used in an accident insurance policy which provides that it shall not cover accidents from voluntary exposure to unnecessary danger, the word "voluntary" means intentional and implies a conscious knowledge of danger: *Empire Life Ins. Co. v. Allen*, 141 Ga. 413, 81 S. E. 120. It is essential that there should be a conscious knowledge of danger and an intentional or wilful exposure to it and that the danger be unnecessary to give rise to an exemption from a liability under an accident insurance policy, providing that it shall not cover accidents resulting from voluntary exposure to unnecessary danger: *Empire Life Ins. Co. v. Allen*, 141 Ga. 413, 81 S. E. 120; *Travelers' Ins. Co. v. Harris* (Tex. Civ. App.), 178 S. W. 816. But it is held that the word "obvious," as used in an accident policy excepting injuries resulting from obvious dangers, bears its common meaning, to wit, easily discovered, readily perceived, plain, evident, and apparent, and applies where insured attempted to cross a track immediately in front of a rapidly approaching train, though he was not conscious of his danger: *Combs v. Colonial Casualty Co.*, 73 W. Va. 473, 80 S. E. 779, 50 L. R. A. (N. S.) 1218n. It is held that the word "obvious," as used in an accident policy, does not mean "unnecessary." "Un-

expose himself to obvious risk of injury within an accident policy.<sup>15</sup>

**§ 4394. Bodily infirmity or disease.<sup>16</sup>**

**§ 4395. Injuries intentionally inflicted by others.<sup>17</sup>**

necessary" means not required by the circumstances of the case, while "obvious" means easily discovered, seen, or understood, plain, manifest, palpable: *Hickman v. Ohio State Life Ins. Co.*, 92 Ohio St. 87, 110 N. E. 542. An instruction that, if insured acted merely in self-defense, plaintiff might recover the whole of the accident policy, was held not to be erroneous, though the policy excepted injury "from voluntary exposure to unnecessary danger": *Empire Life Ins. Co. v. Johnson*, 142 Ga. 330, 82 S. E. 893, Ann. Cas. 1916B, 267n. That the injury resulted while and because insured was exposing himself to an obvious risk was held to constitute a good defense to an action on an accident policy which exempted insurer from liability for injury from exposure to such risks: *Hickman v. Ohio State Life Ins. Co.*, 92 Ohio St. 87, 110 N. E. 542.

<sup>15</sup> *Gillis v. Duluth Casualty Assn.*, 133 Minn. 238, 158 N. W. 252.

<sup>16</sup> It is held that a recovery is not necessarily precluded on an accident policy by the fact that the insured's death may have been merely accelerated by a fall, and that a chronic malady contributed to his death: *Hall v. General Accident Assur. Corporation*, 16 Ga. App. 66, 85 S. E. 600.

<sup>17</sup> Where the injury is inflicted by another and is not the result of misconduct or participation by the insured, and is unforeseen by him, a recovery may be had on a policy which provides for indemnity against loss effected through any accidental means: *Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072. Under an accident insurance policy which provided that no recovery should be had for an injury "intentionally inflicted upon the insured by any other person, sane or insane," there can be no recovery for an injury by an intoxicated person; the

words "sane or insane" covering the whole field of mental condition, including intoxication: *Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072. Death by homicide was not included in an accident insurance policy, excluding recovery for death from injury "intentionally inflicted" or resulting from any act which, if done by assured while in possession of all mental faculties, would be deemed intentional or self-inflicted: *Andrews v. United States Casualty Co.*, 154 Wis. 82, 142 N. W. 487. The intention of the third person is alone controlling where the issue is whether an injury to insured in an accident policy was intentionally inflicted by a third person: *Travelers' Protective Assn. v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991; *Continental Casualty Co. v. Cunningham*, 188 Ala. 159, 66 So. 41, L. R. A. 1915A, 538. And where insured, in an accident policy limiting liability where the injury resulted from the intentional act of a third person, was shot by one who was fleeing from arrest, his act in shooting insured, a police officer, was an intentional act to kill insured: *Continental Casualty Co. v. Cunningham*, 188 Ala. 159, 66 So. 41, L. R. A. 1915A, 538; *Union Accident Co. v. Willis (Okla.)*, 145 Pac. 812. But it is held that where an injury occurs without the agency of the insured, it is accidental within the meaning of an accident insurance policy, though it is brought about designedly by another person: *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845. And though an accident policy excepts the insurer from liability from injuries intentionally inflicted upon the insured by any other person, it is liable for injuries inflicted by another who mistook the insured for his enemy: *Newsome v. Travelers' Ins. Co.*, 143 Ga. 785, 85 S. E. 1035.

§ 4396. Injuries received while engaged in violation of law.<sup>18</sup>

§ 4397. Injuries received while intoxicated.<sup>19</sup>

§ 4398. General provisions—Amount of recovery—Disability.<sup>20</sup>—"Total disability," within an accident policy, does

<sup>18</sup> That a person insured against accidental injury received an injury while engaged in an unlawful act does not necessarily preclude recovery: *Kneedler v. Bankers' Accident Assn.*, 188 Ill. App. 293. A clause in an accident insurance policy, limiting liability in case of injury or death "\* \* \* while violating law," was held not to limit liability, where the insured was killed in a collision between a motorcycle, which he was riding, and another motorcycle, though he had not procured a registration certificate or license number as required by law: *Fischer v. Midland Casualty Co.*, 189 Ill. App. 486. Where it was shown in an action for accident insurance that plaintiff was engaged in cockfighting at the time of the injury, it was held that even if the act was unlawful the stipulation did not so connect the injury with the act of cockfighting as to show that the unlawful act was the agency which brought about the injury: *Kneedler v. Bankers' Accident Assn.*, 188 Ill. App. 293. It has been held that the insured in an accident policy could not recover for an injury resulting from a voluntary fight with another: *Hutton v. States Accident Ins. Co.*, 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E, 127n, Ann. Cas. 1916C, 577n. But breaking of the leg of insured while engaged in a fight begun by himself is caused by "accidental means," within the terms of an accident policy insuring against injuries "effected exclusively by external, violent and accidental means," where the injury is unusual and was an unexpected result of the fight: *Hutton v. States Accident Ins. Co.*, 186 Ill. App. 499. Insurer held liable, though the assured was erecting a fire escape without erecting a covering to protect the street, and though a city ordinance required such a covering in the construction of new

buildings or in the unroofing or tearing down of old buildings under a liability insurance policy exempting the insurer from liability for injuries if the insured was violating a city ordinance: *W. N. Kratzer & Co. v. Pennsylvania Casualty Co.*, 238 Pa. 515, 86 Atl. 303.

<sup>19</sup> The words "intemperate habit," in an accident policy, merely mean the use of intoxicants to excess, that is, with considerable frequency and to an apparent degree, and it was erroneous to instruct that the word "habit" implied regularity: *Andrews v. United States Casualty Co.*, 154 Wis. 82, 142 N. W. 487.

<sup>20</sup> Insurer held liable if insured was disabled from transacting any kind of business pertaining to his occupation under an accident policy insuring against disability preventing performance of every duty pertaining to any business or occupation: *National Life & Ins. Co. v. O'Brien*, 155 Ky. 498, 159 S. W. 1134. A total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation means only such disability as prevents the performance of any substantial part of his duties: *Hefner v. Fidelity & Co. (Tex. Civ. App.)*, 160 S. W. 330. And one was totally disabled within the provisions of a health insurance policy where he was unable to attend to his business as publisher, though he was able to go to his office a few times to give instructions to his foreman: *Great Eastern Casualty Co. v. Robins*, 111 Ark. 607, 164 S. W. 750; *Davis v. Midland Casualty Co.*, 190 Ill. App. 338. Insured could recover if he became totally and permanently disabled from following any business by which he might reasonably earn a livelihood, under a policy entitling him to recover if he becomes totally and permanently disabled from per-

not mean absolute physical inability to transact any kind of business connected with his occupation, and it exists though he may be able to perform a few occasional or trivial acts, if he is unable to do any substantial portion of his work.<sup>21</sup>

§ 4399. **Sick benefits.**<sup>22</sup>—Though insured went out for a short time daily on his physician's advice while being treated in a sanitarium for tuberculosis, he was "continuously confined within the house" within the provisions of a health insurance policy.<sup>23</sup>

forming any kind of manual labor upon which he depends for a livelihood: *Indiana Life Endowment Co. v. Reed*, 54 Ind. App. 450, 103 N. E. 77. The loss of one eye by accident is held not to be total disability within an accident policy providing that total disability shall be such as renders insured unable to work or earn money, where the evidence showed that insured was not wholly unable to earn money: *Whitton v. American Nat. Ins. Co.*, 17 Ga. App. 525, 87 S. E. 827.

<sup>21</sup> *Davis v. Midland Casualty Co.*, 190 Ill. App. 338; *Continental Casualty Co. v. Wynne*, 36 Okla. 325, 129 Pac. 16; *Commonwealth Bonding & Ins. Co. v. Bryant* (Tex. Civ. App.), 185 S. W. 979.

<sup>22</sup> Where the premium is based upon the unlikelihood of such confinement, a stipulation in a policy of accident and health insurance that there can be no recovery except during continuous confinement within the house is reasonable and valid: *Rocci v. Massachusetts Accident Co.*, 222 Mass. 336, 110 N. E. 972. Proof is insufficient where a sick benefit policy required that insured must be necessarily and continuously confined

within the house, and it was shown that he was "wholly and continuously disabled, suffering from walking typhoid fever" during a period for which indemnity was asked: *Bruzas v. Peerless Casualty Co.*, 111 Maine 308, 89 Atl. 199. Where the policy required that insured must have been regularly visited by a qualified physician once every seven days, there could be no recovery for a period during which no physician was employed: *Bruzas v. Peerless Casualty Co.*, 111 Maine 308, 89 Atl. 199.

<sup>23</sup> *Great Eastern Casualty Co. v. Robins*, 111 Ark. 607, 164 S. W. 750; *American Assurance Co. v. Dickson*, 34 Ohio Cir. Ct. 313. But taking trips to another state for medical treatment, going on Thursday and returning on Saturday, is not confinement within the house: *Hakspacher v. Ætna Beneficial Assn.*, 55 Pa. Super. Ct. 410. Where insured made several changes of residence during his sickness, it was held that the insurer was not liable on a policy predicated recovery upon continuous confinement of the insured within the house: *Rocci v. Massachusetts Accident Co.*, 222 Mass. 336, 110 N. E. 972.



## CHAPTER CXXXI

### EMPLOYERS' LIABILITY, CASUALTY, GUARANTY AND TITLE INSURANCE

§ 4405. **Employers' liability insurance—In general.**<sup>1</sup>—It is held that an injured employé of the insured or any other third party can not maintain an action on an indemnity insurance contract, since there is no privity of contract.<sup>2</sup>

§ 4406. **Legal liability — Costs.**<sup>3</sup> — Where the insurer agreed to defend action against the insured at its own cost, and, pending an action, notified the insured that it might withdraw

<sup>1</sup> Statements by an insured under an automobile indemnity policy to the person injured that he was insured and would try to get a settlement, and that a lawyer coming to see the claimant represented the insurance company and not the insured, although he might call himself the insured, did not constitute an "interference with negotiations for compromise," prohibited by the policy: *Hopkins v. American Fidelity Co.*, 91 Wash. 680, 158 Pac. 535. Where a policy insured a physician against liability for mistake of assistant "while acting under assured's instructions" it was held not to cover case treated by assistant without instructions other than previous general instructions: *Seay v. Georgia Life Ins. Co.*, 132 Tenn. 673, 179 S. W. 312, Ann. Cas. 1916E, 1157n.

<sup>2</sup> *Goodman v. Georgia Life Ins. Co.*, 189 Ala. 130, 66 So. 649; *United States Fidelity & Co. v. Maryland Casualty Co.*, 182 Ill. App. 438; *Pfeiler v. Penn Allen Portland Cement Co.*, 240 Pa. 468, 87 Atl. 623.

<sup>3</sup> Policy of automobile accident insurance which provided that insured might not incur expenses or settle claim "except at his own cost," did not forbid payment by insured to decedent's administratrix, pending suit, of \$3,750 which sum she offered to accept in settlement of damages in excess of \$5,000, where it appeared

that payment would not increase insurer's liability or enhance difficulties in defending: *McAleenan v. Massachusetts Bonding & Co.*, 173 App. Div. 100, 159 N. Y. S. 401. A policy providing for indemnity to a sewer contractor against loss from liability imposed by law for damages on account of bodily injuries covers a liability for damages for personal injuries sustained by a pedestrian falling into an unguarded sewer trench: *Kibler v. Maryland Casualty Co.*, 74 Wash. 159, 132 Pac. 878. A surety company whose undertaking related to claims by "others" held not liable to plaintiff, a marshal, on its indemnity bond because of the recovery by the defendant in execution against the marshal in an action for the wrongful levy and execution upon exempt property: *McNamee v. National Surety Co.*, 156 N. Y. S. 758. Where the insurer, issuing an indemnity policy and stipulating that it would defend actions against insured, who should not interfere therewith it was held liable for the amount of a judgment against insured, paid pending an appeal by insurer without executing a stay bond: *E. M. Upton Cold Storage Co. v. Pacific Coast Casualty Co.*, 162 App. Div. 842, 147 N. Y. S. 765. Where the insurer, issuing an indemnity policy against loss from operation of machinery, received notice of actions

from the defense, and the insured thereupon employed an attorney, who assisted in defending the action, the insurer was liable for the attorney's fees incurred.<sup>4</sup>

**§ 4407. Injuries while engaged in designated business.<sup>5</sup>**

against insured on claims, but did not defend, and insured was obliged to pay judgments, insurer was liable therefor: *E. M. Upton Cold Storage Co. v. Pacific Coast Casualty Co.*, 162 App. Div. 842, 147 N. Y. S. 765; *Interstate Casualty Co. v. Wallins Creek Coal Co.*, 164 Ky. 778, 176 S. W. 217, L. R. A. 1915F, 958. It is held that where an indemnity insurance company refused to agree to a settlement which insured could have procured, and a judgment for a larger amount was obtained against insured, that this did not render the insurer liable for that part of such judgment above the amount of the insurer's liability as fixed by the policy and in excess of the settlement which it refused to accept: *C. Schmidt & Co. Brewing Co. v. Travelers' Ins. Co.*, 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (N. S.) 126n; *Bowron v. Georgia Casualty Co.*, 223 Fed. 673; *Wisconsin Zinc Co. v. Fidelity & Co.*, 162 Wis. 39, 155 N. W. 1081. Contra: *Brown v. London Guarantee & Co.*, 232 Fed. 298. See *Brassil v. Maryland Casualty Co.*, 210 N. Y. 235, 104 N. E. 622, L. R. A. 1915A, 629. Where the insured, under an employer's liability policy, did not pay a judgment recovered against it by an employé, held not entitled to recover on the policy: *Atlas Hardwood Lumber Co. v. Georgia Life Ins. Co.*, 129 Tenn. 477, 167 S. W. 109; *Fidelity & Co. v. Martin*, 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F, 924; *McAleenan v. Massachusetts Bonding & Co.*, 173 App. Div. 100, 159 N. Y. S. 401; *Lowe v. Fidelity & Co.*, 170 N. Car. 445, 87 S. E. 250; *Davies v. Maryland Casualty Co.*, 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035; *Wisconsin Zinc Co. v. Fidelity & Co.*, 162 Wis. 39, 155 N. W. 1081. See *Lombard v. Maguire-Penniman Co.* (N. H.), 97 Atl. 892. But where a policy against "loss from liability" for damages on account of accidental injuries indemnifies assured against

liability, and not merely against payment: *Maryland Casualty Co. v. Peppard* (Okla.), 157 Pac. 106. It has been held that damages imposed on affirmance of an appeal and interest are not expenses of litigation within an employer's liability policy: *Little Cahaba Coal Co. v. Aetna Life Ins. Co.*, 192 Ala. 42, 68 So. 317, Ann. Cas. 1917D, 863n.

<sup>4</sup> *John B. Stevens & Co. v. Frankfort Marine & Ins. Co.*, 207 Fed. 757, 125 C. C. A. 295, 47 L. R. A. (N. S.) 1214n; *Anderson & Co. v. Maryland Casualty Co.*, 123 Md. 67, 90 Atl. 780; *Dunham v. Philadelphia Casualty Co.*, 179 Mo. App. 558, 162 S. W. 728; *Murch Bros. Const. Co. v. Fidelity & Co.*, 190 Mo. App. 490, 176 S. W. 399; *Rogers v. Western Indemnity Co.* (Mo. App.), 173 S. W. 1087; *Sachs v. Maryland Casualty Co.*, 170 App. Div. 494, 156 N. Y. S. 419; *Harbor & Co. Savings Assn. v. Employers' Liability Assur. Corporation*, 79 Misc. 150, 140 N. Y. S. 717; *Lowe v. Fidelity & Co.*, 170 N. Car. 445, 87 S. E. 250; *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581; *United States Fidelity & Co. v. Pressler* (Tex. Civ. App.), 185 S. W. 326. That the insurer is not bound absolutely because it refuses to defend where the insured effects a settlement, see *Mayor & Co. v. Commercial Casualty Ins. Co.*, 169 App. Div. 772, 155 N. Y. S. 75.

<sup>5</sup> Where the employment specified in an indemnity policy is "manual classification of work operating and maintenance of electric plant and distributing system, including ordinary repairs and renewals, etc.," the words "ordinary repairs and renewals" may be construed to allow employer to attach labor-saving machinery to his plant to assist in moving coal to its furnaces: *Springfield Light & Co. v. Philadelphia Casualty Co.*, 184 Ill. App. 175. Where insured, under a policy against liabil-

§ 4412. **Fidelity insurance—In general.**<sup>6</sup>—A surety bond which indemnifies the principal against loss sustained by fraud or misapplication of an agent does not extend to a loss occasioned by simple mistake of the agent in paying for merchandise, where there was no fraud.<sup>7</sup>

§ 4413. **Notice of loss or dishonesty.**<sup>8</sup>—Under a fidelity bond the insurer is relieved from liability for the dishonesty of the president of the insured corporation where it was not notified of another act of dishonesty known to the insured.<sup>9</sup>

§ 4417. **Supervision of employe.**<sup>10</sup>—The insurer is not entitled to have the books examined by expert accountants where the contract indemnifying a bank against embezzlement of an

ity for personal injuries to third persons, warranted that the premises were occupied as an apartment hotel, a temporary suspension of business, necessitated by a fire in the hotel, was not a breach of such warranty: *Harbor &c. Savings Assn. v. Employers' Liability Assur. Corporation*, 79 Misc. 150, 140 N. Y. S. 717.

<sup>6</sup> Where a general agent of an insurance company was permitted to deposit in his own name all premiums collected, and the company knew that the agent represented other companies, and kept the funds of all the companies in his individual account, the agent, failing to account for premiums collected, was not guilty of embezzlement, within a bond conditioned to reimburse the company for loss by embezzlement: *Dixie Fire Ins. Co. v. Nelson*, 128 Tenn. 70, 157 S. W. 416. A fidelity bond protecting against loss by any act of "larceny or embezzlement" of plaintiff's employe would not include loss from poor business judgment exercised by the employe resulting in her becoming indebted to plaintiff beyond an agreed amount: *John Lee Clarke v. Fidelity &c. Co.*, 73 Wash. 62, 131 Pac. 468. Where a surety bond insures a corporation against larceny or embezzlement by its president, insurer held not liable for wrongful issuance of stock certificates: *Dominion Trust Co. v. National Surety Co.*, 221 Fed. 618, 137 C. C. A. 342.

<sup>7</sup> *Kansas Flour Mills Co. v. Amer-*

*ican Surety Co.*, 98 Kans. 618, 158 Pac. 1118.

<sup>8</sup> The insured failing to give ten days' notice of shortage as required, the insurer is not liable: *Grand Lodge Independent Western Star Order v. Illinois Surety Co.*, 189 Ill. App. 340. The sureties on an indemnifying bond of an agent to plaintiff held not relieved from liability for the agent's subsequent default because of the railroad company's failure to give notice to plaintiff of a prior error in the agent's account under plaintiff's employer's liability bond to a railroad company, insuring agents: *Fidelity &c. Co. v. Maile*, 177 Mich. 231, 142 N. W. 1087.

<sup>9</sup> *Dominion Trust Co. v. National Surety Co.*, 221 Fed. 618, 137 C. C. A. 342, Ann. Cas. 1917C, 447n.

<sup>10</sup> Examination by officers of bank of the accounts of its cashier held sufficient to entitle insured to recover on a bond requiring a complete examination every 12 months: *Equitable Surety Co. v. Bank of Hazen*, 121 Ark. 422, 630, 181 S. W. 279, 1200. It is held that examination of accounts of plaintiff's cashier once a month and daily examination of the cashier's receipts, ledger, and banking account constitute a sufficient compliance with the requirements of a fidelity bond providing for monthly examination of books and daily and monthly accounting for funds and securities handled: *Prosser Power Co. v. United States Fidelity &c. Co.*,

employé provides that his accounts shall be examined by the officers of the bank.<sup>11</sup>

§ 4418. **Warranties and misrepresentations.**<sup>12</sup>—Answers, materially false, by the president of a bank to a surety company in an application for a fidelity bond for its cashier, which were

73 Wash. 304, 132 Pac. 48. A surety company is discharged from liability on an employer's fidelity bond because of breach of conditions binding the obligee to require daily and monthly reports, and to check the employé's accounts: *Marion Iron & C. Bed Co. v. Empire State Surety Co.*, 52 Ind. App. 480, 100 N. E. 882. It is held that a provision in an indemnity policy, insuring a corporation against loss through the negligence of its treasurer, and which requires it to take all reasonable precautions to prevent such loss does not require it to examine the books of a bank in which the treasurer deposited to ascertain its financial condition: *National Surety Co. v. Western Pac. R. Co.*, 200 Fed. 675, 119 C. C. A. 91.

<sup>11</sup> The insurer is not entitled to have the books examined by expert accountants where the contract of a surety company indemnifying a bank against embezzlement of an employé provides that his accounts shall be examined by the officers of the bank: *United States Fidelity & C. Co. v. Boley Bank & C. Co.*, 43 Okla. 819, 144 Pac. 615; *United States Fidelity & C. Co. v. Foster Deposit Bank's Receiver*, 153 Ky. 698, 156 S. W. 371. Where an application for a policy insuring the fidelity of a delivery foreman provided that his accounts should be checked daily, evidence that the foreman's returns were accepted without verification was a complete defense to the insurer: *Larimore v. United States Fidelity & C. Co.*, 21 Cal. App. 767, 132 Pac. 1050. And where a bank complied with its promises in an application for a bond insuring the fidelity of its cashier as to its supervision over him, the insurer can not avoid liability on the ground that the usual and customary supervision was not exercised: *American Bonding Co. v. Ballard County Bank's Assignee*, 165 Ky. 63, 176 S. W. 368.

<sup>12</sup> Recovery can not be had on fidelity bond to indemnify employer against loss for dishonesty of a traveling salesman and collector, when statements in his application in respect to the salary of the employé, and as to weekly statements sent to customers, were false: *Krey Packing Co. v. United States Fidelity & C. Co.*, 189 Mo. App. 591, 175 S. W. 322. Defalcation of recorder of Order of United Workmen at the time his guaranty bond was issued, continuing after renewals of the bond, held a breach of the warranty that his accounts were correct and the bond was void: *Grand Lodge, A. O. U. W. v. Massachusetts Bonding & C. Co.*, 38 R. I. 276, 94 Atl. 859. A certificate by a bank to a guaranty company for renewal of a fidelity bond for its cashier which certified that his books were examined in the regular course of business and found correct, etc., all moneys, etc., under his control being accounted for, "and he is not now in default," is not a warranty of the correctness of such accounts, and the phrase "and he is not now in default" does not amount to a warranty: *Hunter v. United States Fidelity & C. Co.*, 129 Tenn. 572, 167 S. W. 692. Where the employer, at the time application was made for the bond, had no knowledge that the employé had previously been a defaulter, the company was liable on the bond: *Legler v. United States Fidelity & C. Co.*, 88 Ohio 336, 103 N. E. 897. Where no inquiry was made, a surety bond procured by an agent in favor of his principal held not invalid because the principal did not inform the insurer of the state of the agent's account at the time of its execution: *Citizens' Trust & C. Co. v. Globe & C. Fire Ins. Co.*, 229 Fed. 326, 143 C. C. A. 446. False representations in application for surety bond held no defense, unless insurer, within 90 days after notice thereof,

made recklessly and without personal knowledge or any investigation, amount to fraud and avoid the policy.<sup>13</sup>

notified the insured that it refused to be bound thereby under Rev. St. 1911, § 4948: *National Surety Co. v. Murphy-Walker Co.* (Tex. Civ. App.), 174 S. W. 997. False representations mistakenly made by a bank, in an application for fidelity insurance, on its cashier, that the

cashier's accounts were correct, held not to avoid the policy under Ky. St. 1915, § 639: *American Bonding Co. v. Ballard County Bank's Assignee*, 165 Ky. 63, 176 S. W. 368.

<sup>13</sup> *Hardinsburg Bank &c. Trust Co. v. American Bonding Co.*, 153 Ky. 579, 156 S. W. 394.

## CHAPTER CXXXII

### MARINE INSURANCE

§ 4425. **Generally.**<sup>1</sup>—Marine insurance, primarily, covers risks of travel on the ocean or waters directly connected therewith. It accordingly was held that where the vessel was in a river where the gulf tide ebbed and flowed, a policy upon a vessel while in the waters of the Gulf of Mexico was in force.<sup>2</sup>

§ 4439. **Implied warranties—Seaworthiness—Definition.**<sup>3</sup>—Where the vessel was seaworthy when the voyage commenced and the cargo was in good condition when received, the insurer is liable for a loss during the voyage from external causes, as there is no implied warranty in a policy on a cargo that the goods are seaworthy for the voyage.<sup>4</sup> No warranty is implied on the part of the insured of the seaworthiness of a lighter used in discharging the cargo at the end of the voyage.<sup>5</sup>

<sup>1</sup> It is no defense that a cargo of lumber, the true measurement of which was stated in a marine policy, was understated in the bill of lading: *Granger v. Providence-Washington Ins. Co.*, 200 Fed. 730, 119 C. C. A. 174. Under the terms of the policy an insurer of cargo held liable for a loss caused by the capsizing of a lighter used in discharging: *Thames &c. Marine Ins. Co. v. Pacific Creosoting Co.*, 223 Fed. 561, 139 C. C. A. 101.

<sup>2</sup> *Mannheim Ins. Co. v. Charles Clarke & Co.* (Tex. Civ. App.), 157 S. W. 291.

<sup>3</sup> In every insurance upon a vessel there is an implied warranty on insured's part that at the time of sailing the vessel shall be seaworthy for the voyage insured, which extends not only to the hull, but if a sailing vessel, to the sails and rigging: *Stet-*

*son v. Insurance Co.*, 215 Fed. 186. Except where the vessel is at sea when the risk begins, there is an implied warranty of seaworthiness in time policies, satisfied if the vessel be staunch and properly equipped to meet the ordinary perils of the voyage: *Plummer v. Insurance Co.*, 114 Maine 128, 95 Atl. 605.

<sup>4</sup> *Pacific Creosoting Co. v. Thames &c. Marine Ins. Co.*, 210 Fed. 958.

<sup>5</sup> *Thames &c. Marine Ins. Co. v. Pacific Creosoting Co.*, 223 Fed. 561, 139 C. C. A. 101. And it is no defense to an action on a marine policy on cargo which covered "the risk of craft and (or) raft to and from the vessel," that a lighter employed to land the cargo, on which a loss occurred was not seaworthy: *Pacific Creosoting Co. v. Thames &c. Marine Ins. Co.*, 210 Fed. 958.

## CHAPTER CXXXIII

### MARINE INSURANCE—PERILS AND RISKS

§ 4476. **Perils of the sea.**—Where it was shown that the propeller was new and contained no latent defects, the breaking of the propeller blades is a loss through perils of the seas within the terms of a policy.<sup>1</sup> It was held in a recent case that recovery may be had on a policy against the perils of the sea for a loss by stranding or collision, although arising from the negligence of the insured or of the master or crew.<sup>2</sup>

§ 4489. **Negligence—Misconduct.**<sup>3</sup>—It is held that it is not negligence, relieving the insurer, that the vessel left port on the return voyage with two blades of the propeller partly broken off.<sup>4</sup>

<sup>1</sup> *New York &c. S. S. Co. v. Ætna Ins. Co.*, 204 Fed. 255, 122 C. C. A. 523.

<sup>2</sup> *American-Hawaiian S. S. Co. v. Bennett*, 207 Fed. 510, 125 C. C. A. 172. But, see to effect that there can be no recovery, under a policy insuring a vessel against the adventures and perils of the sea, for the sinking of the vessel if such sinking was caused by the negligence of the watchman in failing to close the sea valve, which caused it to tip over, or to tip so far that water ran in from the top and foundered it: *Mannheim*

*Ins. Co. v. Charles Clarke & Co.* (Tex. Civ. App.), 157 S. W. 291.

<sup>3</sup> The owner of a vessel may take out insurance against his own negligence and against the necessity of entering into any inquiry as to his negligence, where shippers have relieved him from liability for loss by fire; but he remains liable for his negligence: *Symmers v. Carroll*, 207 N. Y. 632, 101 N. E. 698, Ann. Cas. 1914C, 685n.

<sup>4</sup> *New York &c. S. S. Co. v. Ætna Ins. Co.*, 204 Fed. 255, 122 C. C. A. 523.

## CHAPTER CXXXIV

### MARINE INSURANCE—LOSS AND ADJUSTMENT

§ 4496. **Actual total loss—The general rule.**<sup>1</sup>—It was held in a recent case that a vessel which was waterlogged and abandoned by her crew at sea was not an actual total loss, where the hull and parts of the equipment and apparel were saved and brought into port by salvors in a condition capable of being repaired at some cost.<sup>2</sup>

§ 4497. **Constructive total loss—In general.**<sup>3</sup>—Under the American rule there is constructive total loss when the insured has the right to abandon the vessel, and the right exists where the cost of saving and repairing the vessel exceeds one-half her value.<sup>4</sup> But under the English rule the cost of salvage and repairs must exceed the full value of the vessel to constitute constructive total loss.<sup>5</sup> Where the policy contains a provision fixing the right to abandon on certain specified terms, an insured is not entitled to abandon a vessel as for a constructive total loss under the “high probability” rule.<sup>6</sup>

<sup>1</sup> There is an actual total loss where the subject-matter is wholly destroyed, or lost to the assured, or where there remains nothing of value to be abandoned: *St. Paul Fire & Ins. Co. v. Beacham*, 128 Md. 414, 97 Atl. 708, L. R. A. 1916F, 1168n.

<sup>2</sup> *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 149 C. C. A. 614.

<sup>3</sup> The right to abandon a vessel as for a constructive total loss must be determined by the situation of the vessel and the conditions existing at the time notice of abandonment is given: *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 149 C. C. A. 614.

<sup>4</sup> *St. Paul Fire & Ins. Co. v. Beacham*, 128 Md. 414, 97 Atl. 708, L. R. A. 1916F, 1168n. An insurer of freightage under a covering agreement free from partial loss is liable,

if the freight on the goods jettisoned to save the vessel together with the costs of salvage and transshipment chargeable to the freight amount to more than one-half the amount of the freight under Civ. Code, §§ 2703, 2705, 2717, defining constructive total loss: *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 Pac. 807. And it is sufficient if the right to abandon exists under Civ. Code, § 2705, defining a constructive total loss, it not being necessary that there should be an actual abandonment: *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 Pac. 807.

<sup>5</sup> *St. Paul Fire & Marine Ins. Co. v. Beacham*, 128 Md. 414, 97 Atl. 708, L. R. A. 1916F, 1168n.

<sup>6</sup> *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 149 C. C. A. 614.



§ 4498. **Insurance against "actual total loss only"—Memorandum articles "free from average unless general."**—The words "on fire" in an exception in a marine policy which warrants free from particular average unless the vessel "be stranded, sunk or on fire," are held to open the warranty if a structural part was on fire, regardless of extent.<sup>8</sup>

§ 4499. **Entire or severable contract.**<sup>9</sup>—There could be no recovery, under a marine insurance contract which contained a warranty against particular average, for the total loss of a part of the goods unless the various lots of the goods were separately insured and there was a total loss of one of such lots.<sup>10</sup>

§ 4501. **Abandonment—Definition.**—Where the insurer accepts, either expressly or impliedly, the abandonment, it is precluded from claiming that the vessel was not damaged by the peril insured against, or was not a total loss.<sup>11</sup> It is held that the insurer is not entitled to raise a sunken vessel and tender her to the insured in her damaged condition, and claim the benefit of a provision against waiver by acceptance of abandonment.<sup>12</sup> And an offer to abandon may be accepted, even when the insured has no right to abandon.<sup>13</sup>

§ 4514. **General average and adjustment of loss.**<sup>14</sup>—It was

<sup>7</sup> The expression "free of particular average" in a marine insurance policy is equivalent to "against total loss only": *St. Paul Fire & Ins. Co. v. Beacham*, 128 Md. 414, 97 Atl. 708, L. R. A. 1916F, 1168n. The term "particular average" in marine insurance means a partial loss as distinguished from total loss or general average loss: *St. Paul Fire & Ins. Co. v. Beacham*, 128 Md. 414, 97 Atl. 708, L. R. A. 1916F, 1168n. The insurer is liable for constructive total loss under a marine insurance policy upon a vessel and not upon memorandum articles containing the clause "free of particular and general average": *St. Paul Fire & Ins. Co. v. Beacham*, 128 Md. 414, 97 Atl. 708, L. R. A. 1916F, 1168n.

<sup>8</sup> *Thames & C. Marine Ins. Co. v. Pacific Creosoting Co.*, 223 Fed. 561, 139 C. C. A. 101. Under the English rule where a marine policy contains a warranty free from particular average, unless the vessel be stranded,

sunk, or on fire, insurer is liable for loss to cargo of vessel stranded, etc., though not resulting therefrom: *Thames & C. Marine Ins. Co. v. Pacific Creosoting Co.*, 223 Fed. 561, 139 C. C. A. 101.

<sup>9</sup> On question of liability of marine insurer for partial loss under a policy limiting liability to a loss amounting to 3 per cent. of insured value, see: *Bull v. Insurance Co.*, 218 Fed. 616, 134 C. C. A. 374.

<sup>10</sup> *California Canneries Co. v. Canton Ins. Office*, 25 Cal. App. 303, 143 Pac. 549.

<sup>11</sup> *Alliance Ins. Co. v. Producers' Cotton Oil Co.*, 108 Miss. 589, 67 So. 58.

<sup>12</sup> *Alliance Ins. Co. v. Producers' Cotton Oil Co.*, 108 Miss. 589, 67 So. 58.

<sup>13</sup> *Alliance Ins. Co. v. Producers' Cotton Oil Co.*, 108 Miss. 589, 67 So. 58.

<sup>14</sup> A "general average" loss in marine insurance is the amount of the

held that there was only a particular average loss, where part of the goods covered by the policy, subject to the conditions of a standard policy containing warranty against particular average, were damaged by leakage so that they were thrown away.<sup>15</sup>

owner's loss of ship, cargo, freight or other interest by any voluntary sacrifice made or extraordinary expense incurred for the benefit of all: St. Paul Fire &c. Ins. Co. v. Beacham, 128 Md. 414, 97 Atl. 708, L. R. A. 1916F, 1168n.  
<sup>15</sup> California Canneries Co. v. Canton Ins. Office, 25 Cal. App. 303, 143 Pac. 549.

## CHAPTER CXXXV

### LEASES—THE INSTRUMENT OF DEMISE

§ 4525. **Leases—Defined and distinguished from other contractual relations.**<sup>1</sup>—A lease is a conveyance of a limited estate for a limited term with certain conditions attached, and is not an executed contract until the term expires and the conditions are fulfilled.<sup>2</sup>

§ 4529. **Reservations and exceptions.**<sup>3</sup>—The intention of the parties is determined from the language used and no particular words are necessary to create a condition in a lease.<sup>4</sup>

§ 4531. **Duration of the term.**<sup>5</sup>

§ 4532. **Description of premises.**<sup>6</sup>

§ 4533. **Construction.**<sup>7</sup>—It was held that the lease of a floor, and a contemporaneous collateral agreement regarding the

<sup>1</sup> A party must establish such a state of facts as would entitle him to relief in a suit for specific performance to maintain a position as tenant under a parol lease: *MacQueen v. Anderson*, 275 Ill. 409, 114 N. E. 159.

<sup>2</sup> *Shepard v. Sullivan*, 94 Wash. 134, 162 Pac. 34.

<sup>3</sup> An agreement not to rent land to a third party for the erection of billboards for one year is to be interpreted as being limited to the time during which the contract is in force, since, after the contract was terminated, it lacked vitality and was in no part binding on the parties: *Weber v. American Posting Service*, 197 Ill. App. 500.

<sup>4</sup> *Paraffine Oil Co. v. Cruce (Okla.)*, 162 Pac. 716.

<sup>5</sup> A lease of realty for one year beginning September 1, 1911, and ending September 1st of the following year is properly construed to mean a lease year from September 1, 1911, to September 1, 1912: *Brooke v. Atlanta Woolen Mills*, 18 Ga. App. 505, 89 S. E. 598.

<sup>6</sup> The exercise of rights and privi-

leges granted are held to be limited to the space mentioned, where contract between an amusement corporation and a concessionaire granted exclusive rights and privileges for sale of certain commodities in a park, but provided that the "exact space" will be shown and designated on general ground plans: *Merle v. Beifeld*, 275 Ill. 594, 114 N. E. 369. A tenant in possession is entitled to use of outside walls, and can delegate that use to a third person, but can not use them in such a way as to injure the freehold or for purposes inconsistent with lawful and reasonable enjoyment of property: *Kretzer Realty Co. v. Thomas Cusack Co. (Mo. App.)*, 190 S. W. 1011. Though the term "lease and demise" is used in a contract granting the right to remove sand and gravel from leased premises, subsequent provisions may show that it is a lease for purpose of removing sand and gravel only: *Powell v. Cone*, 100 Nebr. 562, 160 N. W. 959.

<sup>7</sup> A lease is to be construed in accordance with Civ. Code, §§ 1641, 1643, 1644, and Code Civ. Proc.

use of a part of a basement, should be construed together as forming one lease.<sup>8</sup>

§ 4534. **Reformation.**<sup>9</sup>

§ 4536. **Execution—Acknowledging and witnessing.**<sup>10</sup>

§ 4538. **Delivery and acceptance.**<sup>11</sup>—The lessee must accept the proposed lease within a reasonable time and when the lessor sent the lessee copies of a proposed lease which was dated May 1 and the lessee did not notify the lessor of her acceptance until July 28, it was held that the acceptance was not made within a reasonable time.<sup>12</sup>

§ 4539. **Recording.**<sup>13</sup>

§ 4547. **Illegal leases.**—A lease for a saloon to a brewing company, prohibited by statute from engaging in the saloon business, is held not void as illegal; the parties acting on the theory that the saloon was to be operated by a sublessee.<sup>14</sup> It was held recently that a lease of hotel property, valid when made, was not

§ 1864, stating rules for ascertaining intent of parties to contract: *Edward Barron Estate Co. v. Waterman*, 32 Cal. App. 171, 162 Pac. 410.

<sup>8</sup> *Lieberman v. Graf Realty Holding Co.*, 174 App. Div. 774, 161 N. Y. S. 567.

<sup>9</sup> The tenant's statement that he continued in possession, understanding he was bound to pay only the reduced sum, was not contradictory of, and was sufficient to show a change of terms of his lease agreement where the tenant testified that he notified the landlord that he would not continue in possession unless the rent was reduced: *Burton v. Gorman*, 125 Ark. 141, 188 S. W. 561.

<sup>10</sup> An unacknowledged lease for over a year is void except as it creates a tenancy from month to month, or other rent period under the statutes: *Jamison v. Reilly*, 92 Wash. 538, 159 Pac. 699.

<sup>11</sup> Leases which are not signed by lessor but delivered to and signed by lessee are not within the rule that, where a lease contains mutual covenants and is executed by lessor only and accepted by lessee, such lease is binding on the lessee: *McGivern v. Parkhill*, 195 Ill. App. 343. Though

the tenant subsequently requested a formal lease, a completed contract of lease results from a letter by owner to agent offering to rent to occupant for a stated amount, which the occupant notified the agent he would accept: *Willey v. Goulding*, 99 Kans. 323, 161 Pac. 611.

<sup>12</sup> *McGivern v. Parkhill*, 195 Ill. App. 343. Where a lessor sends copies of a proposed lease not executed by himself to the lessee, which the lessee signs and retains without notifying the lessor of her acceptance of the lease, the facts show no more than an offer on the part of lessor to make a lease; and where it appears that the lessor gave defendant notice to quit prior to notice of the lessee's acceptance of the lease, such notice in legal effect amounts to a withdrawal of the offer: *McGivern v. Parkhill*, 195 Ill. App. 343.

<sup>13</sup> *Mansf. Dig. Ark. ch. 27, § 660*, which is in force in Indian Territory required lease to be acknowledged before record, and any record of unacknowledged lease is a nullity: *Reardon v. Smith (Okla.)*, 161 Pac. 798.

<sup>14</sup> *Standard Brewing Co. v. Weil*, 129 Md. 487, 99 Atl. 661.

rendered invalid by subsequent legislation relating to fire escapes, which was not complied with by either party.<sup>15</sup>

§ 4548. **Leases obtained by fraud.**—The lessee will be entitled to terminate the lease where the landlord misrepresents the cost of heating the premises, this being a misrepresentation of an existing fact.<sup>16</sup>

§ 4550. **Agreement to lease.**<sup>17</sup>—It should be construed in the light of the surrounding circumstances where a written contract is ambiguous and it is uncertain whether it is a lease or an executory agreement to execute a lease.<sup>18</sup>

<sup>15</sup> Garland v. Samson, 237 Fed. 31, 150 C. C. A. 233.

<sup>16</sup> Phoenix Land &c. Co. v. Baden (Mo. App.), 188 S. W. 924.

<sup>17</sup> Whether a contract constitutes a present lease or an executory contract to execute one depends upon the in-

tention of the parties, which is to be primarily drawn from the writing, which, if clear, is conclusive: Andrews v. Stulb, 145 Ga. 826, 90 S. E. 59.

<sup>18</sup> Andrews v. Stulb, 145 Ga. 826, 90 S. E. 59.

## CHAPTER CXXXVI

### COVENANTS IN LEASES

§ 4555. **General observations.**—There is no implied covenant on the landlord's part that the premises are suitable for the particular use intended by the tenant.<sup>1</sup> And it seems that a lease referring to the premises as "the garage" is merely descriptive and does not raise an implied warranty that the premises are or will continue fit for garage purposes.<sup>2</sup>

§ 4557. **Covenants for renewal.**<sup>3</sup>—While the parties continue negotiations as to the terms of a future lease, a lessee holding over can acquire no right to continued occupancy of the premises.<sup>4</sup> The law presumes his intention to continue his yearly tenancy from a tenant's holding over.<sup>5</sup>

§ 4559. **Covenants for quiet enjoyment—When implied.**<sup>6</sup>

<sup>1</sup> *Wright v. Ware*, 19 Ga. App. 18, 90 S. E. 742.

<sup>2</sup> *Barnett v. Clark*, 225 Mass. 185, 114 N. E. 317.

<sup>3</sup> For the reason that the contract was entire, where a lease for one year provided that the failure of lessee to give certain notice should operate at lessor's option, to extend the term of the lease, the same consideration which supports other provisions of the lease will support the condition that failure to give the notice provided for should extend the lease: *Williams v. Veeder*, 195 Ill. App. 413. It appearing that the required notice was not given, where a lease for one year provides that the failure of lessee to give certain notice shall at the option of lessor operate to extend the term of the lease for a further period of the same length, the fact that lessor brings an action to recover for rent due under the lease as so extended is an election by him to treat the lease as being renewed for the further term: *Williams v. Veeder*, 195 Ill. App. 413.

<sup>4</sup> *Margolis v. Wise*, 91 Conn. 152, 99 Atl. 511. And when there is an agreement that a tenant's holding over

should not be regarded as evidencing his intention to continue the tenancy it may be shown to rebut the presumption of an intention to continue the tenancy: *Hoffman v. Willits*, 194 Mich. 276, 160 N. W. 554. Upon either an express acceptance or continuation in occupancy without further communication and payment of rent provided, which would constitute an acceptance, occupancy would have been upon terms of landlord's proposal, where a landlord notified lessee that occupancy, after termination of lease, would be upon monthly rental and 60 days' notice to vacate: *Margolis v. Wise*, 91 Conn. 152, 99 Atl. 511.

<sup>5</sup> *Hoffman v. Willits*, 194 Mich. 276, 160 N. W. 554. A tenant became, as a matter of law, a lessee for one year under the terms of the written lease, where he continued in possession after expiration of written lease: *Boylan v. Lynch*, 162 N. Y. S. 958.

<sup>6</sup> The law implies a covenant for quiet possession and enjoyment of leased premises: *Curran v. Cushing*, 197 Ill. App. 371. But, there is no implied covenant on landlord's part that premises rented are suitable for particular use intended by tenant or

**§ 4560. Covenants for quiet enjoyment—What amounts to breach.**<sup>7</sup>—The landlord, by his covenant for quiet enjoyment, engages only that he has good title and does not undertake that the lessee will not be disturbed by a tenant in exclusive possession of another portion of the building or of an adjacent building.<sup>8</sup>

**§ 4564. Covenants for insurance.**<sup>9</sup>—By placing insurance, however adequate, in his own name, a lessee does not comply with a condition in a lease requiring him to procure insurance.<sup>10</sup> On the lessee's refusal to do so, the lessor may procure insurance, and the lessee will be liable to him for the premium, where the lease requires the lessee to procure insurance.<sup>11</sup>

**§ 4565. Covenant for repairs.**<sup>12</sup>—The landlord may comply with the order and recover the cost from the lessee, where a

that tenant will not be disturbed in use of premises by third persons: *Wright v. Ware*, 19 Ga. App. 18, 90 S. E. 742.

<sup>7</sup> Where at the time the lessee seeks to take possession of the demised premises another is in possession thereof under a prior lease, the covenant for possession and quiet enjoyment impliedly contained in a lease is breached: *Kammerer v. United States Silica Co.*, 196 Ill. App. 527.

<sup>8</sup> *Adair v. Allen*, 18 Ga. App. 636, 89 S. E. 1099. It is no defense to a claim for rent that the landlord induced tenant to execute notes for rent by representing that he could peaceably occupy premises without objection of third persons in the locality: *Wright v. Ware*, 19 Ga. App. 18, 90 S. E. 742.

<sup>9</sup> The insurance provided must be reasonably adequate to protect the reversioner, where the lease obligated the lessee to provide insurance and required surrender and provided for re-entry on default: *Richmond v. Kelsey*, 225 Mass. 209, 114 N. E. 319.

<sup>10</sup> *Richmond v. Kelsey*, 225 Mass. 209, 114 N. E. 319.

<sup>11</sup> *Richmond v. Kelsey*, 225 Mass. 209, 114 N. E. 319.

<sup>12</sup> A failure to comply with a covenant to repair as soon as the landlord had the right to make a legal entry was a breach, where the owner of a hotel covenanted in a lease which was to begin about two months after

executed to make repairs and enlarge the hotel as soon as possible: *Roberson v. Weaver*, 145 Ga. 626, 89 S. E. 769. Where leased premises were only part of a building, and there were other tenants, and parts of the premises were used in common, the landlord therefore remained in control of such parts, and was bound to keep them in proper repair: *Tootle Theater Co. v. Shubert Theatrical Co.*, 175 App. Div. 530, 162 N. Y. S. 111. The landlord must keep common stairways and hallways in repair: *Tremont Theater Amusement Co. v. Bruno*, 225 Mass. 461, 114 N. E. 672, L. R. A. 1917C, 387n. Neither the landlord nor lessee is bound to replace a wall, where a municipality condemned for street purposes a strip of land including a building subject to leasehold, and removed front wall of such building: *Kafka v. Davidson*, 135 Minn. 389, 160 N. W. 1021. Clause of lease construed and held to mean that, if any of houses on premises was completely destroyed by fire, landlord could elect whether or not to rebuild: *Land v. Johnson* (Tex. Civ. App.), 189 S. W. 337. The landlord kept the lease alive for all purposes, and her own unperformed agreement to repair, where tenants under an oral lease notified the landlord of their abandonment of contract before taking possession of premises and landlord elected to keep contract

tenant fails, after request, to perform a covenant of his lease to comply with the orders of the fire department at his own expense.<sup>13</sup>

§ 4566. **Covenants to pay taxes.**<sup>14</sup>—The lessee is liable for the rent tax under a lease requiring him to pay all taxes in respect to rent, and he can not deduct it from the rent payable to the lessor under Federal Income Tax Law, section 2, e, requiring the lessee to deduct a sum sufficient to pay the income tax on the rent.<sup>15</sup> It has been held in Minnesota that an agreement that the lessee should pay all taxes subsequent to the date when it takes effect applies to a reassessment levied to raise deficiencies in an original assessment for street improvements.<sup>16</sup>

alive and hold tenants to their obligations: *Wise v. Sparks* (Ala.), 73 So. 394. Where tenants' covenant in oral lease to pay rent was dependent upon landlord's covenant to improve and have premises ready on a date named, breach of landlord's covenant to repair would justify tenants in declining to occupy premises at time stipulated, and would release them from obligation to pay rent: *Wise v. Sparks* (Ala.), 73 So. 394. But, if the tenants' covenant in oral lease to pay rent was not dependent upon landlord's covenant to make improvements and the tenants entered and occupied premises without improvements agreed upon, they would be liable for rent subject to reduction by cross-damages that might be allowed for landlord's failure to improve: *Wise v. Sparks* (Ala.), 73 So. 394. A lessee is not at fault for not making repairs except those which he is required to make by Civ. Code, art. 2716: *Boutte v. New Orleans Terminal Co.*, 139 La. 945, 72 So. 513. But the right accorded a lessee by Civ. Code, art. 2694, to make repairs at expense of lessor, does not impose obligation on lessee to make repairs which primarily it is the duty of lessor to make: *Boutte v. New Orleans Terminal Co.*, 139 La. 945, 72 So. 513. When no notice to repair was given, the fact that leased premises in which bookkeeping department was conducted were very damp for two years did not release liability of lessee for

rent for current month: *Rosenbaum Estate Co. v. Robert Dollar Co.*, 31 Cal. App. 576, 161 Pac. 10. Landlord is not liable for special damages resulting from leaks in roof unless he was given notice and failed to make repairs, and in other case is liable only for the diminished value of premises where the landlord agreed to keep premises in repair and the lease authorized the tenant to make repairs at expense of landlord on his failure to repair after ten days' notice: *Roberson v. Weaver*, 145 Ga. 626, 89 S. E. 769.

<sup>13</sup> *Williamsburgh Power Co. v. Shotten*, 97 Misc. 716, 162 N. Y. S. 239; *Gregory v. Manhattan Briar Pipe Co.*, 174 App. Div. 106, 160 N. Y. S. 916; *Deutsch v. Robert Hoe Estate Co.*, 174 App. Div. 685, 161 N. Y. S. 968.

<sup>14</sup> Where a lease requires the lessee to pay taxes for the proportional part of a year during which it occupied premises, it did not require payment of entire tax for year in which lease commenced September 1st: *Brooke v. Atlanta Woolen Mills*, 18 Ga. App. 505, 89 S. E. 598.

<sup>15</sup> *Suter v. Jordan Marsh Co.*, 225 Mass. 34, 113 N. E. 580. And a change of tax law after signing lease, requiring lessee to pay taxes, is of no effect on his liability: *Suter v. Jordan Marsh Co.*, 225 Mass. 34, 113 N. E. 580.

<sup>16</sup> *Theo. Hamm Brewing Co. v. Northwestern Trust Co.*, 135 Minn. 314, 160 N. W. 792.



## CHAPTER CXXXVII

### LEASES—RENEWALS, ASSIGNMENTS AND SUBLETTING

§ 4573. **Assignment—Rights and liabilities of lessor and lessee.**—A lessee covenanting to pay rent who assigns the lease to one agreeing to fulfil its covenants is not released from the terms of the lease after the payment of rent and lessor's acceptance.<sup>1</sup> But where the landlord recognizes the assignment of the lease and accepts rent from the sublessee, he thereby surrenders his right to collect rent from the lessee.<sup>2</sup>

§ 4574. **Assignment—Rights and liabilities of assignee.**—A party will not be liable for rent, unless his assignment was only colorable, where the tenant assigned lease to him as collateral security, and he entered into possession upon tenant's abandonment, and thereafter assigned his interest to a third party.<sup>3</sup> The sublessee can not exercise the option and thus bind the lessees for the extended period, where lessees sublet under an instrument giving the sublessee a right to hold over for an extended period.<sup>4</sup>

<sup>1</sup> *McFarland v. Mayo* (Okla.), 162 Pac. 753.

<sup>2</sup> *Jamison v. Reilly*, 92 Wash. 538, 159 Pac. 699.

<sup>3</sup> *Century Holding Co. v. Ebling Brewing Co.*, 98 Misc. 226, 162 N. Y. S. 1061.

<sup>4</sup> *Tooney v. Casey*, 82 Ore. 71, 160 Pac. 583. Under a contract subleasing property and providing for the sale of an option to purchase it and the

payment, in addition to the rent, of a monthly installment to be applied on the purchase-price, such installment is not rent within the meaning of a statute which provides that a tenant need not pay rent where premises, through no fault of his, have become untenable: *Tungsten Co. v. Beach* (Conn.), 103 Atl. 632, citing *Filene Sons Co. v. Weed*, 245 U. S. 597, 38 Sup. Ct. 211.

## CHAPTER CXXXVIII

### LEASES—KINDS OF TENANCY CREATED

§ 4580. **Estates for years—Nature and extent.**<sup>1</sup>—A lease for ninety-nine years, with the privilege of renewal for a similar term forever, gives the lessee nothing more than a qualified estate, and does not grant an estate in fee.<sup>2</sup>

§ 4586. **Tenancy from month to month.**<sup>3</sup>—In Illinois a verbal agreement for a lease is void under the statute, and a tenant holding over under such an agreement becomes a tenant from month to month.<sup>4</sup> The law in Connecticut is that when there is a written lease for a definite term and the tenant holds over, a tenancy from month to month is not created thereby.<sup>5</sup>

§ 4587. **Tenancy at sufferance.**<sup>6</sup>

<sup>1</sup> Where it appeared that the defendant by his conduct had impliedly agreed to continue as tenant for another year after his lease had expired, the election of plaintiff so to treat the contract may be fairly inferred from the fact that plaintiff sent defendant a new lease for another year on the terms of the old lease, and accepted rent at monthly intervals at the old rate in an action to recover rent due under a lease: *Besley v. Ridgely*, 195 Ill. App. 435.

<sup>2</sup> *Duryea v. Hendrickson*, 175 App. Div. 188, 161 N. Y. S. 999.

<sup>3</sup> The lessee becomes liable for rent for following month unless warranted in removing by Civ. Code, §§ 1941, 1942, relating to duty of landlord to repair where rent is payable monthly in advance and lessee retains possession after end of month for which rent is paid: *Rosenbaum Estate Co. v. Robert Dollar Co.*, 31 Cal. App. 576, 161 Pac. 10. It is held that lessee who transferred the license held over and was liable in an action for rent for premises leased for a saloon:

*Hayes v. Goodwin*, 253 Pa. 607, 98 Atl. 727. Where a tenant paid rent monthly in advance, and agreed to surrender premises on demand, this was a periodic monthly tenancy, and landlord could not demand premises until expiration of the month: *McKibbin v. Pierce* (Tex. Civ. App.), 190 S. W. 1149. Assuming that a tenant by giving notice to the landlord that the lease was void, became a tenant from month to month, he then was required to give a month's notice of intention to quit: *O'Brien v. Clement*, 160 N. Y. S. 975.

<sup>4</sup> *McGivern v. Parkhill*, 195 Ill. App. 343.

<sup>5</sup> *Margolis v. Wise*, 91 Conn. 152, 99 Atl. 511.

<sup>6</sup> Where a person enters into possession of premises under a lease from several cotenants and holds over after the expiration of his term, and after a decree in partition proceedings, he becomes a tenant by sufferance after the partition: *Sutmeyer v. Thornton*, 63 Pa. Super. Ct. 607.

## CHAPTER CXXXIX

### MORTGAGES—ORIGIN, NATURE, DEFINITION AND GENERAL CHARACTERISTICS

§ 4604. **Definition—Mortgages distinguished from other transactions.**<sup>1</sup>—A mortgage is distinguished from a deed in that a mortgage does not pass title while a deed does.<sup>2</sup> When the real character of contracts is doubtful, courts of equity are inclined to construe them as mortgages rather than sales.<sup>3</sup>

§ 4605. **Mortgages distinguished from deeds of trust.**<sup>4</sup>

§ 4606. **Mortgages distinguished from conditional sales.**<sup>5</sup>  
—Where a debt subsists between the parties after the conveyance

<sup>1</sup> A "mortgage" is a conveyance of real estate or some interest therein, defeasible on the payment of money or the performance of some condition: *Palmer v. Albuquerque*, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106; *West v. Middlesex Banking Co.*, 33 S. Dak. 465, 146 N. W. 598. Where a purchaser of land paid the consideration and took possession and made improvements, he was the owner, and the holding of the title deeds by the vendor as security for a debt did not create a mortgage: *Haselden v. Hamer*, 97 S. Car. 178, 81 S. E. 424. The instrument will not be construed to be a mortgage, where there is nothing to show that the parties to a deed and lease creating an irredeemable ground rent intended the transaction to have any other effect: *Krieg v. McComas*, 126 Md. 377, 95 Atl. 68.

<sup>2</sup> *Dewit v. Bozeman*, 17 Ga. App. 666, 87 S. E. 1100.

<sup>3</sup> *Dicken v. Simpson*, 117 Ark. 304, 174 S. W. 1154.

<sup>4</sup> An instrument, partially in the form of a trust deed to land, which declares that it creates a lien upon the land, partakes of the nature of a mortgage with a power of sale: *Banking Corp. v. Hein*, 52 Mont. 238, 156 Pac. 1085. See *Rooker v. Fidelity Trust Co. (Ind.)*, 109 N. E. 766. Trust deed, given by husband and wife to a third person to secure per-

formance of the husband's contract with a purchaser of stock from him, held to operate as a mortgage: *Alexander v. Bosworth*, 26 Cal. App. 589, 147 Pac. 607. Where land is transferred to trustee to secure a loan, it is to be treated as a mortgage, and foreclosed only in the statutory manner: *First National Bank v. Court-right*, 82 Ore. 490, 161 Pac. 966.

<sup>5</sup> A conveyance of mining land for a valuable consideration which was to be reconveyed when the grantee had been repaid the consideration and expenses out of the profits, was not a mortgage, but a defeasible purchase, as there was no debt owing by vendor to vendee: *Coxe v. Carson*, 169 N. Car. 132, 85 S. E. 224. Warranty deed of a mortgagor construed with a contract executed at the same time between the parties held not to constitute a conditional sale, but a mortgage: *Dicken v. Simpson*, 117 Ark. 304, 174 S. W. 1154. An instrument executed as security only is not converted into a conditional sale by the form of a conveyance to reconvey: *Hawkins v. Elston*, 58 Colo. 400, 146 Pac. 254. A transaction whereby purchasers of land transferred the land to a pledgee of the purchase-money mortgage and notes, under an agreement that they might redeem, was held not to be a mortgage but a conditional sale: *First Nat. Bank v. Seaward*, 78 Ore. 567, 152 Pac. 883.

is executed and delivered, the transaction is a mortgage, but where a debt does not exist, and the grantor may refund and entitle himself to a reconveyance, it is a conditional sale.<sup>6</sup>

§ 4608. **Evidence and construction.**<sup>7</sup>—It is held that a reservation of a vendor's lien in a deed and a recorded recognition of such lien constitute a mortgage.<sup>8</sup> The purposes of the transaction and the intention of the parties, properly ascertained, may be admitted in aid of its solution, where there is doubt as to the meaning of terms used in a mortgage.<sup>9</sup>

§ 4609. **Rights of the parties under a mortgage and under a conditional sale.**<sup>10</sup>—A mortgage is merely security and

<sup>6</sup> *Branham v. Peltzer* (Mo.), 177 S. W. 373.

<sup>7</sup> Where in suit to foreclose mortgage made by a wife, the husband disclaimed interest in the real estate, he renounced marital rights in property, rendering transaction an equitable mortgage by the wife: *Osha v. Higgins*, 90 Vt. 130, 96 Atl. 700. Where a vendor deposits a contract for the sale of land as security for a loan, although without assignment, it amounts to a pledge and creates a lien on the purchase-money due thereon, and a grantee of the land by a quitclaim deed from the pledgor with knowledge of such prior pledge takes subject thereto: *Grames v. Consolidated Timber Co.*, 215 Fed. 785. Where the grantee delivered an unrecorded deed to the grantor, with the intention that it should operate as a mortgage to secure taxes and other advances, while the property was unoccupied and in the constructive possession of the grantor, it constituted a valid equitable mortgage: *Jennings v. Augir*, 215 Fed. 658. Defendants claiming under A are not entitled to recover land, a bond for title to which was transferred to secure a debt by A to C under agreement that on payment of the debt it should be transferred to B as the transfer of the bond was an equitable mortgage and trust in B's favor: *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

<sup>8</sup> *White v. Hartman*, 26 Colo. App. 475, 145 Pac. 716. And an executed

contract, whereby defendants were to take title to property which plaintiff had the option to purchase and hold to secure advances to plaintiff, is an "equitable mortgage": *Tenvoorde v. Tenvoorde*, 128 Minn. 126, 150 N. W. 396.

<sup>9</sup> *Pennsylvania Canal Co. v. Brown*, 235 Fed. 669, 149 C. C. A. 89. When a note or bond is given, the mortgage which secures the evidence of the debt is to be construed with it: *Eugley v. Sproul*, 115 Maine 463, 99 Atl. 443.

<sup>10</sup> It is held that the mortgagee has a qualified title in Illinois as the fee title held by a mortgagee is in the nature of a base or determinable fee and is measured by the mortgage debt and, when paid, the mortgagee's title is extinguished by operation of law: *Cobe v. Bartlett*, 191 Ill. App. 242; *Williams v. Williams*, 270 Ill. 552, 110 N. E. 876. The equity of redemption from a mortgage is a substantive property right retained by the mortgagor; it arises when the property is hypothecated and is terminated by a sale: *Banking Corporation of Montana v. Hein*, 52 Mont. 238, 156 Pac. 1085; *Smith v. Berry*, 167 Ky. 646, 181 S. W. 379; *Williams v. Purcell*, 45 Okla. 489, 145 Pac. 1151; *Caro v. Wollenberg*, 68 Ore. 420, 136 Pac. 866; *Yates v. Caswell* (Tex. Civ. App.), 169 S. W. 1104; *McLemore v. Bickerstaff* (Tex. Civ. App.), 179 S. W. 536. A security deed passes title to the grantee until the debt secured

leaves the title in the mortgagor.<sup>11</sup> Where one obtains a conveyance from a grantee in a deed which is absolute in form, but is in fact a mortgage, he acquires no title unless he is a purchaser for value and without notice that the deed is a mortgage.<sup>12</sup>

is fully paid, though a bond for reconveyance be given by the grantee under Civ. Code 1910, § 3306: *Wood v. Dozier*, 142 Ga. 538, 83 S. E. 133; *Minick v. Reichenbach*, 97 Nebr. 629, 150 N. W. 1001.

<sup>11</sup> *Rorman v. Holloway*, 122 Ark. 341, 183 S. W. 763; *Smith v. Berry*, 167 Ky. 646, 181 S. W. 379; *Cleveland v. Bateman*, 21 N. Mex. 675, 158 Pac. 648. A mortgage, being a mere lien on the land, does not affect the quality of the fee-simple estate of the mortgagor, and until the mortgagee enters, the mortgagor is the owner in fee simple: *Terminal Ice & Co. v. Security Co.* (Mo. (Mo. App.), 187 S. W. 564; *Terminal App.*), 187 S. W. 568; *Terminal Ice & Co. v. Lumbermen's Ins. Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice & Co. v. Security Co.* (Mo.

*App.*), 187 S. W. 568; *Terminal Ice & Co. v. Security Co.* (Mo. App.), 187 S. W. 568; *Terminal Ice & Co. v. Commercial Fire Ins. Co.* (Mo. App.), 187 S. W. 569; *Terminal Ice & Co. v. Stuyvesant Ins. Co.* (Mo. App.), 187 S. W. 569; *Page v. Turk*, 43 Okla. 667, 143 Pac. 1047; *Shields v. Pittsburgh*, 252 Pa. 74, 97 Atl. 124; *Union Machinery & Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183. *Contra*: *Watkins v. Perry*, 25 Colo. App. 425, 139 Pac. 551; *Hawkrige v. Treasurer and Receiver General*, 223 Mass. 134, 111 N. E. 707.

<sup>12</sup> *Robertson v. United States Live Stock Co.*, 164 Iowa 230, 145 N. W. 535; *Bond v. Ellison*, 80 Ore. 634, 157 Pac. 1103; *McLemore v. Bickerstaff* (Tex. Civ. App.), 179 S. W. 526; *Murphy's Hotel Co. v. Benet*, 119 Va. 157, 89 S. E. 104.

## CHAPTER CXL

### FORM, CONTENTS AND REQUISITES OF MORTGAGES

#### § 4615. Form of conveyance in general.<sup>1</sup>

#### § 4616. Statutory forms.<sup>2</sup>

§ 4617. Description of parties.—It has been held that where there is a consideration between the debtor and creditor, a note and mortgage given to secure the debt may be taken in the name of a consenting third person, although the consideration did not move from him.<sup>3</sup>

#### § 4618. Description of property.<sup>4</sup>—It is held that the in-

<sup>1</sup> A grantor can not procure reconveyance upon proof of oral promise by grantee to reconvey on repayment of sum advanced to grantor under Act of June 8, 1881 (P. L. 84): *Oliver v. Oliver*, 251 Pa. 574, 97 Atl. 84. And no subsequent parol agreement could change its character where a deed, absolute in form, was a mortgage at the time it was executed: *McLemore v. Bickerstaff* (Tex. Civ. App.), 179 S. W. 536. A parol mortgage of real estate is invalid: *Roberts v. Terry*, 161 Ky. 397, 170 S. W. 965.

<sup>2</sup> A mortgage is sufficient where it describes the mortgagors, the mortgagee, the note to be secured, the premises mortgaged, and the consideration for which the note is given: *Harsh v. Sutton*, 180 Ill. App. 651.

<sup>3</sup> It is held that where there is a consideration between debtor and creditor, a note and mortgage given to secure the debt may be taken in the name of a consenting third person, though the consideration did not move from him: *Newton Savings Bank v. Howerton*, 163 Iowa 677, 145 N. W. 292.

<sup>4</sup> A mortgage which did not give the range number is insufficient to pass the legal title: *Neas v. Whitener-London Realty Co.*, 119 Ark. 301, 178 S. W. 390, Ann. Cas. 1917B, 780n. Description in a trust deed held to include only the farm known as Rock

Hall and certain four detached pieces of land specifically described, and did not include certain beach land located more than three miles from the farm, where the title to this had been derived through a different chain: *Kellum v. Corr*, 209 N. Y. 486, 103 N. E. 701. The intention of the parties at the time the mortgage was executed determines the question whether nursery stock, prima facie a part of the realty, is subject to the lien of a mortgagee of the land: *Colonial Land & Co. v. Joplin* (Tex. Civ. App.), 184 S. W. 537. A conventional mortgage includes future improvements under Rev. Civ. Code, art. 3310: *Louisiana Land & Co. v. Gulf Lumber Co.*, 134 La. 784, 64 So. 713. And at common law a mortgage or lien on land covers all subsequent buildings and improvements placed thereon: *Basham v. Goodholm & Co.*, 52 Okla. 536, 152 Pac. 416. Mortgage deed of farm land adjoining tidewater did not to pass shore as appurtenant thereto: *McLellan v. McFadden*, 114 Maine 242, 95 Atl. 1025. The tramway is included in a mortgage where a mortgage covers two plantations connected by tramway laid on servitude of way over other plantations: *Coguenhem v. Trosclair*, 137 La. 985, 69 So. 800. It is held that a mortgage of a mill property did not cover as "appurtenances" a light plant

section of the name of an adjoining county, erroneously made, does not invalidate the instrument, where the section, township, range and state were correctly stated.<sup>5</sup>

**§ 4626. Description of note.<sup>6</sup>**

**§ 4628. Interest.<sup>7</sup>**

**§ 4629. Taxes.<sup>8</sup>**—Where the mortgagor covenants to pay taxes, a judgment may be entered against him for his breach.<sup>9</sup> A mortgagee who is authorized to pay taxes need not determine at his peril the validity of a tax.<sup>10</sup>

**§ 4630. Insurance.<sup>11</sup>**—Where the mortgage merely provides that on the mortgagor's failure to insure the property the

operated by dynamos placed in the power room of the mill and operated by the same power, but which had no connection with the operation of the mill: *Williamson v. Clay Center*, 237 Fed. 329, 150 C. C. A. 343.

<sup>5</sup> *O'Leary v. Schoenfeld*, 30 N. Dak. 374, 152 N. W. 679. A mortgage is not necessarily invalidated by mere indefiniteness in the description or an error of description: *Varner-Collins Hardw. Co. v. New Milford Security Co.* (Okla.), 153 Pac. 667.

<sup>6</sup> The following has been held to be a sufficient description of the note secured by a mortgage "to secure the payment of promissory note bearing this date and due January 1, 1912, for \$1,000": *Denison-Gholsom Dry Goods Co. v. Hill*, 135 Tenn. 60, 185 S. W. 723. Where a mortgage recited that it secured a note for \$300, and the mortgage and a note for \$250 were in the possession of the mortgagee at his death, the discrepancy indicates only a mistake by the scrivener in preparing the mortgage: *Beattie v. Meeker*, 149 N. Y. S. 453.

<sup>7</sup> Where an agreement to pay an additional 1 per cent. on the amount of a mortgage on the interest days "during the existence of the mortgage" is made it ceases on foreclosure of the mortgage: *Daily Realty Co. v. Schmuck*, 90 Misc. 631, 153 N. Y. S. 965. If considered as a provision for interest, a contract executed with a mortgage and as a part thereof, providing that if the mortgagors failed to pay the debt out of the crops, there

being no crop failure, they would pay the mortgagee the sum of \$500 as liquidated damages was held violative of Rev. Codes 1905, § 6564: *Hocksprung v. Young*, 27 N. Dak. 322, 146 N. W. 547.

<sup>8</sup> A mortgagee, whether in possession or not, is entitled to tack the amount so paid to his mortgage and recover it on foreclosure where he pays rent and taxes to preserve the value of his security: *Leavitt v. Waldemar Co.*, 88 Misc. 285, 151 N. Y. S. 832. On bill to foreclose the complainant was held entitled to taxes paid by him on a portion of the land added by natural accretion subsequent to the mortgage: *Murray v. Gordon*, 182 Ill. App. 460. In the absence of a provision in the mortgage requiring him to do so, a mortgagee is under no obligation to pay taxes on the mortgaged property: *Price v. Salisbury*, 41 Okla. 416, 138 Pac. 1024.

<sup>9</sup> *Ogden v. Bradshaw*, 161 Wis. 49, 150 N. W. 399, 152 N. W. 654.

<sup>10</sup> *Farmers' Security Bank v. Martin*, 29 N. Dak. 269, 150 N. W. 572. And that the grantors in a deed of trust which was given to secure a debt paid taxes due on the land to a corporation organized to develop and sell the land did not relieve them from liability under the deed of trust to the grantee therein for taxes which he paid: *Rowan v. Texas Orchard Development Co.* (Tex. Civ. App.), 181 S. W. 871.

<sup>11</sup> The mortgagee is required to insure upon the mortgagor's failure to

mortgagee may do so at the mortgagor's expense, he may so insure but can not foreclose as for a breach.<sup>12</sup>

§ 4632. **Execution.**<sup>13</sup>—A mortgage note is enforceable where the signatures of the makers appear at the end of the mortgage, though they do not at the end of the note portion.<sup>14</sup>

§ 4635. **Delivery and acceptance.**<sup>15</sup>—Without a delivery the mere filling in of the blanks in a mortgage form by the mort-

do so where the mortgage binds the mortgagor to keep the buildings insured, and stipulates for foreclosure on their failure to pay insurance: *First Nat. Bank v. Kirby* (Mo.), 175 S. W. 926. Where a mortgagee does not insure his own risk, but that of the mortgagor at the latter's expense, the mortgagee, on collecting the policy after loss, is bound to account to the mortgagor: *Rutherford v. Sample*, 186 Mo. App. 469, 171 S. W. 578.

<sup>12</sup> *Johnson v. Northern Minnesota Land & Co.*, 168 Iowa 340, 150 N. W. 596. But where a mortgagor covenants to pay a debt according to the terms of a note, and the mortgage also contains a clause that on failure to maintain insurance the mortgage shall become due, a breach of such agreement accelerates the time of payment: *Porter v. Schroll*, 93 Kans. 297, 144 Pac. 216.

<sup>13</sup> The borrower is entitled to a cancellation of the mortgage where an applicant for a loan executed a note and mortgage and signed the application, and the terms of the verbal agreement were never complied with or the money paid: *Stogsdill v. Holmes*, 114 Ark. 574, 169 S. W. 961. A stockholder in a corporation is competent as a nonofficial witness to the signature of a mortgagor to a mortgage in favor of the corporation: *In re Williams*, 224 Fed. 984. Nor is a stockholder of a mortgagee corporation incompetent as a nonofficial witness under Civ. Code 1910, § 3257, to the signature of the mortgagor: *Peagler v. Davis*, 143 Ga. 11, 84 S. E. 59, Ann. Cas. 1917A, 232n. A signature is essential to the valid execution of a mortgage: *J. S. Gabel Lumber Co. v. West*, 95 Nebr. 394, 145 N. W. 849. If parties acknowledged the execution of a mortgage, it is immaterial that they may not have signed their

own names as the acknowledgment ratifies the unauthorized signature: *O'Neal v. Judsonia State Bank*, 111 Ark. 589, 164 S. W. 295.

<sup>14</sup> *Watson v. Fenn*, 145 Ga. 220, 88 S. E. 819.

<sup>15</sup> Delivery pursuant to the intention of the parties is essential to the legal existence of a mortgage: *Stockton v. Turner*, 30 N. Dak. 641, 153 N. W. 275; *Garner v. Martin*, 73 W. Va. 407, 80 S. E. 495. A delivery of a deed of trust to the vice-president of a bank is a delivery to the bank, although the vice-president agreed that he would retain the instrument in his custody, and that it should only be used to satisfy the directors who had demanded security: *Rushing v. Citizens' Nat. Bank* (Tex. Civ. App.), 162 S. W. 460. Where a mortgage is delivered to one of joint mortgagees, attorney for two of the others, and fellow trustee, under a will, of the remaining mortgagee, it is valid: *Hanson v. Griswold*, 221 Mass. 228, 108 N. E. 1035. There was no valid delivery of a mortgage and note surrendered to the mortgagee with a condition that the property which the mortgagor was buying proved satisfactory on inspection: *Simmons v. Meyers* (Ind. App.), 112 N. E. 31. Where a mortgagee agreed to take a new mortgage which should not be effective until the interest on the first mortgage had been paid or settled, and recorded the new mortgage without the interest being paid, his act amounted to acceptance: *Gray v. Gilliam*, 166 Ky. 194, 179 S. W. 22. A mortgagee's failure to sign an act of mortgage does not render it absolutely null, and proceeding to foreclose amounts to an acceptance: *Richardson v. McDonald*, 139 La. 651, 71 So. 934.



gagee after it had been signed in blank by the mortgagor would not create a valid mortgage.<sup>16</sup>

§ 4639. **Construction.**—A note and mortgage are construed together as one contract.<sup>17</sup>

§ 4640. **Recording.**<sup>18</sup>—Negligent failure to record a mortgage does not render it invalid as against subsequent unsecured creditors.<sup>19</sup> The recording of a mortgage does not give constructive notice where it is not properly executed.<sup>20</sup> An unrecorded mortgage is good as against one holding under a voluntary conveyance.<sup>21</sup>

§ 4641. **Mortgages to secure future advances.**<sup>22</sup>—On a bill for an accounting under a mortgage, the mortgagee was entitled

<sup>16</sup> Vermont Accident Ins. Co. v. Fletcher, 88 Vt. 394, 89 Atl. 480.

<sup>17</sup> Oklahoma City Development Co. v. Picard, 44 Okla. 674, 146 Pac. 31; Sims v. Central State Bank (Okla.), 155 Pac. 878; Vinson v. Carter (Tex. Civ. App.), 161 S. W. 49.

<sup>18</sup> All mortgages, whether on realty or personalty, are a lien on the property as against third parties from the time filed for record: Murray Co. v. Satterfield, 125 Ark. 85, 187 S. W. 927. An unrecorded mortgage is valid between the parties: Western Tie & Co. v. Campbell, 113 Ark. 570, 169 S. W. 253, Ann. Cas. 1916C, 943n; Cooper v. Bacon, 143 Ga. 64, 84 S. E. 123. A lessee from the mortgagor subsequent to the recording of the mortgage holds subject to the mortgage: Bennett v. United States Land & Co. Co., 16 Ariz. 138, 141 Pac. 717. A mortgage on an entire tract is a first mortgage on the portion thereof when a prior mortgage on the portion has been discharged and a new mortgage taken: Stanley v. True, 114 Maine 503, 96 Atl. 1057. An absolute deed which is intended to be defeasible or as security for money, being a mortgage in fact, must be recorded as such: Williams v. Purcell, 45 Okla. 489, 145 Pac. 1151; Freedman v. Avery, 89 Conn. 439, 94 Atl. 969; Gilmore v. Hoskinson, 98 Kans. 86, 157 Pac. 426.

<sup>19</sup> Deupree v. Watson, 216 Fed.

483, 132 C. C. A. 543; Hicks v. Second Nat. Bank, 224 Fed. 53, 139 C. C. A. 615; Voelpel v. Phoenix Mut. Life Ins. Co. (Mo. App.), 183 S. W. 679; Lake v. Oldacre, 160 N. Y. S. 435; Engelkemeier v. Lillis (Okla.), 153 Pac. 877.

<sup>20</sup> National Bank v. Hill, 226 Fed. 102; Storthz v. Bank of England, 132 Ark. 451, 185 S. W. 784; Barrow v. E. Tris Napier Co., 16 Ga. App. 309, 85 S. E. 267. But see Merrick v. Taylor, 14 Ga. App. 81, 80 S. E. 343.

<sup>21</sup> Western Tie & Co. v. Campbell, 113 Ark. 570, 169 S. W. 253, Ann. Cas. 1916C, 943n.

<sup>22</sup> A deed reciting that it secured existing indebtedness, as well as subsequent advances or loans to be made, will include such subsequent advances as between the parties: Carrington v. Citizens' Bank, 144 Ga. 52, 85 S. E. 1027. Advances to mortgagor to meet pay roll are to be included in computing amount due on mortgage to be paid by manufacturing ties and lumber: Blessing v. Johnson, 164 Ky. 647, 176 S. W. 17. But where the mortgage was given by two persons operating a corporation to secure \$10,000 and such advances as should thereafter be made to them, it did not secure a subsequent advance to the corporation as against the holder of a junior mortgage: In re Elmore Cotton Mills, 217 Fed. 810.

to charge the amount paid on a debt of the mortgagor, but was not entitled to any rebate obtained from the debtor.<sup>23</sup>

§ 4647. **Absolute deed as mortgage in general.**<sup>24</sup>—Where the conveyance is absolute in form but is made merely to secure a loan or contemporaneous debt, a court of equity will disregard the form of the instrument and construe it according to the intent of the parties.<sup>25</sup> But where the intent of the parties was that title

<sup>23</sup> *Compton v. Collins*, 190 Ala. 499, 67 So. 395. See also *Engler v. Engler*, 192 Mich. 361, 158 N. W. 836.

<sup>24</sup> [Main section cited in *In re Assessment of Aurora Gaslight & Co.* (Ind. App.), 113 N. E. 1012, 1016.]

The form of an instrument will not preclude inquiry into the real nature of the transaction as equity looks to the final intent rather than to the form, and though a conveyance be in the form of a deed, yet where the intent to secure an indebtedness is clear, equity will treat it as a mortgage: *Lewis v. Davis* (Ala.), 73 So. 419; *In re Assessment of Aurora Gaslight & Co.* (Ind. App.), 113 N. E. 1012. Where there is no debt due from a grantor to the grantee in a deed absolute in form it is not a mortgage: *Stollenwerck v. Marks*, 188 Ala. 587, 65 So. 1024. Where a purchaser was unable to complete the contract except with the assistance of a third person made a contract with such third person, who agreed to pay the balance of the price and to make a further advancement in consideration of an absolute deed in fee, the transaction was held not a mortgage: *Stollenwerck v. Marks*, 188 Ala. 587, 65 So. 1024; *Arizona Copper Estate v. Watts*, 237 Fed. 585, 150 C. C. A. 467; *Lewis v. Davis* (Ala.), 73 So. 419; *King v. Crone*, 141 Ark. 121, 169 S. W. 238; *Shaner v. Rathdrum State Bank*, 29 Idaho 576, 161 Pac. 90; *Friend v. Beach*, 276 Ill. 397, 114 N. E. 911; *Wenske v. Kenneke*, 182 Ill. App. 558; *Koehler v. Haller*, 62 Ind. App. 8, 112 N. E. 527; *City Lumber Co. v. Hollands*, 181 Mich. 531, 148 N. W. 361; *Hutchings v. Terrace City Realty & Co.* (Mo.), 175 S. W. 905; *Branham v. Peltzer* (Mo.), 177 S. W. 373; *Caro v. Wollenberg*, 68 Ore. 420, 136 Pac. 866; *Mitchell v. Morgan* (Tex. Civ. App.), 165 S. W. 883. Equity, upon

proper averments and sufficient proof, will treat absolute conveyance as mortgage, and permit redemption by the mortgagor: *Van Dyke v. Bloede*, 128 Md. 330, 97 Atl. 630. Generally where doubt exists as to whether a writing is a sale or mortgage, such doubt will be resolved in favor of the debtor, and the writing construed to be a mortgage: *Charles v. Thacker*, 167 Ky. 835, 181 S. W. 611. A deed of community property made by a husband on the parol agreement that the grantee should pay debts of the husband is held not to be regarded as a mortgage given as security for the payment of the debt due the grantee or the other debts: *Bier v. Leisle*, 172 Cal. 432, 156 Pac. 870. An agreement that a deed with agreement to recovery on payment of the debt should not be regarded as a mortgage did not change its character as a mortgage: *Marshall v. Russell*, 61 Colo. 417, 158 Pac. 141.

<sup>25</sup> *Power & Co. v. Capay Ditch Co.*, 226 Fed. 634, 141 C. C. A. 390; *Kidwell v. White*, 44 App. D. C. 600; *First Nat. Bank v. Timmins*, 4 Alaska 242; *Prickett v. Williams*, 110 Ark. 632, 161 S. W. 1023; *McIver v. Roberts*, 112 Ark. 607, 165 S. W. 273; *Hawkins v. Elston*, 58 Colo. 400, 146 Pac. 254; *Berry v. Williams*, 141 Ga. 642, 81 S. E. 881; *Wells v. Kemme*, 145 Ga. 17, 88 S. E. 562; *Wiggins v. Sheppard*, 145 Ga. 835, 90 S. E. 56; *Henry v. Britt*, 265 Ill. 131, 106 N. E. 455; *Peterson v. Peterson*, 192 Ill. App. 553; *Shultz v. McCarty*, 193 Ill. App. 318; *Threewit v. McFall*, 196 Ill. App. 609; *Donlon v. Maley*, 60 Ind. App. 25, 110 N. E. 92; *Fort v. Colby*, 165 Iowa 95, 144 N. W. 393; *Cullen v. Butterfield* (Iowa), 160 N. W. 125; *Gilmore v. Hoskinson*, 98 Kans. 86, 157 Pac. 426; *Jackson v. Maxwell*, 113 Maine 366, 94 Atl. 116, Ann. Cas.

should pass, with the privilege of repurchase instead of providing security for a debt, the transfer is a mortgage.<sup>26</sup>

**§ 4648. Deed and defeasance — Time of execution.**<sup>27</sup>—Where a deed absolute in form is accompanied by a contract requiring the grantee to sell and account for the excess above the grantor's debt, and gives the grantor a right to redeem, it is in effect a mortgage.<sup>28</sup>

**§ 4650. Absolute deed as mortgage or conditional sale—Facts considered.**<sup>29</sup>—If there is doubt as to the intent of the parties, the court will construe the transaction to be a mortgage.<sup>30</sup>

**§ 4651. Existence of debt.**<sup>31</sup>

1917C, 966n; Crawford v. Nies, 224 Mass. 474, 113 N. E. 408; Ehle v. Looker, 182 Mich. 248, 148 N. W. 378; Young v. Baker, 128 Minn. 398, 151 N. W. 132; Gibson v. Morris State Bank, 49 Mont. 60, 140 Pac. 76; Belieu v. Card, 95 Nebr. 462, 145 N. W. 976; Palmer v. Albuquerque, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106; Williams v. Purcell, 45 Okla. 489, 145 Pac. 1151; Messner v. Carroll (Okla.), 159 Pac. 362; Niehaus v. Shetter, 78 Ore. 447, 153 Pac. 486; Bryan v. Boyd, 100 S. Car. 397, 84 S. E. 992; Alexander v. Conley (Tex. Civ. App.), 187 S. W. 254; Mankin v. Dickinson, 76 W. Va. 128, 85 S. E. 74, Ann. Cas. 1917D, 120n; Harvey v. Shipe, 78 W. Va. 246, 88 S. E. 830; Polly v. Gurney, 157 Wis. 362, 147 N. W. 356.

<sup>26</sup> Shaner v. Rathdrum State Bank, 29 Idaho 576, 161 Pac. 90; Greff v. Hobbs (Iowa), 159 N. W. 429; Cullen v. Butterfield (Iowa), 160 N. W. 125; Johnson v. McKenzie, 80 Ore. 160, 154 Pac. 885, 156 Pac. 791; Flynn v. J. M. Radford Grocery Co. (Tex. Civ. App.), 174 S. W. 902.

<sup>27</sup> McHendry v. Shaffer, 242 Pa. 476, 89 Atl. 587; Williams v. Williams, 270 Ill. 552, 110 N. E. 876; People's Nat. Bank v. Maxson, 168 Iowa 318, 150 N. W. 601; Karcher v. Karcher, 138 La. 288, 70 So. 228; Heck v. Watkins (Mo. App.), 183 S. W. 351. It is not necessary that there should be a written deed of defeasance to constitute a deed in form a mortgage: Niehaus v. Shetter, 78 Ore. 447, 153

Pac. 486. It did not constitute a mortgage but an absolute conveyance with an option to repurchase where a deed was executed in consideration of a certain sum and an agreement made that the vendee should reconvey upon a repayment of the money within three years: Gogarn v. Connors, 188 Mich. 161, 153 N. W. 1068; Lamberon v. Bashore, 167 Cal. 387, 139 Pac. 817; Palmer v. Albuquerque, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106; Bethea v. Allen, 101 S. Car. 350, 85 S. E. 903; Baldwin v. McDonald, 24 Wyo. 108, 156 Pac. 27.

<sup>28</sup> Hawkins v. Elston, 58 Colo. 400, 146 Pac. 254; Freedman v. Avery, 89 Conn. 439, 94 Atl. 969; McRobert v. Bridget, 168 Iowa 28, 149 N. W. 906; Colgan v. Farmers & C. Bank, 69 Ore. 357, 138 Pac. 1070.

<sup>29</sup> Whether an instrument is a deed or a mortgage is determined at the inception of the transaction and the intention of the parties determines its nature: Beverly v. Davis, 79 Wash. 537, 140 Pac. 696; Cullen v. Butterfield (Iowa), 160 N. W. 125; Robitaille v. Boulet, 53 Mont. 66, 161 Pac. 163; Yori v. Phenix, 38 Nev. 277, 149 Pac. 180; Voris v. Robbins, 52 Okla. 671, 153 Pac. 120; Vincent v. First Nat. Bank, 76 Ore. 579, 143 Pac. 1100, 149 Pac. 938.

<sup>30</sup> Fort v. Colby, 165 Iowa 95, 144 N. W. 393; McRobert v. Bridget, 168 Iowa 28, 149 N. W. 906.

<sup>31</sup> The controlling test in determining whether a deed absolute in form is a mortgage is whether the grantor

§ 4655. **Evidence.**<sup>32</sup>—One alleging that a deed is a mortgage has the burden of proving it.<sup>33</sup> And the evidence must be clear, definite, unequivocal and convincing.<sup>34</sup>

§ 4657. **Equitable mortgages—Definition.**<sup>35</sup>

§ 4659. **Informal mortgages.**<sup>36</sup>—In equity, an agreement to give a mortgage is ordinarily considered a mortgage.<sup>37</sup>

§ 4664. **Insane persons.**<sup>38</sup>

was the grantee's debtor: *Root v. Wear*, 98 Kans. 234, 157 Pac. 1181. A deed may still be a mortgage, provided a debt or the fulfilment of some contract is secured by the latter, and no collateral personal security need be taken: *Eugley v. Sproul*, 115 Maine 463, 99 Atl. 443.

<sup>32</sup> In a bill to compel conveyance of land when it is alleged that the predecessor of defendant in title to certain land took title on a verbal agreement to convey to complainant on payment of certain sums of money, oral testimony of the agreement to reconvey is competent: *Henry v. Britt*, 197 Ill. App. 167; *McGehee v. Weeks*, 112 Miss. 483, 73 So. 287. Inadequacy of consideration for an absolute deed, taken by itself, is not sufficient to show that it was intended as a mortgage: *De Shazo v. Eubank* (Tex. Civ. App.), 191 S. W. 369.

<sup>33</sup> *Shaner v. Rathdrum State Bank*, 29 Idaho 576, 161 Pac. 90; *De Shazo v. Eubank* (Tex. Civ. App.), 191 S. W. 369.

<sup>34</sup> *Friend v. Beach*, 276 Ill. 397, 114 N. E. 911; *Greff v. Hobbs* (Iowa), 159 N. W. 429; *De Shazo v. Eubank* (Tex. Civ. App.), 191 S. W. 369.

<sup>35</sup> A court of equity looks behind the transaction, and will often pronounce that to be an equitable mortgage which at law would be considered a conditional sale: *Cullen v. Butterfield* (Iowa), 160 N. W. 125. A resulting trust or equitable mortgage for plaintiff's benefit arose, and he was entitled to a conveyance upon paying defendants the amount due them where defendants bought property at an execution sale with money furnished by plaintiff upon an agreement to hold the title for plaintiff: *Hutchings v. Clerk*, 225 Mass. 483,

114 N. E. 746, Ann. Cas. 1917C, 979n.

<sup>36</sup> It was held that, as between the parties, the land was subject to the lien where one who had mortgaged chattels and agreed to replace the mortgage with one executed by himself and wife used the property to secure a loan to complete payment of a farm, promising to give the lender a mortgage on the farm executed by himself and wife, but gave a mortgage not acknowledged and signed only by himself, though his wife enjoyed the fruits of the exchange of security: *English v. Sanborn*, 97 Kans. 393, 155 Pac. 1079. Where an agreement is made to buy in property and hold it in trust for plaintiffs to secure certain payments held to create the relation of mortgagor and mortgagee and to give plaintiffs an equitable estate: *Lutz v. Hoyle*, 167 N. Car. 632, 83 S. E. 749. Where a mortgage is executed in a foreign country in pursuance to the requirements of a trust deed and is invalid because not registered, it is admissible as evidence to show that the trust deed was to be an equitable lien: *Title Ins. & Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542.

<sup>37</sup> *Carter v. Sapulpa & C. R. Co.*, 49 Okla. 471, 153 Pac. 853. But a lien can not be created on land by an oral agreement to give a mortgage: *Meixel v. Meixel*, 161 App. Div. 518, 146 N. Y. S. 587.

<sup>38</sup> The fact that one who executes a trust deed is afflicted with paranoia, which manifests itself in delusions that do not affect his ability to carry on his business, does not invalidate a deed of trust given by him to secure attorney's fees: *Mounger v. Gandy*, 110 Miss. 133, 69 So. 817.

§ 4674. **Consideration—In general.**<sup>39</sup>—A verbal agreement to make future advances is a sufficient consideration for a mortgage or a deed of trust for a definite sum.<sup>40</sup>

§ 4675. **Failure of consideration.**<sup>41</sup>

§ 4677. **Mortgage obtained by fraud.**<sup>42</sup>—To justify the cancellation of a note and deed of trust for fraud it is necessary that it appear that the fraud was material and related to some

<sup>39</sup> Notes and deed of trust are not valid without consideration: *Crews v. Lombard* (Mo. App.), 182 S. W. 825. A release by mortgagees of what was believed by them to be a good cause of action and which was at least prima facie so, is a sufficient consideration for the note and mortgage: *Zent v. Lewis*, 90 Wash. 651, 156 Pac. 848. An agreement to forbear to sue on a debt is such consideration as will support a transfer of collateral or the execution of a trust deed by the original debtor: *Gate City Nat. Bank v. Elliott* (Mo.), 181 S. W. 25. The burden of proving want of consideration is on the complainant where a mortgagor's verified answer in foreclosure avers a total want of consideration for the note: *Chesser v. Chesser*, 67 Fla. 6, 64 So. 357.

<sup>40</sup> Where a verbal agreement is made to make future advances it constitutes a sufficient basis for a mortgage or deed of trust for a definite sum: *Simms v. Ramsey* (W. Va.), 90 S. E. 842; *National City Bank v. Wagner*, 216 Fed. 473, 132 C. C. A. 533; *B. C. Bynum Mercantile Co. v. First Nat. Bank*, 187 Ala. 281, 65 So. 815; *Horney v. Sellers*, 120 Ark. 631, 180 S. W. 479; *Kirchhoff v. Gerli*, 171 App. Div. 160, 156 N. Y. S. 770. Extension of time on debt is sufficient consideration for mortgage given to secure it: *Tripler v. MacDonald Lumber Co.*, 173 Cal. 144, 159 Pac. 591. A pre-existing debt is a sufficient consideration to support a mortgage given as security therefor: *Reeves & Co. v. Dyer*, 52 Okla. 750, 153 Pac. 850; *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327; *Lamoille County Sav. Bank & Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002; *Lapoint v. Sage*, 90 Vt. 560, 99 Atl. 233; *Hammond v. Ridley*, 116 Va. 393, 82

S. E. 102. A verbal agreement to become a surety or indorser is a sufficient consideration for a mortgage or deed of trust for a definite sum: *Simms v. Ramsey* (W. Va.), 90 S. E. 842.

<sup>41</sup> The note and deed of trust to broker was without consideration where plaintiff complied with his part of contract and broker failed to procure the loan: *Crews v. Lombard* (Mo. App.), 182 S. W. 825. There was a failure of consideration for note and mortgage in so far as amount was retained where an insurance company made a loan taking a note and mortgage, but retained part of the loan as payment of a premium on policy issued as collateral security for loan, and policy was later held void as against public policy: *Deming Inv. Co. v. Shannon* (Okla.), 162 Pac. 471. Where notes were given to indemnify the payee against any liability from furnishing bail or making advancements in connection with criminal prosecutions, and mortgages were given to secure the notes, and no such liability accrued the consideration failed: *Grebe v. Swords*, 28 N. Dak. 330, 149 N. W. 126.

<sup>42</sup> Foreclosure of a mortgage which was given to secure a sum charged by the vendor's agent in excess of the price fixed by the vendor and fraudulently represented to have been paid to the vendor will be denied: *Young v. Taylor*, 84 N. J. Eq. 173, 93 Atl. 569. It is ground for declaring a mortgage void for fraud that, instead of explaining it to them, he induced them to sign it where it is in the hands of the officer who took the acknowledgment of ignorant women to it, they having signed without understanding: *Guatelli v.*

matter of inducement, and that the complaining party was injured thereby and that he relied on the fraudulent statements and had the right to do so.<sup>43</sup>

§ 4678. **Mortgage obtained by duress.**<sup>44</sup>—It is not duress for a mortgagee to threaten to foreclose on the homestead and other property unless a new mortgage is given.<sup>45</sup> Nor is it duress to threaten to sue for the collection of a debt.<sup>46</sup>

§ 4684. **Subject of mortgage—In general.**<sup>47</sup>—A purchaser had a mortgageable interest where he was in possession under an unrecorded executory contract for a deed.<sup>48</sup> It is held that a deed of trust given by the holder of an equitable title is a charge on the equity for the secured debt.<sup>49</sup>

§ 4693. **After-acquired property.**<sup>50</sup>—It is held that where

Brown, 84 N. J. Eq. 33, 92 Atl. 904. Where a broker represented that the owner's price for land which he was authorized to sell to net \$1,000 was \$1,600, and made the same to a purchaser who saw and valued the premises and gave the broker a mortgage to secure \$600 furnished by him, it is held immaterial and not to have influenced the purchase, so that the foreclosure of the mortgage could not be resisted on the ground of fraud or want of consideration: *Young v. Taylor* (N. J. Ch.), 90 Atl. 1053. Where a creditor obtains security for debt by fraud held not entitled to retain the security: *Greenlee v. Los Angeles Trust & Co. Bank*, 171 Cal. 371, 153 Pac. 383.

<sup>43</sup> To justify cancellation of a note and deed of trust for fraud, it is necessary that it must appear that the fraud was material, and related to some matter of inducement; that the complaining party was injured thereby, and that he relied on the fraudulent statements and had the right to do so: *Delolme v. State Sav. Bank*, 113 Ark. 599, 169 S. W. 229; *Egeland v. Scheffler*, 189 Ill. App. 426.

<sup>44</sup> A note and mortgage for the son's debt are voidable where executed by parents, through threats of imprisonment of their son: *Anderson v. Kelley* (Okla.), 156 Pac. 1167.

<sup>45</sup> *F. B. Collins Inv. Co. v. Easley*, 44 Okla. 429, 144 Pac. 1072.

<sup>46</sup> *Lincoln Court Realty Co. v. Kentucky Title Savings Bank & Co.*, 169 Ky. 840, 185 S. W. 156; *Baldwin Co. v. Savage*, 81 Ore. 379, 159 Pac. 80.

<sup>47</sup> An assignee of the bond had an equitable interest which he had a right to mortgage where the owner of lots executes a bond agreeing to convey them to vendees upon the payment of \$200 within two years: *Harsh v. Sutton*, 180 Ill. App. 651. A deed of trust held to be a real estate mortgage where given upon corporate property including land and personalty which later became realty by affixation to the soil: *International Trust Co. v. Palisade Light & Co.*, 60 Colo. 397, 153 Pac. 1002.

<sup>48</sup> *Simonson v. Wenzel*, 27 N. Dak. 638, 147 N. W. 804.

<sup>49</sup> *Yellow Chief Coal Co. v. Johnson*, 166 Ky. 663, 179 S. W. 599; *Yellow Chief Coal Co. v. Preston*, 166 Ky. 669, 179 S. W. 602; *Cooper v. Newell* (Mo.), 172 S. W. 326; *Gray v. Delpho*, 97 Misc. 37, 162 N. Y. S. 194.

<sup>50</sup> A mortgage of after-acquired property in equity is effective between the parties: *Minnesota Loan & Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255. A mortgage of prop-

a purchaser of land gives a trust deed on the same but does not warrant the title, and his title afterward fails, a good title subsequently acquired by him is not subject to the trust deed.<sup>51</sup>

erty to be acquired in futuro is void, as a general rule, as against mortgagors, creditors, or purchasers for value: *Yellow Chief Coal Co. v. Johnson*, 166 Ky. 663, 179 S. W. 599; *Yellow Chief Coal Co. v. Preston*, 166 Ky. 669, 179 S. W. 602. Mortgage on a manufacturing plant, if sufficiently broad and explicit, is held to cover chattels acquired subsequently and put into the plant as a part thereof, but not raw materials or goods made therefrom: *In re Progressive Wall Paper Corporation*,

222 Fed. 87. It is held that an after-acquired property clause in a mortgage to secure advances will not confer title upon the mortgagee to crude gum taken from trees on public lands, and which the mortgagor mixed with gum of which he was the unquestioned owner: *Union Naval Stores Co. v. United States*, 240 U. S. 284, 60 L. ed. 644, 36 Sup. Ct. 308.

<sup>51</sup> *Linn v. Collins*, 77 W. Va. 592, 87 S. E. 934.

## CHAPTER CXLI

### RESPECTIVE RIGHTS AND LIABILITIES OF PARTIES

#### § 4700. In general.<sup>1</sup>

§ 4702. **Right to possession.**<sup>2</sup>—Since possession follows title, where a mortgagor has title, he is in possession.<sup>3</sup>

§ 4703. **Right to rents and profits.**<sup>4</sup>—The owner of the equity of redemption in possession is not required to pay rent

<sup>1</sup> The mortgagor, in case of a common-law mortgage may convey his title or mortgage the premises to others subject to the incumbrance: *Williams v. Williams*, 270 Ill. 552, 110 N. E. 876. A real estate mortgage or deed of trust is merely security for the debt, and until the mortgagor defaults in his obligation and the mortgagee forecloses or takes possession, the mortgagor may sell or lease the premises and collect the rents and profits: *Hunter v. Henry* (Mo. App.), 181 S. W. 597.

<sup>2</sup> During the period of redemption the holder of a certificate of sale is not entitled to possession of the premises or to the rents, issues, or profits thereof: *McQuillen v. Mazzone*, 182 Ill. App. 133.

<sup>3</sup> *Southern Pac. Co. v. Miller*, 39 Nev. 169, 154 Pac. 929; *Farmers' & C. Bank v. Rivers*, 103 S. Car. 84, 87 S. E. 438.

<sup>4</sup> A mortgagor has the right to the full use of the land until foreclosure and this right can not be contracted away in the mortgage: *Orr v. Bennett*, 135 Minn. 443, 161 N. W. 165. A mortgagor of land is entitled to the full usufruct of the property until his rights are barred by foreclosure, and sale, and this right applies to rents or royalties under a mining lease: *Orr v. Bennett*, 135 Minn. 443, 161 N. W. 165; *Hunter v. Henry* (Mo. App.), 181 S. W. 597; *Kettering v. Barber*, 37 S. Dak. 602, 159 N. W. 133. A tenant who has possession of land at the time it is sold at foreclosure sale becomes by operation

of law a tenant of the purchaser: *Bliss v. Duncan*, 44 App. D. C. 93. And the possession of the premises and rents, issues, and profits thereof after a sale on foreclosure and until the period of redemption expires belong to the owner of the equity of redemption: *Elgin City Banking Co. v. Hancock*, 183 Ill. App. 23. The rents of mortgaged premises belong to the owner of the equity of redemption until the expiration of the period of redemption; but where the premises pledged are scant security, and it is found that the obligors are insolvent, a receiver may be appointed to collect the rents during the period of redemption, to be applied in payment of the deficiency decree that has been or may be entered: *Hansen v. Cole*, 189 Ill. App. 19. Until demand is made there is no obligation on the part of the mortgagor to pay over the income or profits to the mortgagee: *Davis v. Virginia R. & Co.*, 229 Fed. 633, 144 C. C. A. 43. The mortgagees are not entitled to the rents while the property is held by the mortgagor after default under a clause in a mortgage assigning rents: *In re Israelson*, 230 Fed. 1000. A mortgagee who has taken possession is not entitled to rents and profits in excess of the debt: *Morgan v. Mahony*, 124 Ark. 483, 187 S. W. 633; *Darcourt v. Brunet*, 139 La. 486, 71 So. 776; *McSween v. Windham*, 104 S. Car. 508, 89 S. E. 500. Though the sum realized did not satisfy the mortgage, mortgagees who joined in a suit to enjoin foreclosure



during the period of redemption.<sup>5</sup> And a mortgagee in possession who collects rent is accountable to the assignee of the mortgagor's equity of redemption.<sup>6</sup>

§ 4706. **Personal liability.**<sup>7</sup>—Where the purchaser of real estate had the property conveyed to K and, as a straw man, K executed mortgages, the purchaser and not K was personally liable for a deficiency on foreclosure.<sup>8</sup> No personal liability is imposed on the grantees to pay the mortgage where the deed recites that it is made subject to a mortgage on the land.<sup>9</sup>

§ 4708. **Waste by mortgagor.**<sup>10</sup>—Without proof of fraud,

under powers of sale, and prayed for foreclosure by the court, held not entitled to rents collected by the administrator of the mortgagor pending foreclosure: *Brickey v. Cotter*, 119 Ark. 543, 178 S. W. 370. Under the New York law it has been held that the provisions of a mortgage entitle mortgagee to rents collected by receiver in bankruptcy after default, but before application for receivership or order of sequestration: In re *Jarmulowsky*, 224 Fed. 141. It is held in Massachusetts that a mortgagee, upon giving notice to a tenant in possession under a lease which was executed before the mortgage, is entitled to receive the rents due and unpaid after the execution of the mortgage: *Noble v. Brooks*, 224 Mass. 288, 112 N. E. 649.

<sup>5</sup> *Armistead v. Bishop*, 110 Ark. 172, 161 S. W. 182; *Brickey v. Cotter*, 119 Ark. 543, 178 S. W. 370.

<sup>6</sup> *Harris v. Jones*, 188 Ala. 633, 65 So. 956; *Williams v. Wallace*, 111 Ark. 509, 164 S. W. 301; *Dicken v. Simpson*, 117 Ark. 304, 174 S. W. 1154; *Debbins v. Forster*, 219 Mass. 370, 106 N. E. 1017; *Miller v. Peter*, 184 Mich. 142, 150 N. W. 554; *Reich v. Cochran*, 213 N. Y. 416, 107 N. E. 1029.

<sup>7</sup> His whole estate was held liable for his debt, though a landowner mortgaged only a part of his estate to secure it: *Ramirez v. Lasater* (Tex. Civ. App.), 174 S. W. 706; *Stollenwerck v. Marks*, 188 Ala. 587, 65 So. 1024, Ann. Cas. 1917C, 981n; *Mutual Life Ins. Co. v. Rothschild*, 160 N. Y. S. 164. Unless it was expressly provided that there should be none, under Rem. & Bal. Code,

§ 1119, relating to judgment for deficiency in mortgage foreclosure, the mere erasure from the note of the clause providing for a deficiency judgment would be ineffective, and such judgment could be had: *Sappington v. Owens*, 92 Wash. 632, 159 Pac. 785. Where a deed is made subject to liens generally without mentioning the particular mortgage being foreclosed, it is held not to make the grantees liable for a deficiency judgment: *Chaffee v. Hawkins*, 89 Wash. 130, 154 Pac. 143, 157 Pac. 35. Plaintiff is entitled to a personal judgment against a debtor where he establishes the debt though he fails to establish a lien: *Linn v. Collins*, 77 W. Va. 592, 87 S. E. 934; *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327.

<sup>8</sup> *Dexter Horton Nat. Bank v. Seattle Homeseekers Co.*, 82 Wash. 480, 144 Pac. 691, Ann. Cas. 1917A, 685n. But the contract will not be construed as rendering him personally liable, where a contract for a mortgage by its words contemplates that one party shall give a mortgage, but a provision is written in that he need not execute the bond therefor personally: *Carvalho v. Sudderly*, 169 App. Div. 652, 155 N. Y. S. 413.

<sup>9</sup> *McArthur v. Goodwin*, 173 Cal. 499, 160 Pac. 679. A bank is not liable for deficiency judgment in an action to foreclose a mortgage on land, where the bank had taken a deed as agent of another without specific agreement to assume the mortgage: *Painter v. Kennedy*, 89 Wash. 275, 154 Pac. 161.

<sup>10</sup> In equity a mortgagor is held to be a trustee for the creditor and

mortgaged property converted by the mortgagor may be followed by the mortgagee in the hands of third persons, except purchasers without notice.<sup>11</sup>

### § 4709. Right to emblements.<sup>12</sup>

§ 4710. Right to redeem.<sup>13</sup>—A junior mortgagee's right to redeem from a senior mortgagee is not affected by a fore-

may be restrained from committing waste or held to account for values taken from land: *Shields v. Pittsburgh*, 252 Pa. 74, 97 Atl. 124. And a mortgagee may ask for an injunction and the appointment of a receiver to prevent the subject-matter from being impaired or wasted: *Davis v. Alton & Co. R. Co.*, 180 Ill. App. 1. Cutting timber from land by a mortgagor in possession does not alone constitute him a wilful trespasser, but that depends upon the circumstances as to whether his act was in good faith, and whether it resulted in injury to the mortgagee: *Foreman v. Holloway*, 122 Ark. 341, 183 S. W. 763.

<sup>11</sup> *Davis v. Virginia R. & Co.*, 229 Fed. 633, 144 C. C. A. 43. A purchaser of the timber was conclusively charged with record notice, and was liable for the amount not so applied, where a recorded deed of trust of land contained a special provision that timber would not be cut without consent of mortgagee, and if permitted was to be applied to secured notes: *Hidden v. Mahanes*, 119 Va. 116, 89 S. E. 121.

<sup>12</sup> A mortgagee was not prevented from advancing sums to the mortgagor to aid him in making a crop by a clause in a mortgage providing that crops should be shipped to the mortgagee, who should apply the proceeds first to the interest and then the principal: *Zayas v. Lothrop*, 231 U. S. 171, 58 L. ed. 172, 34 Sup. Ct. 108.

<sup>13</sup> Both at common law and under the statute, the right to redeem is favored by a court of equity, and will not be taken away except by strict compliance with the necessary steps: *Caro v. Wollenberg*, 68 Ore. 420, 136 Pac. 866; *Sunny Brook Zinc & Co. v. Metzler*, 231 Fed. 304;

*Banking Corp. v. Hein*, 52 Mont. 238, 156 Pac. 1085. The statutory right of redemption inheres in a mortgage, and this right can not be waived, whether the mortgage be in the usual form or in the form of an absolute deed; the rule being "once a mortgage, always a mortgage": *Beverly v. Davis*, 79 Wash. 537, 140 Pac. 696. No scheme can be devised which will deprive the grantor of his right of redemption where the intent of the parties to make an absolute conveyance a security for a debt is once established: *Fort v. Colby*, 165 Iowa 95, 144 N. W. 393; *Page v. Cockrum*, 122 Ark. 472, 184 S. W. 405; *Casper Nat. Bank v. Jenner*, 268 Ill. 142, 108 N. E. 998; *Threewit v. McFall*, 196 Ill. App. 609, *Drebing v. Zahrt*, 55 Ind. App. 492, 104 N. E. 46; *McGuire v. Halloran* (Iowa), 160 N. W. 363; *Reich v. Cochran*, 84 Misc. 247, 145 N. Y. S. 1025; *Ray v. Patterson*, 170 N. Car. 226, 87 S. E. 212; *Williams v. Purcell*, 45 Okla. 489, 145 Pac. 1151. The statutory right of redemption is absolute and can not be cut off by a strict foreclosure: *Beverly v. Davis*, 79 Wash. 537, 140 Pac. 696. Redemption must be made within the time prescribed by the statute: *Banking Corp. of Montana v. Hein*, 52 Mont. 238, 156 Pac. 1085; *Sharp v. Blanton*, 194 Ala. 460, 69 So. 889; *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6; *Carll v. Kerr*, 111 Maine 365, 89 Atl. 150. Under the Montana statute, a judgment debtor was held entitled to redeem within one year from the date shown by the record though the date was erroneous: *Hamilton v. Hamilton*, 51 Mont. 509, 154 Pac. 717. Under the Alabama Code the statutory right of redemption does not arise until after foreclosure: *Leith v. Galloway Coal Co.*, 189 Ala. 204, 66 So. 149. The

closure suit to which he was not a party.<sup>14</sup> A mortgagor's wife has such an interest in the mortgaged premises that she is entitled to redeem.<sup>15</sup> And so has a purchaser from the mortgagor during the period of redemption.<sup>16</sup> But a mortgagee may refuse to allow redemption of a part of the mortgaged premises.<sup>17</sup>

**§ 4713. Right to possession.**—When a mortgagee obtains possession condition broken, as against the mortgagor, he may retain it until the debt is paid.<sup>18</sup> This is true, though he enters under a void judgment or a void foreclosure.<sup>19</sup>

contract was unenforceable where one to whom mortgaged realty was transferred in the Indian Territory was induced by fraud of the mortgagee to contract to pay more than the mortgage debt to redeem same: *Parks v. Watson*, 51 Okla. 19, 151 Pac. 477. A wife's right to redeem may be lost by laches where land is sold under foreclosure of deeds of trust executed by her husband: *Big-oness v. Hibbard*, 267 Ill. 301, 108 N. E. 294. Where a mortgagor delayed asserting his right to redeem for more than 20 years, he is barred by his laches: *Harrington v. Butte & Co. Copper Co.*, 52 Mont. 263, 157 Pac. 181. The right of redemption arises only where sale is made, and exists for the period fixed by law, and is not property in any sense, but a bare personal privilege of statutory origin, to be exercised only in the instances mentioned in the statute and upon the conditions prescribed: *Banking Corp. v. Hein*, 52 Mont. 238, 156 Pac. 1085. A decree of foreclosure of a mortgage barred the general equitable right of redemption, and no right of redemption was left except such as is given by the statutes authorizing redemptions: *Ft. Wayne Builders' Supply Co. v. Pfeiffer*, 60 Ind. App. 615, 111 N. E. 192. Before court of equity is justified in extending the time of redemption on statutory foreclosure for fraudulent conduct inducing owner to refrain from redeeming, equitable grounds must clearly appear: *Palmer v. Palmer*, 194 Mich. 79, 160 N. W. 404. But courts of equity will enforce agreements involving an extension of the statutory or legal

period of time for the redemption of property from a foreclosure sale: *Diggins v. Axtell*, 196 Ill. App. 480.

<sup>14</sup>*Black v. Manhattan Trust Co.*, 213 Fed. 692; *Purcell v. Gann*, 113 Ark. 332, 168 S. W. 1102; *Cowling v. Britt*, 114 Ark. 175, 169 S. W. 783; *Washington Trust Co. v. Norwich & Co. Traction Co.*, 89 Conn. 59, 92 Atl. 880; *Ft. Wayne Builders' Supply Co. v. Pfeiffer*, 60 Ind. App. 615, 111 N. E. 192; *Cathro v. McArthur*, 30 N. Dak. 337, 152 N. W. 686; *Parks v. Watson (Okla.)*, 151 Pac. 477; *Froelich v. Swafford*, 33 S. Dak. 142, 144 N. W. 925; *Froelich v. Swafford*, 35 S. Dak. 35, 150 N. W. 476, 893.

<sup>15</sup>*Tuttle v. Davis*, 114 Maine 109, 95 Atl. 513.

<sup>16</sup>*Smith v. Lorentzen*, 4 Alaska 1.

<sup>17</sup>*Morrison v. Formby*, 191 Ala. 104, 67 So. 668; *Kirven v. Wilds*, 98 S. Car. 463, 82 S. E. 673.

<sup>18</sup>*Hardwicke v. Barnes*, 179 Mo. App. 386, 166 S. W. 826; *Kelly v. Struth*, 164 App. Div. 705, 150 N. Y. S. 391; *Caro v. Wollenberg*, 68 Ore. 420, 136 Pac. 866; *Lapoint v. Sage*, 90 Vt. 560, 99 Atl. 233.

<sup>19</sup>*Johnson v. Putnam Foundry & Co.*, 167 App. Div. 99, 152 N. Y. S. 792; *Page v. Turk*, 43 Okla. 667, 143 Pac. 1047. The mortgagee must enter with the mortgagor's consent, or otherwise lawfully to acquire rights of mortgagee in possession: *Herrmann v. Cabinet Land Co.*, 217 N. Y. 526, 112 N. E. 476; *West v. Middlesex Banking Co.*, 33 N. Dak. 465, 146 N. W. 598. In equity a mortgagor in possession is a trustee: *Reich v. Cochran*, 213 N. Y. 416, 107 N. E. 1029.

§ 4714. **Accounting.**<sup>20</sup>§ 4715. **Foreclosure.**<sup>21</sup>—Where there is no default, a mort-

<sup>20</sup> A mortgagor on redemption is entitled to the rents and profits received by the purchaser at foreclosure during his possession under L. O. L., §§ 248, 252: *Fields v. Crowley*, 71 Ore. 141, 142 Pac. 360; *Buhs v. Austin*, 182 Ill. App. 455. Party claiming under foreclosure of earlier mortgage held not required to account for rents and profits in junior mortgagee's suit to foreclose and redeem from earlier mortgage: *Froelich v. Swafford*, 33 S. Dak. 142, 144 N. W. 925. Where the owner, after foreclosure and sale, conveys all interest in property together with the right of redemption to another, that other, on redemption, has a right to an accounting at the hands of the mortgagee or purchaser at foreclosure sale: *Smith v. Lorentzen*, 4 Alaska 1. The mortgagee is properly allowed for improvements on the mortgagor seeking to redeem where the parties by their express contract contemplate that improvements may be made by the mortgagee, and provide that on a repurchase or redemption such expenditure shall be paid for: *Fort v. Colby*, 165 Iowa 95, 144 N. W. 393. But where improvements are made without the mortgagor's consent and not necessary to preserve the property, in a suit to redeem a mortgagee in possession under an equitable mortgage is not entitled to allowance for permanent improvements: *Sposedo v. Merriman*, 111 Maine 530, 90 Atl. 387.

<sup>21</sup> Without regard to where the contract was entered into, the sale of land which is situated in this state under the power contained in a deed of trust must be in accordance with the laws of this state: *Tate v. Dinsmore*, 117 Ark. 412, 175 S. W. 528. Where a trustee makes a foreclosure sale pursuant to the terms of the mortgage, it is not a judicial sale: *Commonwealth v. Keystone Graphite Co.*, 248 Pa. 344, 93 Atl. 1071. Where the mortgage contained no power of sale an attempted foreclosure by advertisement is void: *Purcell v. Thornton*, 128 Minn. 255,

150 N. W. 899. The mortgagee may elect to foreclose his mortgage if the mortgagor or his successor in interest fail to keep up current charges against the property and permit it to depreciate or become lost: *Gerber v. Heath*, 92 Wash. 519, 159 Pac. 691; *Marlatt v. Holdridge*, 97 Misc. 456, 161 N. Y. S. 148. When there were past-due taxes unpaid, on which interest was accumulating, while the rents received by him were less than the taxes, a mortgagee, whose mortgage gave him power to sell upon nonpayment of taxes, could foreclose: *Taylor v. Weingartner*, 223 Mass. 243, 111 N. E. 909; *Chapman v. Richey*, 188 Ill. App. 551; *Union Cent. Life Ins. Co. v. Puckett*, 97 Kans. 428, 155 Pac. 930. An agreement in a mortgage that failure to comply with any of its agreements shall cause the whole debt to become due and collectible at the election of the mortgagee or his assigns, without a demand for fulfilment of conditions or notice of election, is valid: *Buffalo Center Land & Co. v. Swigart*, 176 Iowa 422, 156 N. W. 701; *Colton v. Anderson*, 31 Cal. App. 397, 160 Pac. 843; *Mills v. Mason*, 182 Ill. App. 69; *First State Bank v. Day*, 188 Mich. 228, 154 N. W. 101; *Ward v. San Antonio Life Ins. Co.* (Tex. Civ. App.), 164 S. W. 1043; *Musselman v. Knottingham*, 77 Wash. 435, 137 Pac. 1012. A demand for payment is unnecessary before suing to enforce mortgage securing a note, the note and mortgage providing that on default in paying instalment of interest, holder might, without notice, enforce his option of declaring the whole debt due: *Ogilvie v. Union Cent. Life Ins. Co.*, 171 Ky. 134, 188 S. W. 309. Without seeking a personal judgment for the mortgage debt, a suit to foreclose real estate mortgage may be maintained: *Echols v. Reebergh* (Okla.), 161 Pac. 1065. An absolute deed which is intended to be defeasible or as security for money is a mortgage and must be foreclosed as such: *Williams v. Purcell*, 45 Okla. 489, 145 Pac. 1151; *Lewis*

gagee can not sell under a power of sale, so as to pass title, even to an innocent purchaser.<sup>22</sup>

§ 4716. Purchase subject to mortgage.<sup>23</sup>

§ 4717. Assumption of mortgage by purchaser.<sup>24</sup>

§ 4718. Personal liability of purchaser.<sup>25</sup>—It was held that it amounted to an assumption by the grantee, though a deed did not state directly that the mortgage was assumed by the

v. Davis (Ala.), 73 So. 419. The obligee has a right to foreclose and sell the property notwithstanding tender of the amount due: *Smith v. Williams-Brooke Co.*, 111 Miss. 393, 71 So. 648. Where the lien of the mortgage is extinguished, the mortgagee can not exercise the power of sale, as there must be a valid, existing mortgage lien: *Berkin v. Healy*, 52 Mont. 398, 158 Pac. 1020; *D. S. B. Johnston Land Co. v. Mitchell*, 29 N. Dak. 510, 151 N. W. 23. Generally, a foreclosure by nonjudicial sale under powers contained in the mortgage are valid only if every condition is strictly followed: *Higbee v. Chadwick*, 220 Fed. 873, 136 C. C. A. 317; *McSwain v. Young*, 111 Miss. 686, 72 So. 129.

<sup>22</sup> *Wright v. Harris*, 221 Fed. 736; *Dure v. Wright*, 228 Fed. 1021, 142 C. C. A. 654; *Fountain v. Pateman*, 188 Ala. 153, 66 So. 75; *Copelan v. Sohn*, 75 W. Va. 83, 82 S. E. 1016.

<sup>23</sup> The land constituted the primary fund for the payment of the mortgage where a grantee of mortgaged premises did not assume a mortgage thereon sought to be foreclosed: *Manilla Anchor Brewing Co. v. Raw Silk Trading Co.*, 163 App. Div. 30, 148 N. Y. S. 119. A conveyance to a grantee "subject to said mortgage" does not impose any personal liability on the grantee for the mortgage debt: *Lippitt v. Thames Loan & Co.*, 88 Conn. 185, 90 Atl. 369; *Bennett v. United States Land & Co.*, 16 Ariz. 138, 141 Pac. 717; *Mott v. American Trust Co.*, 124 Ark. 70, 186 S. W. 631. The most that a mortgagor can convey is his equity of redemption: *Purcell v. Gann*, 113 Ark. 332, 168 S. W. 1102. The defense that the officers of the mortgagor corporation were not authorized to execute the

mortgage can not be set up by persons who had purchased the mortgaged property for a nominal consideration: *Yaeger & Co. Hardw. Co. v. Pritz*, 69 Fla. 8, 67 So. 231. Though the mortgage and the deed under which the mortgagor held were void, where a purchaser of mortgaged land withheld the amount of the mortgage from the purchase-money, she was estopped to deny its validity on foreclosure: *Jones v. Perkins*, 43 Okla. 734, 144 Pac. 183; *Midland Savings & Co. v. Neighbor (Okla.)*, 154 Pac. 506; *United States Bond & Co. v. Keahey (Okla.)*, 155 Pac. 557.

<sup>24</sup> The last grantee becomes the principal debtor and primarily liable to the mortgagee, where mortgagor conveyed to one who assumes the mortgage, who in turn conveys to another, who also assumes it: *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327. A purchaser who assumes a mortgage in general terms becomes liable for all that may be actually due on it, which may include attorney's fees: *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327; *Peabody v. Kent*, 213 N. Y. 154, 107 N. E. 51.

<sup>25</sup> While merely purchasing land subject to a mortgage will not render the purchaser personally liable for the mortgage debt, if he assumes the payment thereof as a part of the purchase-price, he becomes personally liable: *Morris v. Fidelity Mortgage Bond Co.*, 187 Ala. 262, 65 So. 810; *Interstate Land & Co. v. Logan*, 196 Ala. 196, 72 So. 36; *Hibernia Savings & Co. Society v. Dickinson*, 167 Cal. 616, 140 Pac. 265; *Welfley v. Babb*, 181 Ill. App. 54; *Johnson v. Northern Minnesota Land & Co.*, 168 Iowa 340, 150 N. W. 596; *Terry v. Groves*, 258 Mo. 450, 167 S. W. 563; *Llewellyn v. Butler*, 186 Mo. App. 525, 172 S. W.

grantee, but the deed mentioned it and provided that the grantor should be released from liability for it.<sup>26</sup>

413; McDonald v. Finseth, 32 N. Dak. 400, 155 N. W. 863; Chaffee v. Hawkins, 89 Wash. 130, 154 Pac. 143, 157 Pac. 35. A purchaser of realty covered by a mortgage, which he assumes, becomes, as to the vendor, the principal debtor, and the vendor becomes his surety: Winans v. Hare, 46 Okla. 741, 148 Pac. 1052; Seeman v. Mills, 197 Ill. App. 589; Gray v. Gilliam, 166 Ky. 194, 179 S. W. 22; Greer v. Orchard, 175 Mo. App. 494, 161 S. W. 875; Citizens' Bank v. Douglass, 178 Mo. App. 664, 161 S. W. 601; Hildrith v. Walker (Mo. App.), 187 S. W. 608; Holland Reformed School Society v. De Lazier, 84 N. J. Eq. 442, 93 Atl. 199; Bradstreet v. Gill, 22 N. Mex. 202, 160 Pac. 354; Merrimon v. Parkey, 136 Tenn. 645, 191 S. W. 327; Lamoille County Sav. Bank &c. Co. v. Belden, 90 Vt. 535, 98 Atl. 1002. The grantee by accepting the deed impliedly promised to discharge the mortgage where a deed recited that the consideration was a certain sum in cash, and the assumption of a \$400 mortgage by the grantee: Felker v. Rice, 110 Ark. 70, 161 S. W. 162; Casselman v. Gordon, 118 Va. 553, 88 S. E. 58. The purchaser becomes primarily liable for the debt where there is a verbal agreement by him to assume and pay a debt secured by a deed of trust, it being as effective and binding as if it had been recited in the contract and conveyance: Goode v. Bryant, 118 Va. 314, 87 S. E. 588. It is held that where the purchaser of mortgaged property from the mortgagor's assignee assumed payment of

the debt, he was personally liable for the amount, though his grantor had not assumed payment of same, and though the mortgagee by agreement with the mortgagor had not paid to the mortgagor the full amount of the loan for which the mortgage was given: McDonald v. Finseth, 32 N. Dak. 400, 155 N. W. 863. In the absence of an agreement therefor, the sale or gift of an equity of redemption does not oblige the grantee to pay the mortgage debts: Haskins v. Young, 89 Conn. 66, 92 Atl. 877. A purchaser of mortgaged lands is not personally liable for the mortgage debt unless he expressly or impliedly agrees to pay it: Interstate Land &c. Co. v. Logan, 196 Ala. 196, 72 So. 36; Hibernia Savings &c. Society v. Dickinson, 167 Cal. 616, 140 Pac. 265; Raffel v. Clark, 87 Conn. 567, 89 Atl. 184; Nicholson v. Nicholson Coal Co., 190 Ill. App. 607; Mutual Life Ins. Co. v. Rothschild, 160 N. Y. S. 164. The grantee is liable only if his assumption was part of the consideration unless the grantee's assumption of payment of incumbrances was agreed upon: Halvorson v. Mullin (Iowa), 156 N. W. 289. Unless he has agreed to release the mortgagor and look solely to the grantee, where the grantee of mortgaged property assumes the mortgage debt, the mortgagee may treat them both as principal debtors and have a personal decree against both: Elwell v. Hicks, 180 Ill. App. 554; Haley v. Branham, 192 Mo. App. 125, 180 S. W. 423.

<sup>26</sup> Greer v. Orchard, 175 Mo. App. 494, 161 S. W. 875.

## CHAPTER CXLII

### ASSIGNMENT OF MORTGAGES

#### § 4725. Form, requisites, and methods of assignment.<sup>1</sup>

§ 4726. What constitutes an assignment.<sup>2</sup>—It operates as an assignment of the mortgage, where a mortgagee in possession conveys the property by deed.<sup>3</sup>

#### § 4727. Delivery.<sup>4</sup>

#### § 4728. Consideration.<sup>5</sup>

<sup>1</sup> In an assignment of a note and mortgage it is not necessary that it be executed in the presence of witnesses, and, when unattested by a subscribing witness, may be proved by any one who was present and saw it executed: *Talbert v. Talbert*, 97 S. Car. 136, 81 S. E. 644. The form of expression is immaterial, where in an assignment of mortgage, it is clear that title to the land itself was intended to pass, as well as the security: *Weill v. Davis*, 168 N. Car. 298, 84 S. E. 395. Where one executes a deed to secure a debt and grantee indorses it "for value received, I hereby transfer the within mortgage deed to K," the transferee does not acquire legal title and can not exercise the power of sale: *McCook v. Kennedy*, 146 Ga. 93, 90 S. E. 713.

<sup>2</sup> A quitclaim deed given by a grantee in a deed, in fact a mortgage, is an assignment of the mortgage debt and invests in the quitclaim grantee the right to collect the debt: *Hawkins v. Elston*, 58 Colo. 400, 146 Pac. 254; *Gooch v. Phillips*, 46 Okla. 145, 148 Pac. 135. Where a conveyance is made by a mortgagee holding title under a void foreclosure and sheriff's deed it operates as a transfer of the mortgage and the debt: *Lawrence v. Murphy*, 45 Utah 572, 147 Pac. 903. An owner who conveyed land and received back a bond for deed, created an equitable mortgage and divested himself of legal title, and he could assign his bond

for deed by indorsement, and his heirs could not attack the assignment on the ground that the deed and bond for deed constituted a mortgage: *Williams v. Williams*, 270 Ill. 552, 110 N. E. 876. The transfer of a note which is secured by a mortgage operates as an immediate assignment of the mortgage, and a bona fide purchaser of the note takes the mortgage free from equities in favor of third parties: *Weaver Hardw. Co. v. Solomonovitz*, 98 Misc. 413, 163 N. Y. S. 121.

<sup>3</sup> *Farnsworth v. Kimball*, 112 Maine 238, 91 Atl. 954; *Smith v. Booth Granite Co.*, 112 Maine 297, 92 Atl. 103. A deed given by a mortgagee out of possession, unaccompanied by an assignment or other transfer of the mortgage indebtedness, conveys no title: *Vermeule v. Vermeule*, 113 Maine 81, 93 Atl. 40.

<sup>4</sup> It is held that they did not pass the title, though the mortgage was subsequently found in an envelope indorsed by some one as belonging to the assignee, where attorney executed assignments of mortgagor but never recorded or delivered them: *In re Wagner*, 213 Fed. 682.

<sup>5</sup> It is a sufficient consideration for the promise of the assignee to pay the price for the assignor to agree to transfer a note and mortgage to the assignee upon the payment of the price: *Norman v. Bullock County Bank*, 187 Ala. 33, 65 So. 371. It is held that there was a sufficient con-

§ 4729. **Effect of assignment.**<sup>6</sup>—A mortgage without consideration is void in the hands of either the mortgagee or his assignee.<sup>7</sup>

§ 4732. **Notice of assignment.**<sup>8</sup>

§ 4735. **Equitable assignments.**<sup>9</sup>—Where part of the whole number of negotiable bonds secured by the same mortgage are transferred, it operates as a transfer of the mortgage pro tanto.<sup>10</sup>

sideration for the assignment of interest in debt secured by trust deed as security for pre-existing promissory note, the validity of which was not attacked: *Greenlee v. Los Angeles Trust &c. Bank*, 171 Cal. 371, 153 Pac. 383.

<sup>6</sup> The assignee of a mortgage owns the lien created by the mortgage: *Simmons v. Meyers* (Ind. App.), 112 N. E. 31; *Rawls v. American Central Ins. Co.*, 97 S. Car. 189, 81 S. E. 505. Where an assignment is made for collection the proceeds do not vest in the assignee: *Hopkins v. Sargent's Estate*, 88 Vt. 217, 92 Atl. 14. Assignees of a mortgagee take the legal title though no beneficial interest passed: *Miller v. Blinn*, 219 Mass. 266, 106 N. E. 985.

<sup>7</sup> *Riley v. Hopkinson*, 82 N. J. Eq. 469, 88 Atl. 1077; *Guatelli v. Brown*, 84 N. J. Eq. 33, 92 Atl. 904.

<sup>8</sup> An assignment of a mortgage made of record is constructive notice of such assignment to the mortgagor: *Steadman v. Foster*, 83 N. J. Eq. 641, 92 Atl. 353. Where a mortgagee makes two assignments and recording each, the mortgagor is not given valid constructive notice of the second assignment by its being recorded where first assignee never reassigned it to the mortgagor, though the first assignment contained a covenant to reassign: *Reid v. Dublier*, 89 N. J. L. 368, 98 Atl. 386. Unless the earlier mortgage had been previously duly recorded, the assignee of a mortgage for value without notice, by recording his assignment, obtains priority over an earlier mortgage: *Gray v. Delpho*, 97 Misc. 37, 162 N. Y. S. 194.

<sup>9</sup> Where an attorney receiving money from a client to invest in a mortgage, bought a mortgage there-

with which had been executed in his favor, but did not assign the mortgage to his client, and thereafter held it in his own name, he held only the legal title, and the client was in equity the real owner and could have compelled an assignment: *In re Wagner*, 213 Fed. 682. One became the equitable assignee of the mortgage and the debt by paying the mortgage and taking possession of the instrument: *Stockdale v. Cooper*, 193 Ala. 258, 69 So. 110. The indorsement of a note ordinarily carries with it the mortgage which secures it: *McClure v. American Nat. Bank*, 67 Fla. 32, 64 So. 427; *Pensacola State Bank v. McClure*, 67 Fla. 289, 64 So. 1022; *McConnell v. American Nat. Bank* (Ind. App.), 103 N. E. 809; *Robertson v. United States Live Stock Co.*, 164 Iowa 230, 145 N. W. 535; *Cooper v. Newell*, 263 Mo. 190, 172 S. W. 326; *Northwestern Improvement Co. v. Rhoades*, 52 Mont. 428, 158 Pac. 832; *W. C. Early Co. v. Williams*, 135 Tenn. 249, 186 S. W. 102, L. R. A. 1916F, 418; *Ward v. San Antonio Life Ins. Co.* (Tex. Civ. App.), 164 S. W. 1043. A transfer by mere delivery for a valuable consideration of a note secured by mortgage operates as an equitable assignment of the mortgage to the transferee: *Arnett v. Willoughby*, 190 Ala. 530, 67 So. 426. The first note negotiated to an innocent purchaser carries the mortgage security, where duplicate notes, purporting to be secured by a single deed of trust, are executed: *Quinn v. McCallum*, 178 Mo. App. 241, 165 S. W. 1115.

<sup>10</sup> *Wing v. Union Cent. Life Ins. Co.*, 181 Mo. App. 381, 168 S. W. 917; *Herzog v. Union Debenture Co.*, 94 Nebr. 820, 144 N. W. 814.



## CHAPTER CXLIII

### NATURE OF CHATTEL MORTGAGES

§ 4750. **Definition and general nature.**<sup>1</sup>—A chattel mortgagee has merely a lien on the mortgaged property as security for the debt, under the California statute, and does not take title.<sup>2</sup>

§ 4751. **Distinguished from pledge.**<sup>3</sup>

<sup>1</sup> A chattel mortgage is a present transfer of title which can be defeated only by payment of the sum secured thereby, and, in default, the title of the mortgagee is absolute, subject to the mortgagor's equity of redemption: *Peter Barrett Mfg. Co. v. Wheeler*, 212 N. Y. 90, 105 N. E. 811; *Donnell v. G. G. Deering Co.*, 115 Maine 32, 97 Atl. 130. It was formerly held in Alabama that after default the legal title is in the mortgagee, and the only office of a foreclosure is to cut off the equity of redemption: *Harmon v. Dothan Nat. Bank*, 186 Ala. 360, 64 So. 621. But under Code 1907, § 4894, the rule is otherwise and the mortgagee takes legal title at the time the mortgage is executed: *Pinckard v. Cassels*, 195 Ala. 353, 70 So. 153. Where it appears to have been given as security an instrument must be deemed a mortgage whatever its form: *Pittman v. Milton*, 69 Fla. 304, 68 So. 658. An agreement whereby a bankrupt agreed to hold property to be purchased by him in trust for a creditor until the latter was paid was held to be a chattel mortgage: *Scandinavian-American Bank v. Sabin*, 227 Fed. 579, 142 C. C. A. 211. The character of an instrument which is a mortgage at its inception does not afterward change: *Pittman v. Milton*, 69 Fla. 304, 68 So. 658. There was no such thing as a chattel mortgage under the common law; it was the rule that all sales and pledges of personalty were void, unless possession accompanied and went with the title or to the pledgee: *W. W. Kimball Co. v. Polakow*, 190 Ill. App. 174. The essential charac-

teristic of a mortgage is the right to redeem: *Sheldon v. McFee*, 216 N. Y. 618, 111 N. E. 220.

<sup>2</sup> But under Civ. Code, § 2888, which provides that a lien or contract for a lien transfers no title, a chattel mortgagee has merely a lien on the mortgaged property as security for the payment of his debt: *Flores v. Stone*, 21 Cal. App. 105, 131 Pac. 348, 351, 352; *Singer Sewing Mach. Co. v. Dyer*, 156 Ky. 156, 160 S. W. 917. A chattel mortgage is regarded merely as security for the debt in equity: *Shorter v. Dail*, 122 Md. 101, 89 Atl. 329.

<sup>3</sup> The distinguishing feature between a pledge and a chattel mortgage is that in the former possession must be delivered and retained by the pledgee: *Clanton Bank v. Robinson*, 195 Ala. 194, 70 So. 270. The legal title in a chattel mortgage is vested in the mortgagee, leaving the mortgagor with only an equitable title, which only equity can enforce, while in a pledge the pledgor retains his legal title to the property, which a court of law can enforce: *Minge v. Clark*, 196 Ala. 617, 72 So. 167. It was held to constitute a pledge and not a mortgage, where bankrupts executed a bill of sale of an automobile as security for a note for borrowed money, accompanied by a delivery of the car: *Darragh v. Elliotte*, 215 Fed. 340, 131 C. C. A. 482. It is a mortgage and not a pledge where a debtor makes an assignment of its interest in described chattels to its creditor as collateral for a loan: *Gandy v. Collins*, 214 N. Y. 293, 108 N. E. 415. But an agreement that plaintiff should hold

§ 4752. **Distinguished from conditional sale.**<sup>4</sup>—Courts will take into consideration the intention of the parties in view of all the circumstances in determining the question whether a bill of sale is really a chattel mortgage or a sale, it being principally one of intent.<sup>5</sup>

§ 4756. **Absolute bill of sale at law and in equity.**<sup>6</sup>

corporate stock, then in the possession of another, as collateral security held a valid pledge, and not a chattel mortgage: *First Nat. Bank v. Exchange Nat. Bank*, 153 N. Y. S. 818; *Monasco v. State*, 105 Miss. 551, 62 So. 427.

<sup>4</sup> A contract of conditional sale transfers the legal title while a chattel mortgage evidences a lien against the legal title: *Jennings v. Swartz*, 86 Wash. 202, 149 Pac. 947. An agreement which binds a buyer of an automobile to pay on a specified date and stipulates that the title shall remain in the seller until payment, and on default that the seller may take possession of the automobile and sell it, is a conditional sale and not a chattel mortgage within *Gen. Stat. Fla.* 1906, § 2496; *Southern Hardw. & Co. v. Clark*, 201 Fed. 1, 119 C. C. A. 339; *Wynn v. Tyner*, 139 Ga. 765, 78 S. E. 185; *Puett v. Edwards*, 17 Ga. App. 645, 88 S. E. 36; *Montenegro-Riehm Music Co. v. Beuris*, 160 Ky. 557, 169 S. W. 986. *Contra* under *Rev. Civ. Stat. Tex.* 1911, art. 5654: *In re Raney*, 202 Fed. 996. And an instrument conveying property "free from any lien whatever" held a bill of sale conveying title, and not a mortgage, though it recited that on failure to pay the price on a given date the payee would have the right to take possession and sell at public outcry: *Tremere v. Barfield*, 12 Ga. App. 774, 78 S. E. 729; *John Deere Plow Co. v. Mowry*, 222 Fed. 1, 137 C. C. A. 539. It has been held in Georgia that a paper stipulating that the maker conveys certain personalty to secure a debt, and that upon payment of the debt the creditor will reconvey, is a bill of sale to secure a debt and not a mortgage: *Owens v. Bridges*, 13 Ga. App. 419, 79 S. E. 225. Though called a conditional sale, an agreement by which merchandise was trans-

ferred upon deferred payments with a provision that the business should be continued and stock kept up by new purchases, the vendor to have title as security, held in legal effect a "chattel mortgage," within *Stat.* 1913, § 2316b: *Lauerman Bros. Co. v. Riehl*, 156 Wis. 12, 145 N. W. 174; *Crowder v. Allen-West Commission Co.*, 213 Fed. 177, 129 C. C. A. 521. It was not a conditional sale, for the title passed to the purchaser and then back under the chattel mortgage where a seller of furniture took a chattel mortgage back to secure the price: *McMail v. Michaels*, 147 N. Y. S. 516. So where a bill of sale stated that the conveyance was security for a note, and that if the note was paid the bill of sale was to be null and void, it constituted a chattel mortgage: *Maynard v. Shaw*, 246 Pa. 330, 92 Atl. 204; *Jones v. Farmers' Nat. Bank (Okla.)*, 162 Pac. 681. Assignments of a company's future income as security for debt are held to be chattel mortgages within *Rem. & Bal. Code*, § 3660, which declares such instruments void unless recorded, especially as section 3659 provides that all kinds of personal property may be mortgaged: *Heermans v. Blakeslee*, 93 Wash. 595, 161 Pac. 489. It is held to constitute a mortgage where a transfer and assignment is executed by a borrower to a lender as trustee of all the borrower's one-half interest in a corporation as security for a loan: *Boyett v. Hahn*, 197 Ala. 439, 73 So. 79.

<sup>5</sup> *Keane v. Kibble*, 28 Idaho 274, 154 Pac. 972; *Zimmerle v. Childers*, 67 Ore. 465, 136 Pac. 349.

<sup>6</sup> The surrounding circumstances may determine whether a bill of sale, with an agreement to repurchase, is a chattel mortgage or conditional sale: *Rairden v. Hedrick*, 46 Mont. 510, 129 Pac. 498; *Dewit v. Bozeman*, 17 Ga.

§ 4757. **Verbal mortgages—Necessity for writing.**<sup>7</sup>—If a chattel mortgage was satisfied, a verbal agreement that it should continue as security did not continue the mortgage in view of the Alabama code, providing that a chattel mortgage is not valid unless made in writing.<sup>8</sup>

App. 666, 87 S. E. 1100; Klein v. Stubbe, 190 Ill. App. 211; Weber v. Towle, 97 Nebr. 233, 149 N. W. 406; Zimmerle v. Childers, 67 Ore. 465, 136 Pac. 349. Where an instrument purports to be a bill of sale and describes a debt and contains a defeasance clause, it is a chattel mortgage: Dewit v. Bozeman, 17 Ga. App. 666, 87 S. E. 1100. A valid chattel mortgage is created by a bill of sale of chattels with a separate defeasance: Sheldon v. McFee, 216 N. Y. 618, 111 N. E. 220. Title passes in a bill of sale of chattels, but does not under a chattel mortgage: Dewit v. Bozeman, 17 Ga. App. 666, 87 S. E. 1110. If instrument in the form of an absolute bill of sale was intended only as security, it may be treated as equitable mortgage: Farmer v. State, 18 Ga. App. 307, 89 S. E. 382. Both the general rule and Rev. Codes, § 5768, recognize that a bill of sale, though absolute on its face, may be in fact a chattel mortgage: Rairden v. Hedrick, 46 Mont. 510, 129 Pac. 498.

<sup>7</sup> An agreement intended to effect a mortgage lien on personalty or an equity therein, though it is lacking in some legal requisite, will be upheld in equity, and the party or purchaser regarded as a trustee for the benefit of the lienor as against the parties and purchasers with notice: Howard v. McPhail, 37 R. I. 21, 91 Atl.

12, Ann. Cas. 1917A, 186n. Because not in writing under Code 1907, § 4288, agreement that crop should be good for buggy purchased on credit held to give surety no lien on the crop: Johnson v. McFry, 13 Ala. App. 619, 68 So. 718. A chattel mortgage is valid as between the parties without writing, but as an instrument intended as security must be filed as against subsequent creditors and purchasers, it must for that purpose be in writing: Sheldon v. McFee, 216 N. Y. 618, 111 N. E. 220. It is held that an instrument is sufficiently definite to constitute a lien as to third persons where a chattel mortgage, duly witnessed and recorded on August 7, 1912, purported to have been signed on the — day of —, 1912, and described crops on certain lands: Todd v. Hurst Supply Co., 17 Ga. App. 98, 86 S. E. 255. A mortgage of crops contained only in the printed portion of a mortgage is void under Civ. Code S. C. 1912, § 4103, which provides that no chattel mortgage shall be good unless the property mortgaged shall be described in writing or typewriting, but not printing, on the face of the mortgage, as construed by the Supreme Court of the state: In re Manning, 206 Fed. 685.

<sup>8</sup> Interstate Lumber Co. v. Duke, 183 Ala. 484, 62 So. 845.

## CHAPTER CNLIV

### REQUISITES IN FORM AND EXECUTION OF INSTRUMENT

§ 4765. **In form.**—A mortgage on a stock of merchandise which provides that the mortgagor shall not dispose of any of it without the mortgagee's consent is valid.<sup>1</sup>

§ 4766. **Affidavit.**<sup>2</sup>—Where there was in fact only an agreement to make a loan, under the New Jersey statute, a mortgage was held void as to creditors, the annexed affidavit stating that the consideration was money loaned.<sup>3</sup>

§ 4779. **Description of property in general.**<sup>4</sup>—If the description is sufficient to put one acting with ordinary care on

<sup>1</sup> Bell-Wayland Co. v. Miller-Mitscher Co., 39 Okla. 4, 130 Pac. 593, Ann. Cas. 1915D, 780n. But a provision of a chattel mortgage that no second mortgage shall be given without written consent, which is neither asked nor given, does not have the effect of invalidating a second mortgage given in violation thereof: Ackerman v. C. C. Chapell Hardw. Co., 41 Okla. 275, 137 Pac. 349. To constitute a chattel mortgage, no particular form of words is necessary: Georgia Home Ins. Co. v. Hoskins, 71 Fla. 282, 71 So. 285.

<sup>2</sup> A first mortgage of personal property given to secure part purchase-price which was not accompanied by the affidavit of good faith required by Rem. & Bal. Code, § 3660, held void as against second mortgage given to secure mortgagor's prior indebtedness: Belcher v. Young, 90 Wash. 303, 155 Pac. 1060; In re Novelty Web Co., 236 Fed. 501, 149 C. C. A. 553; Lippincott v. Shivers, 86 N. J. Eq. 59, 97 Atl. 269; Mutual Inv. Co. v. Walton Mach. Co., 91 Wash. 298, 157 Pac. 682; Kato v. Union Oil Co., 92 Wash. 473, 159 Pac. 692. As between the parties, a chattel mortgage is valid, though not accompanied by an affidavit that it is executed in good faith, without intent to hinder, delay, or defraud creditors: Hare v.

Young, 26 Idaho 691, 146 Pac. 107. The mortgage was absolutely void as to creditors whose debts were in existence at the time the mortgage was executed when an affidavit as to consideration of chattel mortgage failed to state how the debt on which it was founded arose or was incurred, as required by the statute: Wilkinson v. Bohlen, 88 N. J. L. 680, 97 Atl. 279. Their intent to do everything necessary to make the instrument valid did not validate it where chattel mortgagors neither signed affidavit nor swore that mortgage was not to hinder or defraud creditors, as required by Civ. Code Cal., § 2957: In re Johnston, 220 Fed. 218.

<sup>3</sup> In re Novelty Web Co., 228 Fed. 1007; Kato v. Union Oil Co., 92 Wash. 473, 159 Pac. 692.

<sup>4</sup> A description in a chattel mortgage, which enables a third person by inquiries suggested by the instrument to identify the property, is sufficiently definite: Farmers' & C. State Bank v. Sutherland, 93 Nebr. 707, 141 N. W. 827, 46 L. R. A. (N. S.) 95, Ann. Cas. 1914B, 1250n; Hoblitt v. Farmers' State Bank (Okla.), 153 Pac. 1154; Hourigan v. Home State Bank (Okla.), 162 Pac. 699; Slimmer v. Meade County Bank, 34 S. Dak. 147, 147 N. W. 734; Pitluk v. Butler (Tex. Civ. App.), 156

inquiry, mere inaccuracies in the description of property are not fatal, if the subject is described so that it can be readily identified, even with the aid of extrinsic evidence.<sup>5</sup>

§ 4780. **Description of live stock.**<sup>6</sup>—The description of animals is sufficient if it, together with inquiries suggested by it,

S. W. 1136. A contract of sale which reserved title in the seller and described parts of complete wagons, and contained a stenciled legend that was, in fact, stenciled on the wagons covered by the contracts, held to contain a sufficient description to sustain them as chattel mortgages: *In re Raney*, 202 Fed. 1000. Description of property in a mortgage is not void for indefiniteness which refers to it as "all my shop tools and fixtures in my possession": *International Harvester Co. v. Davis*, 13 Ga. App. 1, 78 S. E. 770. Chattel mortgage which described property as "three new Michigan automobiles, forty horse power, No. —," and provided that property should not be moved from Oklahoma county, is not void for uncertainty in description: *Stiles v. City State Bank (Okla.)*, 156 Pac. 622. The description is sufficient, when recorded, to put subsequent creditors on inquiry, where a chattel mortgage describes the merchandise as a stock of goods, and gives the number of the lot and block and name of the town, county, and state in which it is located: *Bell-Wayland Co. v. Miller-Mitscher Co.*, 39 Okla. 4, 130 Pac. 593. Description held sufficient where property in chattel mortgage is described as "the entire stock of general merchandise located in A. Building, about \$1,500 being boxed in rear room of G.'s restaurant, value \$3,000": *Bank of Mendon v. Mell*, 185 Mo. App. 510, 172 S. W. 484. A mortgage on lumber is void which describes the property as 50,000 feet of "the last sawing": *Smith v. McCoy-Kessinger Lumber Co.*, 108 Ark. 162, 157 S. W. 735. A chattel mortgage describing the property as "3,500 bushels of marketable potatoes in a potato storehouse near the B. & A. R. R. station at Winterport" was held to be insufficient for want of definite description of the location of the potatoes in the storehouse, so as to

pass the title as against subsequent mortgages and bills of sale of the same property: *Connors v. Bucksport Nat. Bank*, 214 Fed. 847. It is held that a chattel mortgage upon a grain elevator, together with weights, scales and appurtenances will not include a roll-top desk kept in the office, as the term "appurtenances" applies only to machinery necessary to the operation of the elevator: *Dixon v. Ladd*, 32 S. Dak. 163, 142 N. W. 259, 46 L. R. A. (N. S.) 206n, Ann. Cas. 1916A, 253n. A chattel mortgage of "open accounts" does not include a note: *Ladd v. Ardmore State Bank*, 43 Okla. 502, 143 Pac. 170. Where the automobile was not in his possession and not usually kept at his place of business, a chattel mortgage, describing property as "a Regal Underslung Model N roadster automobile, now in possession of mortgagor and usually kept at his place of business" did not identify the property so as to impute notice to a third party not having actual notice: *Commercial Sav. Bank v. Brooklyn Lumber & Co. (Iowa)*, 160 N. W. 817. The requirement that a chattel mortgage must specify the property does not require such a complete description as will identify the property without the aid of parol evidence: *Gatlin v. Ed Matthews & Co.*, 16 Ga. App. 645, 85 S. E. 953; *Jones & Co. Auto Co. v. Lott*, 17 Ga. App. 834, 88 S. E. 719; *Ferrell-Michael Abstract & Co. v. McCormac (Tex. Civ. App.)*, 184 S. W. 1081. It is not necessary, as between the contracting parties, that a chattel mortgage should particularly describe the chattels covered by the mortgage: *Bonneviere v. Cole*, 90 Wash. 526, 156 Pac. 527.

<sup>5</sup> *Chattanooga State Bank v. Citizens' State Bank*, 39 Okla. 255, 134 Pac. 954; *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115.

<sup>6</sup> As between the parties, a description of the mortgaged property as "1,333 early spring lambs, branded

furnishes a reasonable basis for identification, but the suggestion of inquiry must be from the mortgage itself, and not merely in the minds of the parties.<sup>7</sup> Though no mention of the progeny is made in the mortgage, as between the mortgagor and the mort-

O—" is a sufficient description: *Hare v. Young*, 26 Idaho 691, 146 Pac. 107. A duly recorded mortgage of "two black mules, two and four years old, the same being now in possession of" the mortgagor, is held to be a sufficient description of the mules: *Overstreet Grain Co. v. Ford*, 113 Ark. 464, 168 S. W. 1080. Description held sufficient to charge the purchaser with notice, where the property in chattel mortgage was described as "one black mare mule colt eight months old": *Pitluk v. Butler* (Tex. Civ. App.), 156 S. W. 1136. Though the cattle are not kept on the quarter section mentioned, but on another section within a mile and a half thereof, a chattel mortgage, describing the cattle by brand and stating that they are in the mortgagor's possession on a certain quarter section of land, and that the mortgagor has no other property of such description in his possession is sufficient to put a subsequent mortgagor on notice: *Chattanooga State Bank v. Citizens' State Bank*, 39 Okla. 255, 134 Pac. 954. Description in a recorded chattel mortgage "one Jersey cow, unbranded, bought from Willie Gardner, Asherton, Texas," is sufficient to charge a purchaser with constructive notice: *Conley v. Dimmit County State Bank* (Tex. Civ. App.), 181 S. W. 271. The words, "also the wool clipped from said ewes," in a chattel mortgage are sufficient to cover future clippings: *Vorenberg v. Bosserman*, 17 N. Mex. 433, 130 Pac. 438. As against subsequent mortgages, the record of a chattel mortgage on one pair of bay horses describing the property as one pair of bay steers was insufficient: *Abernethy v. Starnes*, 164 N. Car. 162, 80 S. E. 157. The description was held insufficient where chattel mortgage described the property as "Forty head of three-year-old steers, weight about 1,200 lbs., color reds and roans. Worth about \$60 per head. The same is now in my possession in sections 14 and 15, L. township, M.

county, Iowa": *Simon Casady & Co. v. German Savings Bank*, 159 Iowa 149, 140 N. W. 401. Where it appeared that the mortgagor owned a large number of cows, description of mortgaged property as "fourteen cows" held insufficient as against a bona fide purchaser for value: *Moebus v. Collins*, 85 N. J. L. 430, 89 Atl. 986. Description of cattle covered by a chattel mortgage as "147 head of cattle," held too general: *State v. Hurt* (Mo.), 183 S. W. 333. A description of cattle as "100 head of coming two-year-old native Kansas steers branded," etc., located on certain premises of the mortgagor, is not sufficient to identify cattle found in another location without the brand: *Ehrke v. Tucker*, 99 Kans. 52, 160 Pac. 985. A recorded mortgage, describing "five black mare mules ranging from six to nine years," does not sufficiently describe them to afford notice thereof to an innocent purchaser for value taking subsequent mortgage on two black mules about 15 hands high and nine years old: *Milner Banking Co. v. Adair*, 18 Ga. App. 575, 90 S. E. 170. An express agreement between the mortgagor and the mortgagee that the offspring of animals should be subject to the mortgage will be enforced as an equitable lien notwithstanding Kirby's Dig., § 5397, which provides that the lien of a chattel mortgage shall not cover the offspring of a mortgaged animal: *Howell v. Walker*, 111 Ark. 362, 164 S. W. 746; *In re Thompson*, 164 Iowa 20, 145 N. W. 76, Ann. Cas. 1916D, 1210n. The offspring is covered, when born, by a chattel mortgage on the dam: *McCarver v. Griffin*, 194 Ala. 634, 69 So. 920, Ann. Cas. 1917C, 1172n. "Increase" does not cover wool clipped from sheep while the sheep are in the possession of the mortgagor: *Sorrels v. Sigel-Campion Live Stock Commission Co.*, 27 Colo. App. 154, 148 Pac. 279.

<sup>7</sup> *Ehrke v. Tucker*, 99 Kans. 52, 160 Pac. 985.

gagee, the unborn progeny of domestic animals follows the title to the mother and becomes a part of the security.<sup>8</sup>

§ 4782. **Crops to be raised by mortgagor.**<sup>9</sup>—A description of mortgaged wheat was sufficient which described it as "four hundred acres of wheat growing on 11-114-51 all in my possession in the county of Hamlin, South Dakota."<sup>10</sup>

§ 4786. **Effect of false description.**<sup>11</sup>—It was held that a mortgage of one "Maxwell four-passenger automobile, factory No. 32466," did not charge the purchaser of a "five-passenger Maxwell automobile, model 1-3 car, No. 2466" with notice.<sup>12</sup>

§ 4789. **Substitution of other property.**<sup>13</sup>

<sup>8</sup> *Dunton v. Kimball Bros. Co.*, 114 Maine 270, 95 Atl. 1038.

<sup>9</sup> Parol evidence being admissible to identify it, description in crop mortgage of all the grantor's crop of cotton of 100 acres now up and growing on the lands of a specified person held not fatally defective: In re Beard, 204 Fed. 129; *Anderson v. Chenault*, 208 Fed. 400, 125 C. C. A. 616; *First Nat. Bank v. Rome Mercantile Co.*, 14 Ga. App. 99, 80 S. E. 210; *Todd v. Hurst Supply Co.*, 17 Ga. App. 98, 86 S. E. 255; *Burlington State Bank v. Marlin Nat. Bank* (Tex. Civ. App.), 166 S. W. 499. A chattel mortgage is not void for uncertainty given on "all cotton and corn grown during the current season on lands fertilized with the fertilizer": *Hillis v. E. T. Comer & Co.*, 14 Ga. App. 30, 79 S. E. 930. Description by chattel mortgage of property covered as "200 bushels of corn of my 1912 crop from my said farm" held sufficient as against third persons, though the total crop did not amount to 200 bushels: *Mitchell v. Abernathy* 194 Ala. 608, 69 So. 824; *Whaley v. Bright*, 189 Ala. 134, 66 So. 644; *Hughes & Co. Supply Co. v. Bussey*, 14 Ala. App. 388, 70 So. 997; *First Nat. Bank v. Cazort & Co.*, 123 Ark. 605, 186 S. W. 86, L. R. A. 1917C, 8n; *Griggs Fertilizer Co. v. Adams-Oliff Co.*, 144 Ga. 564, 87 S. E. 776; *Brown v. Hughes*, 94 S. Car. 140, 77 S. E. 730; *Livingston v. Seaboard Air Line R. Co.*, 100 S. Car. 18, 84 S. E. 303; *Spiller v. W. J. Mann & Co.* (Tex. Civ. App.), 187 S. W. 1014. A chattel mortgage

which describes the property as the entire crop to be raised on plaintiff's farm in Faulkner county, or elsewhere in that county, is sufficiently definite to give all persons notice of the lien on any crop raised by the mortgagor on defendant's land in the county: *Storthz v. Smith*, 109 Ark. 552, 161 S. W. 183. The description in a chattel mortgage was held sufficient where it was given on certain specified bales of cotton to be grown: *Houssels v. Coe* (Tex. Civ. App.), 159 S. W. 864. The whole was subject to the tenant's crop mortgage, where part of a tenant's crop was raised by his son, without a cropping contract: *Maybank v. Lumpkin*, 189 Ala. 559, 66 So. 584.

<sup>10</sup> *Catlett v. Stokes*, 33 S. Dak. 278, 145 N. W. 554.

<sup>11</sup> A description of property in a chattel mortgage which is wholly false renders it void: *Morrison v. Elzy*, 190 Ill. App. 374.

<sup>12</sup> *McQueen v. Tenison* (Tex. Civ. App.), 177 S. W. 1053.

<sup>13</sup> An oral agreement between the mortgagor and mortgagee, that a mule substituted for one which was taken back on account of defects should be subject to the mortgage, is, as between the parties, enforceable in equity where a chattel mortgage was given to secure the payment of a note for the purchase-price of mules: *Howell v. Walker*, 111 Ark. 362, 164 S. W. 746; *Bright v. Mack*, 197 Ala. 214, 72 So. 433; *Miller v. Biggs* (Mo. App.), 183 S. W. 713. It was held that a printed provision of a chattel mortgage cov-

§ 4792. **Construction.**<sup>14</sup>—It has been held that a chattel mortgage, being a creature of statute and contrary to the common law, must be strictly construed against those seeking to enforce it.<sup>15</sup>

ering goods, written on an ordinary farm mortgage, that "all increase from said stock of whatever kind or nature, the above-described stock being kept in my possession on — Section No. —, Township No. —, Range No. —," did not cover additions to or substitutions in the stock of goods: *In re Thompson*, 164 Iowa 20, 145 N. W. 76, Ann. Cas. 1916D, 1210n. The language quoted was too vague and general to be good as to third parties as a lien on lumber cut after the mortgage was executed in a chattel mortgage embracing all the personal property of the mortgagor "and also the full cut of the mill pine and cypress": *Farmers' Union Warehouse Co. v. Wells*, 65 Fla. 350, 61 So. 745.

<sup>14</sup>The instruments together evidenced the agreement, and the receipt was admissible in evidence, where mortgagee, upon delivery of chattel mortgage, gave mortgagor, who accepted a receipt to effect that mortgage was payable \$10 each month: *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618; *Beavers v. Farmers' &c. Bank* (Mo. App.), 163 S. W. 529. Note and mortgage should be construed together, but note governs in case of conflict: *Lumbermen's Trust Co. v. Title Ins. &c. Co.*, 248 Fed. 212.

<sup>15</sup>*W. W. Kimball Co. v. Polakow*, 268 Ill. 344, 109 N. E. 313; *Kennedy Furniture Co. v. Griffin*, 194 Ill. App. 530.



## CHAPTER CXLV

### DEBT SECURED AND CONSIDERATION IN GENERAL

§ 4805. The debt secured.—In general.<sup>1</sup>—A bill of sale may be made to secure a present, past or future debt.<sup>2</sup>

§ 4811. Description of note secured.<sup>3</sup>—Because by inadvertence the note is not signed by the mortgagor, a chattel mortgage which is given to secure the note, and which correctly describes the note and the amount secured as shown by the note, is not void.<sup>4</sup>

§ 4813. Mortgage to secure future advances.<sup>5</sup>

<sup>1</sup> A stipulation is valid in a chattel mortgage that provides that it should be security for any other debt due from the mortgagor: *Farmers' State Bank v. Bell* (Tex. Civ. App.), 176 S. W. 922. Provision of notes secured by chattel mortgage for attorney's fees if suit were commenced to enforce payment is valid and enforceable against the maker: *Fell v. Frierson*, 171 Cal. 351, 153 Pac. 229. The words "in trust" is equivalent to the term "mortgage" and a purchase-price note given for fertilizer, which stipulated that crops on lands fertilized with the fertilizer should be held "in trust" for payment of the note, held to create a mortgage upon the crops mentioned: *Hillis v. E. T. Comer & Co.*, 14 Ga. App. 30, 79 S. E. 930. A mortgage executed to secure a note of \$100 and a future indebtedness, held not to secure an indebtedness incurred after full settlement of the indebtedness contemplated by the parties when the mortgage was executed: *Cantrell v. Cawyer* (Tex. Civ. App.), 162 S. W. 919. And where the parties intended the clause to cover future indebtedness for store supplies, a chattel mortgage, with a printed clause covering future indebtedness up to \$150, held not to cover an indebtedness of \$155 for a stump puller: *Jenkins v. Morgan* (Tex. Civ. App.), 187 S. W. 1091.

<sup>2</sup> *Skinner v. Elliott*, 17 Ga. App. 511, 87 S. E. 759. Trust deed held to indicate that it was intended to include future advances up to the date the mortgage is due: *Word v. Cole*, 122 Ark. 457, 183 S. W. 757; *Paschal v. Bohannon* (Okla.), 158 Pac. 365; *Greig v. Mueller*, 66 Ore. 27, 133 Pac. 94, 46 L. R. A. (N. S.) 722; *Brunson v. Dawson State Bank* (Tex. Civ. App.), 175 S. W. 438; *Thomas v. Graves*, 89 Vt. 339, 95 Atl. 643.

<sup>3</sup> A mortgage is not void because of a discrepancy in dates because the date shown in the mortgage did not agree with the date in the note: *Catlett v. Stokes*, 33 S. Dak. 278, 145 N. W. 554. Where a chattel mortgage provided that the note secured thereby "became due and payable on or before 35 months after date of option of the legal holder thereof," it was held to state no time for the maturity of the debt, and to constitute a defect of which a third party may take advantage: *Snite v. Gehrke*, 189 Ill. App. 382.

<sup>4</sup> *Lierman v. O'Hara*, 153 Wis. 140, 140 N. W. 1057, 44 L. R. A. (N. S.) 1153n.

<sup>5</sup> A mortgage to secure future advances up to the time of foreclosure is valid, but such purpose must clearly appear from the instrument, and can not be presumed where the mortgage does not contain a general description

§ 4818. **Delivery in general.**<sup>6</sup>—No particular form or ceremony is necessary to constitute a delivery.<sup>7</sup>

§ 4819. **Delivery and acceptance necessary.**<sup>8</sup>—It is held that merely retaining possession of a chattel mortgage does not amount to an acceptance in the absence of an intention to accept it.<sup>9</sup> Where a creditor once refuses to accept a chattel mortgage, he can not afterward accept it without the consent of the debtor.<sup>10</sup>

§ 4822. **Recording and filing in general.**<sup>11</sup>—Though the mortgage was not recorded, a mortgagee who took possession

of the indebtedness so as to put one who examines it on notice: *Word v. Cole*, 122 Ark. 457, 183 S. W. 757; *Howell v. Walker*, 111 Ark. 362, 164 S. W. 746; *Law Sprinkle Mercantile Co. v. Hause* (Tex. Civ. App.), 184 S. W. 737. This is true though it does not show its object: *Scofield Implement Co. v. Minot Farmers' Grain Assn.*, 31 N. Dak. 605, 154 N. W. 527.

<sup>6</sup> A chattel mortgage has no validity until actually delivered, and the date it is signed and acknowledged is immaterial, if it was not delivered until later: *Levy v. Horn*, 90 Misc. 624, 153 N. Y. S. 913; *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

<sup>7</sup> *Scofield Implement Co. v. Minot Farmers' Grain Assn.*, 31 N. Dak. 605, 154 N. W. 527.

<sup>8</sup> A chattel mortgage which has not been accepted has no validity: *Wertheimer Bag Co. v. Hill*, 14 Ala. App. 623, 71 So. 618.

<sup>9</sup> *First Nat. Bank v. McCreary*, 66 Ore. 484, 132 Pac. 718, 134 Pac. 1180.

<sup>10</sup> *First Nat. Bank v. McCreary*, 66 Ore. 484, 132 Pac. 718, 134 Pac. 1180.

<sup>11</sup> Where the mortgagee does not take possession of the mortgaged chattels something is required to take the place of change of possession, such as recording the mortgage, to affect creditors of and subsequent purchasers from the mortgagor without notice: *Allison v. Teeters*, 176 Mich. 216, 142 N. W. 340. Under Rev. St. Maine, ch. 93, § 1, it is essential for the mortgage to be valid as against the mortgagor's creditors that a chattel mortgage be recorded, where possession is not given: In re Alden, 233 Fed. 160; *Fourth Nat. Bank v. Willingham*, 213 Fed. 219,

129 C. C. A. 563; *Massachusetts &c. Ins. Co. v. Kemper*, 220 Fed. 847, 136 C. C. A. 593; *People's Nat. Bank v. Mulholland*, 224 Mass. 448, 113 N. E. 365; *Spokane Merchants' Assn. v. First Nat. Bank*, 86 Wash. 367, 150 Pac. 434. Under Comp. Laws 1907, §§ 150, 2473, a chattel mortgage is invalid as against all persons who give credit to mortgagor at any time subsequent to execution and previous to filing without notice of its existence: *Volker Lumber Co. v. Utah &c. Lumber Co.*, 45 Utah 603, 148 Pac. 365, Ann. Cas. 1917D, 1158n; *O'Neil v. Brooks*, 180 Mich. 540, 147 N. W. 537; *Pacific Coast Biscuit Co. v. Perry*, 77 Wash. 352, 137 Pac. 483. The mortgage never became a lien on the crop against strangers under *Kirby's Dig.*, § 5407, where a chattel mortgage on crops was handed to the recorder by the mortgagee with verbal instruction to file but not to record it: *Nix v. Watts*, 121 Ark. 346, 181 S. W. 127. The inclusion of chattels in a real estate mortgage and recording of such instrument in the records of real estate mortgages is not constructive notice of any lien upon the personalty, and is void as to subsequent creditors under *Rem. & Bal. Code*, §§ 3661, 3662, 3668: *Bonneviere v. Cole*, 90 Wash. 526, 156 Pac. 527. At the expiration of such year the mortgage ceases to be valid as against creditors and can not be revived by any act of the parties, under *Hurd's Rev. St. Ill.* 1909, ch. 95, § 4, providing for the extension of the lien of a chattel mortgage not to exceed one year by the filing of an affidavit, etc.: In re *Tengwall Co.*, 201 Fed. 82, 119 C. C. A. 420.

after condition broken, acquired a good title as against a creditor of the mortgagor.<sup>12</sup>

§ 4823. **Effect of recording or filing.**<sup>13</sup>—A chattel mortgage is a lien on the property as against third parties from the time it is filed for record and this is true even though the recording officer omits to index or record.<sup>14</sup>

<sup>12</sup> McClendon v. First Nat. Bank, 112 Ark. 187, 165 S. W. 952.

<sup>13</sup> A recorded chattel mortgage is constructive notice to a purchaser, not only of its existence, but also of its provision: Shorter v. Dail, 122 Md. 101, 89 Atl. 329; In re Cooper's Estate, 226 Fed. 317; Brown v. Rankin, 100 S. Car. 371, 84 S. E. 1001; National Bank v. Elkins, 37 S. Dak. 479, 159 N. W. 60; University State Bank v. Steeves, 85 Wash. 55, 147 Pac. 645. As between the parties an unrecorded chattel mortgage is binding: Woods v. Davis, 153 Ky. 99, 154 S. W. 905; Martin v. Bankers' Trust Co., 18 Ariz. 55, 156 Pac. 87; McClendon v. First Nat. Bank, 112 Ark. 187, 165 S. W. 952; Judkins v. State, 123 Ark. 28, 184 S. W. 407; Kinder v. King, 180 Ill. App. 62; Commonwealth Trust Co. v. Salem Light & Co., 77 N. H. 146, 89 Atl. 452; Gandy v. Collins, 214 N. Y. 293, 108 N. E. 415; Hof v. Mager, 168 App. Div. 318, 154 N. Y. S. 60; Rhode Island Warehouse Co. v. W. H. Holt Mfg. Co., 36 R. I. 192, 89 Atl. 706; Howard v. McPhail, 37 R. I. 21, 91 Atl. 12, Ann. Cas. 1917A, 186n; Watson v. First Nat. Bank, 82 Wash. 65, 143 Pac. 451; Reynolds v. Morton, 22 Wyo. 174, 136 Pac. 795. A chattel mortgage, properly registered, although subsequent in execution to a prior mortgage defectively registered, gave the mortgagee therein a prior lien: Abernethy v. Starnes, 164 N. Car. 162, 80 S. E. 157. But the prior registration of a mortgage on a crop will not defeat the landlord's lien upon the crop conferred by Rev. St. 1895, arts. 3235-3237: Neblett v. Barron (Tex. Civ. App.), 160 S. W. 1167; Brown v. Hughes, 94 S. Car. 140, 77 S. E. 730; American Type Founder Co. v. First Nat. Bank (Tex. Civ. App.), 156 S. W. 300. Though

he did not know of the other mortgage, where the holder of an unrecorded first mortgage, under which possession was not taken, obtained from a third person possession of the mortgaged automobile and then recorded his mortgage after the execution of another unrecorded mortgage on it held not to validate his mortgage so as to give it priority: Dixon v. Tyree, 92 Kans. 137, 139 Pac. 1026; Neely v. Reynolds, 196 Ala. 581, 72 So. 124; Smith v. E. T. Davenport & Co., 12 Ala. App. 456, 68 So. 545; McCabe v. Lee, 123 Ark. 82, 184 S. W. 448; Murray Co. v. Satterfield, 125 Ark. 85, 187 S. W. 927; Burlington State Bank v. Marlin Nat. Bank (Tex. Civ. App.), 166 S. W. 499; Brinberry v. White (Tex. Civ. App.), 167 S. W. 205; J. M. Radford Grocery Co. v. Pace (Tex. Civ. App.), 172 S. W. 146; Caldwell v. Yarbrough (Tex. Civ. App.), 186 S. W. 350. It is held that where a chattel mortgage which is not entitled to be recorded is placed on record, it does not receive any added efficacy by reason of record, and is good only between the parties and those having knowledge of it: Guyer v. Union Trust Co., 55 Ind. App. 472, 104 N. E. 82. A chattel mortgage which is made by one not the owner of the property, or by the owner in a fictitious name, and recorded, is not constructive notice to any one dealing with the owner in his true name: L. Fish Furniture Co. v. Reliable Storage & Co., 187 Ill. App. 6; Ozark City Bank v. Planters' & Co. Bank (Ala.), 73 So. 72.

<sup>14</sup> Murray Co. v. Satterfield, 125 Ark. 85, 187 S. W. 927; Seymore v. Dabbs, 170 Mo. App. 151, 155 S. W. 493; Dabney v. Hathaway, 51 Okla. 658, 152 Pac. 77; Hourigan v. Home State Bank (Okla.), 162 Pac. 699;

§ 4824. **Requisites of valid filing and recording.**—The record of a chattel mortgage which does not comply with the statute because not acknowledged before a notary public and attested by only one witness is not constructive notice as against third parties in good faith and without notice.<sup>15</sup>

§ 4825. **Place of filing.**<sup>16</sup>—The word “residence” means actual residence as contradistinguished from his domicile or political residence as used in the Georgia statute requiring that the mortgage must be recorded in the county of the mortgagor’s residence.<sup>17</sup>

§ 4826. **Time of filing or recording.**<sup>18</sup>—Where the statute requires that chattel mortgages shall be “immediately recorded,”

Murray Co. v. Randolph (Tex. Civ. App.), 174 S. W. 825; Murray Co. v. Deal (Tex. Civ. App.), 175 S. W. 718.

<sup>15</sup> Merchants’ Nat. Bank v. Frazier (Okla.), 159 Pac. 647. Nor one not properly acknowledged: Vorenberg v. Bosserman, 17 N. Mex. 433, 130 Pac. 438. Nor one with a defective affidavit: Bollschweiler v. Packer House Hotel Co., 83 N. J. Eq. 459, 91 Atl. 1027. But it was held that it was properly recorded and valid where chattel mortgage, not disclosing that the mortgagor was a corporation, was recorded on the affidavit of the subscribing witness that he saw M. & Co. sign and deliver it, without stating that he saw its officers do so: Bank of Dillon v. Murchison, 213 Fed. 147, 129 C. C. A. 499. A bill of sale may be recorded as a chattel mortgage, provided it is duly attested, acknowledged, and certified if it secures a debt: Zimmerle v. Childers, 67 Ore. 465, 136 Pac. 349.

<sup>16</sup> In Indiana a chattel mortgage which is recorded in the county where the property is located, but not in the county where the mortgagor resides, is void as to third persons under Burns’ Rev. Stat. 1914, § 7472: Fife v. Ohio Inv. Co., 52 Ind. App. 108, 100 N. E. 392. A chattel mortgage must be recorded in the county of the mortgagor’s residence under Ky. Stat., § 495: Burbank v. Robek, 157 Ky. 524, 163 S. W. 457; In re Hughes, 214 Fed. 270; Argo v. Sylacauga Mercantile Co., 12 Ala. App.

442, 68 So. 534; Judkins v. State, 123 Ark. 28, 184 S. W. 407; Horton v. Wright, 113 Maine 439, 94 Atl. 883; Foy v. Hurley, 172 N. Car. 575, 90 S. E. 582; First Nat. Bank v. Baldridge, 37 S. Dak. 606, 159 N. W. 130. It is required under Rev. Laws 1910, § 4031, that a chattel mortgage be filed in the county in which the chattel was at the execution of the mortgage, and where the chattel remains at the time of such filing: Cowart v. Allen, 37 Okla. 708, 134 Pac. 66. In Texas it is held that the mortgage should be recorded in the county where the property was situated when the mortgage was executed, and not where it was located when it was recorded: Burlington State Bank v. Marlin Nat. Bank (Tex. Civ. App.), 166 S. W. 499; Bailey v. Culver (Tex. Civ. App.), 175 S. W. 1083. Recording mortgage in the county where the property was situated at the time the mortgage was executed, but after its removal, is not notice to third parties: Sublett v. Hurst (Tex. Civ. App.), 164 S. W. 448; Cowart v. Allen, 37 Okla. 708, 134 Pac. 66.

<sup>17</sup> Farmer v. Phillips, 12 Ga. App. 732, 78 S. E. 353.

<sup>18</sup> The mortgagee is not guilty of negligence in failing to record it within the 10 days after execution limited by Burns’ Rev. Stat. 1914, § 7472, where a chattel mortgage was executed on October 3d, but which was not delivered until November 13th: Guyer v. Union Trust Co., 55 Ind. App. 472, 104 N. E. 82. In New

it means as soon as may be with reasonable dispatch under the circumstances of the case.<sup>19</sup>

§ 4827. **Refiling instrument.**<sup>20</sup>—An affidavit extending a chattel mortgage which is given as security for a note, extends the maturity of the indebtedness due on such note.<sup>21</sup>

§ 4828. **Law of the place of contract.**<sup>22</sup>—It is held that the validity of a chattel mortgage on after-acquired property is governed by the law of the state in which the mortgage is executed.<sup>23</sup>

Jersey a delay of five days in recording a chattel mortgage was held invalid as to creditors who became such prior to the recording of the mortgage: *Bollschweiler v. Packer House Hotel Co.*, 83 N. J. Eq. 459, 91 Atl. 1027; *Bollschweiler v. Packer House Hotel Co.*, 84 N. J. Eq. 502, 95 Atl. 549. Likewise three days was not immediate: *Gulden v. Lucas*, 83 N. J. Eq. 354, 95 Atl. 1085. It was held in Massachusetts that a mortgage of personal property recorded within 15 days subsequent to the date the mortgage was acknowledged was recorded within 15 days from the "date written in the mortgage," as required by Rev. Laws, ch. 198, § 1: *Old Colony Trust Co. v. Medfield &c. St. R. Co.*, 215 Mass. 156, 102 N. E. 484.

<sup>19</sup> *Black v. Mullins & Co.*, 86 N. J. L. 463, 92 Atl. 281; *Gulden v. Lucas*, 83 N. J. Eq. 354, 93 Atl. 1085.

<sup>20</sup> It is held that Civ. Code, § 2089, which provides that a mortgage of personalty ceases to be valid as against creditors of mortgagor and subsequent purchasers in good faith after the expiration of three years from its filing, unless within 30 days before such expiration a copy and statement of the amount of the existing debt was filed anew with the register of deeds, applies only to persons who are purchasers in good faith after the expiration of three years, when there has been no renewal: *Catlett v. Stokes*, 33 S. Dak. 278, 145 N. W. 554. It is the rule in Michigan under Comp. Laws 1897, § 9526, that an affidavit of renewal filed by mortgagee of stock of goods before general creditor obtained any lien upon or interest in the goods, though after the time specified by statute, left the rights of the parties

the same as if affidavit was filed within specified period: *Symons Bros. & Co. v. Brink*, 194 Mich. 389, 160 N. W. 638; *Hunt v. Gragg*, 19 N. Mex. 450, 145 Pac. 136; *First State Bank v. King*, 37 Okla. 744, 133 Pac. 30, 47 L. R. A. (N. S.) 668n; *Grubb v. Lashus*, 42 Utah 254, 129 Pac. 1029; *Best v. Felger*, 77 Wash. 115, 137 Pac. 334. It was invalid as to a judgment creditor of the mortgagor, where a chattel mortgage was not renewed within a year, as required by Lien Law, § 235: *Protter v. Lovell*, 91 Misc. 417, 155 N. Y. S. 275. Filing of a replevin suit by mortgagee is equivalent to taking possession, and hence it was unnecessary for the plaintiff to refile his mortgage in accordance with Lien Law, § 235, after the commencement of the suit: *Crutts v. Daly*, 84 Misc. 192, 145 N. Y. S. 850.

<sup>21</sup> *Cooke Brewing Co. v. Wolf*, 173 Ill. App. 80.

<sup>22</sup> If valid under the laws of the sister state, a chattel mortgage executed in a sister state, covering property situated there, and while the parties thereto are domiciled there, will be enforced in Indiana: *Cable Co. v. McElhoe*, 58 Ind. App. 637, 108 N. E. 790; *John Deere Plow Co. v. Mowry*, 222 Fed. 1, 137 C. C. A. 539. A chattel mortgage is governed as to registration, and its validity and priority determined by the law of the state where the property was situated, where at the time of the execution of the mortgage the property was situated in a state other than that in which the mortgagor was domiciled and the mortgage executed: *In re Nuckols*, 201 Fed. 437.

<sup>23</sup> *Grimes v. Clark*, 234 Fed. 604, 148 C. C. A. 370.

## CHAPTER CXLVI

### RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE

§ 4835. Rights of possession as between the parties.<sup>1</sup>—When payment is made of a first mortgage on chattels, a second mortgage immediately becomes a first lien and the second mortgagee is entitled to possession.<sup>2</sup>

<sup>1</sup> A chattel mortgage is valid though mortgagor retains possession: *Rairden v. Hedrick*, 46 Mont. 510, 129 Pac. 498. The mortgagee is entitled to possession immediately upon its execution without a provision in a chattel mortgage, expressly or impliedly giving the mortgagor the right to possession: *Horton v. Hovator*, 11 Ala. App. 413, 66 So. 939; *Shorter v. Dail*, 122 Md. 101, 89 Atl. 329. A chattel mortgagee may use his own discretion as to taking possession of the property pending maturity of the debt in the absence of a statute or agreement to the contrary; and the mortgagee may take possession where the mortgagor is permitted to retain possession for a particular purpose and abandons such purpose and the property: *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115. Even though the mortgage was not then due, where a chattel mortgage provides that the mortgagee may take possession in case of insecurity, he is justified in taking possession of the mortgaged chattel, where the mortgagor absconded, leaving the chattels without a custodian: *Crutts v. Daly*, 84 Misc. 192, 145 N. Y. S. 850. In Iowa, where a chattel mortgagor retains possession of the property, the title does not pass to the mortgagee, and the mortgage is only security for the debt: *Des Moines Packing Co. v. Uncaphor*, 174 Iowa 39, 156 N. W. 171. A mortgagee of personal property is entitled to possession thereof, although the title remains in the mortgagor under the express provision of Code 1897, § 2911; *Krebs v. Sawyer*, 162 Iowa 593, 144 N. W.

345. After mortgagor's default and after possession taken by the mortgagee of personal property, the mortgagor has no estate in the mortgaged property: *Callagan v. American Trust &c. Bank*, 196 Ill. App. 102. Chattel mortgage which authorizes mortgagee to take possession upon default or if he feels unsafe, is valid and entitles him to take possession without the mortgagor's consent, if he can do so peaceably: *Jesse French Piano &c. Co. v. Elliott* (Tex. Civ. App.), 166 S. W. 29; *McClendon v. First Nat. Bank*, 112 Ark. 187, 165 S. W. 952; *Greene v. Washington*, 105 S. Car. 137, 89 S. E. 649; *State Exchange Bank v. Smith* (Tex. Civ. App.), 166 S. W. 666. And where a chattel mortgage authorized the mortgagee to take possession on default, and the mortgagee acquired possession peaceably to repair the chattel when the last instalment of the price had been overdue for more than a year, it could refuse to return the chattel until the balance was paid: *Thompson v. White Sewing Mach. Co.*, 179 Mo. App. 276, 166 S. W. 895. A provision that the mortgagee may go on the mortgagor's premises and take the property does not entitle him to take by force and threats without the mortgagor's consent: *Ray v. Navarre*, 47 Okla. 438, 147 Pac. 1019. The mortgagee, under Rev. Laws 1910, § 4039, is entitled to the immediate possession of the mortgaged chattels where they are removed from the county: *Bank of Commerce v. Gaskill*, 44 Okla. 728, 145 Pac. 1131.

<sup>2</sup> *Ford v. Coweta Hardw. Co.*

§ 4837. **Mortgagor's right to sell the property.**—It is held in some of the states that a chattel mortgage on a stock of merchandise in the possession of the mortgagor, who continues the business with the knowledge of the mortgagee, is fraudulent as against creditors.<sup>3</sup>

§ 4840. **Rights of subsequent purchasers.**<sup>4</sup>—A purchaser who bought without notice is not guilty of a conversion of mortgaged property and the mortgagee has no right of action against him, where hogs were subject to a verbal chattel mortgage.<sup>5</sup>

§ 4842. **Rights of assignees.**—A transfer of notes secured by a chattel mortgage without assignment of the mortgage merely carries with it the equitable title to the mortgage.<sup>6</sup>

(Okla.), 153 Pac. 865. The holder as assignee of a prior subsisting mortgage on an engine, securing a small balance due on a note which he purchased, is entitled to possession as against a subsequent mortgagee, who neither paid his claim, nor offered to do so by a tender of the amount before bringing suit in replevin: *Weber Implement Co. v. Dunard*, 181 Mo. App. 658, 164 S. W. 685.

<sup>3</sup> *Baillargeon v. Dumoulin*, 165 App. Div. 730, 151 N. Y. S. 112; *Maynard v. Shaw*, 246 Pa. 330, 92 Atl. 204. But it is held in Indiana that a provision in a mortgage upon a stock of goods which authorizes the mortgagor to sell the property in the usual course of business and to apply the proceeds of such sales, after the payment of the expenses, to the payment of the debt or to the replenishing of the stock, does not render the mortgage invalid as to the creditors of the mortgagor: *Vermillion v. National Bank* (Ind. App.), 105 N. E. 530. And in Washington a chattel mortgage on a stock of goods securing a part of the price and authorizing the mortgagor in possession to reduce the stock to \$12,000, paying one-half of the reduction to the mortgagor on the debt, held not void as a fraud on creditors: *R. N. Nason & Co. v. Stack*, 81 Wash. 147, 142 Pac. 477; *Schwabacher Bros. Co. v. Palmer*, 4 Alaska 75; *Kahmke v. Weber*, 187 Mo. App. 698, 173 S. W. 76; *Newman v. Peyser*, 80 Misc. 404, 141 N. Y. S. 422;

*Baillargeon v. Dumoulin*, 148 N. Y. S. 443; *Greig v. Mueller*, 66 Ore. 27, 133 Pac. 94, 46 L. R. A. (N. S.) 722; *Morgan v. Dayton Coal & Co.*, 134 Tenn. 228, 183 S. W. 1019.

<sup>4</sup> One parting with something of value without notice of a chattel mortgage held a purchaser for valuable consideration, and entitled to protection pro tanto, the mortgage not being recorded: *Donahoo Horse & Co. v. Durick*, 193 Ala. 456, 69 So. 545; *Springs v. Cole*, 171 N. Car. 418, 88 S. E. 721; *Burlington State Bank v. Marlin Nat. Bank* (Tex. Civ. App.), 166 S. W. 499; *Ridgill v. E. L. Wilson Hardw. Co.* (Tex. Civ. App.), 178 S. W. 668. A subsequent mortgagee of personalty is in the same position as would be a subsequent purchaser as to a prior unrecorded mortgage, under Gen. Stat. 1906, § 2496: *Spellman v. Beeman*, 70 Fla. 575, 70 So. 589. Within the registration laws, one who takes a mortgage to secure an antecedent debt is a "purchaser for value": *Bank of Colerain v. Cox*, 171 N. Car. 76, 87 S. E. 967. A purchaser at an execution sale under a judgment recorded by such a creditor has the protection given by the Chattel Mortgage Act (1 Comp. Stat. 1910, p. 463) to creditors and subsequent purchasers and mortgagees against an unrecorded chattel mortgage: *Black v. Mullins & Co.*, 86 N. J. L. 463, 92 Atl. 281.

<sup>5</sup> *May v. Merchants' & Nat. Bank* (Tex. Civ. App.), 152 S. W. 1194.

<sup>6</sup> It is held in Tennessee that a transfer of notes secured by a chattel

§ 4843. **Rights of mortgagee after forfeiture.**<sup>7</sup>—A mortgagee has the legal title to the mortgaged chattels and after default has the legal right to their possession.<sup>8</sup>

§ 4844. **Right of redemption.**<sup>9</sup>

mortgage without assignment of the mortgage in his own name merely carries with it the equitable title to the mortgage: *Richmond Type & Foundry v. Carter*, 133 Tenn. 489, 182 S. W. 240. A bill of sale given as security for a note is transferred when the note is sold: *Farmer v. State*, 18 Ga. App. 307, 89 S. E. 382. A mortgagee, after default having assigned the debt, the right to seize and sell the property conferred by the mortgage vested in the assignee: *Elder v. Jones*, 106 Miss. 489, 64 So. 212. An assignee of a chattel mortgage can not recover for an alleged conversion of the mortgaged chattels which took place prior to the assignment of the mortgage: *First Nat. Bank v. McCreary*, 66 Ore. 484, 132 Pac. 718, 134 Pac. 1180.

<sup>7</sup> That the holder of a chattel mortgage obtains possession of the property after default without the mortgagor's consent, or even by force, will not entitle the mortgagor to replevy the property: *Geiser Mfg. Co. v. Davis*, 110 Ark. 449, 162 S. W. 59. On the failure of the mortgagor to pay the debt at maturity, a chattel mortgagee is entitled to the possession of the mortgaged chattels: *Black v. Slocumb Mule Co.*, 8 Ala. App. 440, 62 So. 308. The mortgagee was not bound to declare a forfeiture and take possession of the mortgaged property upon a default in payment of one of the instalments, but, if it saw fit to do so, could wait until the entire debt secured by the mortgage became due, where a note secured by a chattel mortgage provided for payment on or before 23 months after date, payment to be made in monthly

instalments: *Keelin v. Postlewait Co.*, 259 Ill. 130, 102 N. E. 205; *Twaits v. Willy H. Lau Co.*, 176 Ill. App. 588; *Chase Bros. Piano Co. v. Conners*, 182 Ill. App. 418; *Furman v. Melnick*, 154 N. Y. S. 100. A chattel mortgage has three several remedies against the mortgagor: first, an action at law for the debt; second, an action to recover possession; and, third, a foreclosure of the mortgage and sale of the property: *Ex parte Logan*, 185 Ala. 525, 64 So. 570.

<sup>8</sup> A mortgagee has the legal title to the mortgaged chattels, and after condition broken has the right to possession: *Tiedt v. Boyce*, 122 Minn. 283, 142 N. W. 195; *Thompson v. White Sewing Mach. Co.*, 179 Mo. App. 276, 166 S. W. 895; *Stockyards State Bank v. Johnson*, 52 Okla. 32, 152 Pac. 585.

<sup>9</sup> A chattel mortgagor may redeem before the sale under foreclosure proceedings: *Greene v. Washington*, 105 S. Car. 137, 89 S. E. 649. Though not strictly complying with the mortgage, a chattel mortgagor has the right of redemption: *Plumiera v. Bricka*, 79 Misc. 468, 140 N. Y. S. 171; *Brothers v. Russell*, 195 Ala. 643, 71 So. 450. Before foreclosure, at least, every mortgagor has an equity of redemption, existing independent of the terms of the contract as an incident of all mortgages: *Horton v. Hovater*, 11 Ala. App. 413, 66 So. 939. Under Code 1907, § 4091, subds. 2, 3, the purchaser at execution sale of the interest of a mortgagor of personalty had the equity of redemption: *Horton v. Hovater*, 11 Ala. App. 413, 66 So. 939.



## CHAPTER CXLVII

### SUBJECT-MATTER OF CHATTEL MORTGAGES

§ 4860. **In general.**<sup>1</sup>—Except as to increase of female animals and certain corporation property, the thing mortgaged must be in existence to create a lien.<sup>2</sup>

§ 4861. **What present interest subject to mortgage.**<sup>3</sup>—A vendee in a conditional sale can mortgage such possession and title as he has.<sup>4</sup>

§ 4867. **Mortgages of future personal property.**<sup>5</sup>—It is

<sup>1</sup> A liquor tax certificate is not a chattel which can be mortgaged: *Bachmann-Bechtel Brewing Co. v. Gehl*, 154 App. Div. 849, 139 N. Y. S. 807.

<sup>2</sup> *Cheatham v. Tennell*, 170 Ky. 429, 186 S. W. 128, L. R. A. 1917C, 1n; *Isbell v. Slette*, 52 Mont. 156, 155 Pac. 503. Nor can a crop be mortgaged until it is planted: *Bank of Cusseta v. Ellaville Guano Co.*, 143 Ga. 312, 85 S. E. 119; *Isbell v. Slette*, 52 Mont. 156, 155 Pac. 503. And the mortgagor of crops must have a present interest in the land upon which they were to be raised: *Littleton v. Abernathy*, 195 Ala. 65, 70 So. 282; *Sellers & Co. v. Hardaway*, 188 Ala. 388, 66 So. 460; *Pinckard v. Cassels*, 195 Ala. 353, 70 So. 153; *Phillips-Neely Mercantile Co. v. Banks*, 8 Ala. App. 549, 63 So. 31.

<sup>3</sup> It is necessary that the mortgagor have title before he can create a valid lien by chattel mortgage: *Titusville Iron Co. v. New York*, 207 N. Y. 203, 100 N. E. 806; *Isbell v. Slette*, 52 Mont. 156, 155 Pac. 503; *Herrmann v. Minnesota Elevator Co.*, 27 N. Dak. 235, 145 N. W. 821; *Cattlemen's Trust Co. v. Turner* (Tex. Civ. App.), 182 S. W. 438; *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115. Where the mortgagee has possession but not title he can not create a valid lien by chattel mortgage: *Greene v. Carmichael*, 24 Cal. App.

27, 140 Pac. 45; *Real Estate Bank & Co. v. Baldwin Locomotive Works*, 145 Ga. 831, 90 S. E. 49. That a chattel mortgagor of property belonging to another person made false representations to the mortgagee concerning his title, and thereby obtained credit and defrauded the mortgagee, could not affect the title of the real owner, where the owner did not acquiesce in or authorize such representations: *Mizell Live Stock Co. v. Smith*, 14 Ga. App. 593, 81 S. E. 904.

<sup>4</sup> *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 109 N. E. 880; *Levy v. Horn*, 90 Misc. 624, 153 N. Y. S. 913. One who obtains title by fraud can create a valid lien by mortgage to another in good faith and for value: *Payne v. Brownlee*, 196 Ill. App. 108.

<sup>5</sup> Mortgages or contracts pledging subsequently acquired property will be enforced in equity as between mortgagor and mortgagee as agreements for liens and as against purchasers with notice, but as against creditors they will have no force or effect: *Titusville Iron Co. v. New York*, 207 N. Y. 203, 100 N. E. 806; *Clark v. Grimes*, 232 Fed. 190; *Grimes v. Clark*, 234 Fed. 604, 148 C. C. A. 370; *Hill v. Morris*, 124 Ark. 132, 186 S. W. 609; *Murray Co. v. Satterfield*, 125 Ark. 85, 187 S. W. 927; *Penton v. Hall*, 140 Ga. 235, 78 S. E. 917; *Hogg v. Fuller*, 17 Ga. App. 442, 87

held in Washington that future earnings may be the subject of a chattel mortgage.<sup>6</sup>

§ 4868. **Delivery and possession of mortgaged chattels.**<sup>7</sup>—There was no change of possession so as to render recording unnecessary where a chattel mortgagee merely gave the mortgagor permission to let another have the property for a short time, there being no understanding that he was taking possession for the mortgagee.<sup>8</sup>

S. E. 760; Commonwealth Trust Co. v. Salem Light &c. Co., 77 N. H. 146, 89 Atl. 452. But see Williams v. Noyes &c. Mfg. Co., 112 Maine 408, 92 Atl. 482, Ann. Cas. 1916D, 1224n. It is held in an Arkansas case that a chattel mortgage on lumber to be manufactured in the future is valid: Smith v. McCoy-Kessinger Lumber Co., 108 Ark. 162, 157 S. W. 735. A provision in a chattel mortgage of pianos is valid where it is provided that the mortgagee may exchange

them for new pianos on condition that the mortgage should immediately attach to the new pianos: Williams v. W. W. Kimball Co., 188 Mo. App. 646, 176 S. W. 478.

<sup>6</sup> Heermans v. Blakeslee, 93 Wash. 595, 161 Pac. 489.

<sup>7</sup> Either the mortgagee must record his mortgage or take possession of the chattels: Gulden v. Lucas, 81 N. J. Eq. 106, 85 Atl. 902.

<sup>8</sup> O'Neil v. Brooks, 180 Mich. 540, 147 N. W. 537.

## CHAPTER CXLVIII

### PARTNERSHIP CONTRACTS—FIRM AS DISTINCT ENTITY—FIRM NAME

§ 4875. **Introductory.**<sup>1</sup>—An interchangeable relation of principal and agent is indispensable to the existence of a partnership.<sup>2</sup>

§ 4876. **Firm as distinct entity.**<sup>3</sup>

§ 4878. **Firm name—Choice, display, failure to choose.**<sup>4</sup>—Borrowers from a firm doing business under an assumed name, who knew with whom they were dealing, will not be relieved in equity from paying the debt because of the firm's failure to comply with the statute requiring them to file a statement giving the names of the individual members.<sup>5</sup>

§ 4879. **Use of firm name.**<sup>6</sup>—A partnership may be sued

<sup>1</sup> A partnership is the association of two or more, for the purpose of carrying on business together, and dividing its profits and sharing the losses: *Westcott v. Gilman*, 170 Cal. 562, 150 Pac. 177, Ann. Cas. 1916E, 437n; *Meagher v. Fogarty*, 129 Minn. 417, 152 N. W. 833; *Municipal Paving Co. v. Herring*, 50 Okla. 470, 150 Pac. 1067.

<sup>2</sup> *Dixon v. Dixon (Mo.)*, 181 S. W. 84; *Croft v. Bain*, 49 Mont. 484, 143 Pac. 960.

<sup>3</sup> A "partnership," regardless of its name, is an entity *prima facie* distinct from any other partnership or person: *Floyd v. Boyd*, 16 Ga. App. 43, 84 S. E. 494; *Smith v. Smith (Iowa)*, 160 N. W. 756; *Holmes v. Alexander*, 52 Okla. 122, 152 Pac. 819. But see, to the contrary, *Abbott v. Anderson*, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668n, Ann. Cas. 1916A, 741n.

<sup>4</sup> Since no part of the firm name was fictitious, under Ky. Stat., § 199b, subsecs. 1, 4, conduct of mercantile business by Richey father and son as partners under the firm name of

"Richey & Son," without filing certificate required by statute, held not an offense, since no part of the name was assumed or fictitious: *Commonwealth v. Richey*, 171 Ky. 330, 188 S. W. 397, L. R. A. 1917B, 697; *Commonwealth v. Bassett*, 171 Ky. 385, 188 S. W. 459.

<sup>5</sup> *Missaukee Farm &c. Co. v. Ferris*, 193 Mich. 286, 159 N. W. 490.

<sup>6</sup> Where it showed the names of the partners and that they were doing business under the company's name, a contract by a partnership, signed "Lakeside Dredging Company" by the partners, held not invalid, under Pub. Acts Mich. 1907, No. 101; *Carland v. Heckler*, 233 Fed. 504, 147 C. C. A. 390. It was held that no suit can be maintained by a firm of attorneys on an obligation assigned the firm where a certificate of partnership was not filed: *Sloman v. Bender*, 189 Mich. 258, 155 N. W. 581; *Farquharson v. Wadkins (Okla.)*, 153 Pac. 1160; *Wilson Bros. Garage v. Tudor*, 89 Vt. 522, 95 Atl. 794; *Powelson v. Seattle*, 87 Wash. 617, 152 Pac. 329. But see as to re-

at least in some jurisdictions in its firm name if the names of the partners composing it are set out in the complaint and summons.<sup>7</sup>

ceivers of firm: *Tripp v. Deupree* (Okla.), 158 Pac. 923. Where a firm composed of two persons adopted the name of one of them and adds "& Co.," it was held not to have adopted an assumed name within the prohibition of Pub. Acts 1907, No. 101, and the partners may sue as partners: *Zemon v. Trim*, 181 Mich. 130, 147 N. W. 540; *Cross v. Leonard*, 181 Mich. 24, 147 N. W. 540.

<sup>7</sup> *Irvine v. Church*, 227 Fed. 252; *Illinois Cent. R. Co. v. Avery*, 190

Ala. 241, 67 So. 414; *Illinois Cent. R. Co. v. Kilgore*, 12 Ala. App. 358, 67 So. 707; *Van Dyk v. Mosterd*, 171 Iowa 3, 153 N. W. 206; *Style v. Lantrip* (Tex. Civ. App.), 171 S. W. 786; *Western Grocery Co. v. K. Jata & Co.* (Tex. Civ. App.), 173 S. W. 518; *Commonwealth Bonding &c. Ins. Co. v. Meeks* (Tex. Civ. App.), 187 S. W. 681. Contra, see *Law Reporting Co. v. Texas Grain &c. Co.* (Tex. Civ. App.), 168 S. W. 1001.

## CHAPTER CXLIX

### PARTNERSHIP CAPITAL AND PROPERTY

§ 4890. **Definition of "capital" and "property."**—The capital advanced by a partner need not be in cash, but may consist of lands or goods or any other thing of value.<sup>2</sup>

§ 4892. **Proportionate shares of partners.**<sup>3</sup>—It is held that a contract to remunerate an agent by paying him a share of the profits of the business does not of itself make the agent a partner.<sup>4</sup>

<sup>1</sup> It is held that each partner is under an implied obligation to furnish a fourth of the additional sum necessary, where a contract between four persons stipulates that each shall furnish an equal amount sufficient to option a coal field, and share alike in all options: *Jackson v. Jackson*, 224 Fed. 888, 140 C. C. A. 332.

<sup>2</sup> *Minter v. Minter*, 80 Ore. 369, 157 Pac. 157. As to right or power of one partner or a majority to sell all or substantially all of the firm assets, see *Reiser v. Johnson* (Okla.), 166

Pac. 723, L. R. A. 1918A, 924n; *Kay v. Chapman* (Sask.), 11 D. L. R. 726, 24 West. L. R. 80.

<sup>3</sup> It is held that the lessors of an ice plant under contract for share of net profits with lessees are partners of the lessees, and liable, as such, to plaintiff workman injured while repairing boiler in plant, through lessees' negligence: *Fink v. Brown* (Tex. Civ. App.), 183 S. W. 46.

<sup>4</sup> *Studebaker Corporation v. Dodds*, 161 Ky. 542, 171 S. W. 167.

## CHAPTER CL

### RIGHTS AND LIABILITIES OF PARTNERS INTER SE

§ 4905. **Good faith.**<sup>1</sup>—Partners bear a relation of trust and confidence as to one another, and the standard by which they are tried in equity is higher than the ordinary standards of business; questionable dealing of any kind will not be tolerated.<sup>2</sup>

§ 4909. **Interest—On capital.**—And so, where plaintiff brought suit upon a partnership agreement, it was held that interest could not be allowed, except by special agreement, where plaintiff was to furnish certain information and the defendant was to furnish the necessary money to purchase and sell stock.<sup>3</sup>

§ 4910. **Interest—On advances.**—But interest is properly chargeable when agreed upon and so the defendant was chargeable with interest on advances actually made under a partnership contract for the management of a farm for a year, whereby the plaintiff was to furnish the money needed at the customary rate of interest.<sup>4</sup>

§ 4912. **Contribution.**<sup>5</sup>—And where some members of a firm become insolvent, the solvent members must contribute where it has been paid by one partner.<sup>6</sup> Where a firm of attor-

<sup>1</sup> Partners must exercise the most scrupulous good faith to one another: *Guggenheim v. Guggenheim*, 95 Misc. 332, 159 N. Y. S. 333. A member of the firm who acts as trustee for his associate is bound to exercise the highest degree of diligence and good faith, and to render exact account of all moneys received: *Swanton v. Jacks*, 30 Cal. App. 66, 157 Pac. 11.

<sup>2</sup> *Stem v. Warren*, 96 Misc. 362, 161 N. Y. S. 247.

<sup>3</sup> *Morgan v. Child*, 47 Utah 417, 155 Pac. 451.

<sup>4</sup> *Wally v. Heck*, 125 Ark. 597, 185 S. W. 444.

<sup>5</sup> A claim for contribution against a copartner will not be rejected unless the firm is an illegal one or unless the act relied on as the basis of

the claim was not only illegal, but the illegality was such that it ought to have been known to the partner claiming contribution: *In re Ryan's Estate*, 157 Wis. 576, 147 N. W. 993, Ann. Cas. 1916D, 840n; *Webb v. Butler*, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916D, 815n; *Sperry v. Tulley*, 76 W. Va. 106, 84 S. E. 1067. Where subsequent to the partnership agreement property is purchased to be used in the firm business, the purchase-money debt is a firm liability, and if one partner discharges the same he is entitled to contribution from the others: *Sperry v. Tulley*, 76 W. Va. 106, 84 S. E. 1067.

<sup>6</sup> *Sperry v. Tulley*, 76 W. Va. 106, 84 S. E. 1067.

neys, in good faith, but under a mistake of the law, rendered services in settling an estate contrary to the terms of the will and were compensated for their services, and the court directed that the fee be returned to the estate, a partner who made the refund was entitled to contribution from a copartner.<sup>7</sup>

**§ 4914. Contribution—Right of partner to salary.**<sup>8</sup>—It is held that no compensation for services will be allowed a partner who performed all the services for the firm unless there was a special agreement for such compensation.<sup>9</sup> Where one partner has had full charge of the business, while the others have tacitly or expressly acquiesced therein and devoted their entire time to their own affairs, an agreement to compensate will be more readily implied than where all are giving equal attention to the business, though no contract to pay for the services of a partner will be implied from the mere fact that he gave more time, labor and attention to the business than the others.<sup>10</sup>

**§ 4916. Rights of action between partners.**<sup>11</sup>—It is held where the defendant refused to perform his contract with the plaintiff looking to the purchase of real property, that it was not necessary to sue in equity for dissolution and an accounting, but that the plaintiff might sue for breach of contract.<sup>12</sup>

<sup>7</sup> In re Ryan's Estate, 157 Wis. 576, 147 N. W. 993, Ann. Cas. 1916D, 840n.

<sup>8</sup> Where there are circumstances from which an agreement to pay for such services may fairly be implied, a partner may recover for services in the partnership business: *Mondamin Bank v. Burke*, 165 Iowa 711, 147 N. W. 148. See also *Maynard v. Maynard* (Ga.), 93 S. E. 289, L. R. A. 1918A, 81, and note to *Rains v. Weiler* in L. R. A. 1917F, 575.

<sup>9</sup> *Cole v. Cole*, 119 Ark. 48, 177 S. W. 915; *Blair v. Fraley*, 172 Ky. 570, 189 S. W. 886; *Kyle v. Griffin*, 76 W. Va. 214, 85 S. E. 559. And this,

though one partner became insane and another died: *Cole v. Cole*, 119 Ark. 48, 177 S. W. 915.

<sup>10</sup> *Mondamin Bank v. Burke*, 165 Iowa 711, 147 N. W. 148.

<sup>11</sup> Where a partnership has been wrongly broken up, either partner may bring action for value to him of continuance of agreement during covenanted term: *Kebart v. Arkin*, 232 Fed. 454, 146 C. C. A. 448.

<sup>12</sup> *Taylor v. Nelson*, 26 Cal. App. 681, 147 Pac. 1189; *Manny v. Burke*, 174 App. Div. 654, 160 N. Y. S. 879. See also *Reiser v. Johnston* (Okla.), 166 Pac. 723, L. R. A. 1918A, 924.

## CHAPTER CLI

### RIGHTS AND LIABILITIES AS TO THIRD PERSONS

§ 4925. **Contracts binding upon partnership.**<sup>1</sup>—Each partner has authority to deal with and to sell the choses in action belonging to the partnership.<sup>2</sup> A partner does not bind his co-partner by purchasing goods for a business which is not connected with the firm.<sup>3</sup>

§ 4926. **“Apparent” scope of partner’s authority.**<sup>4</sup>—It is held that one partner can not modify a contract which the other partner made individually.<sup>5</sup>

§ 4928. **Particular kinds of contracts—Negotiable paper.**<sup>6</sup>—A partner has no implied authority to bind the members of the

<sup>1</sup> One of the partners does not have authority to bind the firm for a purchase of lumber for a strictly private purpose, wholly foreign to the firm’s business, of which the seller was apprised on the face of the transaction: *Vinegar Bend Lumber Co. v. Howard*, 186 Ala. 451, 65 So. 172. A partner can not defeat recovery on a partnership note given for the price on the ground that the purchase was without the scope of the partnership where he, as a member of a real estate firm, consented to the purchase of an automobile by the firm: *Felker v. John F. Meyer & Co. Milling Co.*, 123 Ark. 619, 185 S. W. 276. A guaranty signed by one of the members of the firm, and who signed the names of the others, is binding where an underwriting agreement made the members of a firm managers of the syndicate: *Union Land Co. v. Gwynn*, 216 N. Y. 664, 110 N. E. 162. In partnership the firm may, as to third parties, be bound by the apparent as well as by the actual scope of a partner’s authority, but, as between themselves, partners may limit the scope of their mutual agency by agreement: *Coady v. Igo*, 91 Conn. 54, 98 Atl. 328. One dealing with a partnership will not be bound by any pri-

vate agreement of partners as to authority of one of them, unless he was aware of the agreement and was advised by partner claiming its protection that he would not be bound by the unauthorized act of his partner: *Williams v. Carson*, 126 Ark. 618, 191 S. W. 401.

<sup>2</sup> *Little v. Britton*, 189 Ala. 10, 66 So. 694; *Milwaukee Land Co. v. Rue-sink*, 50 Mont. 489, 148 Pac. 396; *Liebert v. Reiss*, 174 App. Div. 308, 160 N. Y. S. 535.

<sup>3</sup> *Gimbel v. Martinson*, 157 N. Y. S. 458.

<sup>4</sup> Without his copartner’s knowledge and assent, a partner can not bind his copartner to any contract not reasonably within the scope of the partnership: *Anderson v. Guymon* (Okla.), 151 Pac. 863; *Burke v. Mountain Timber Co.*, 224 Fed. 591. It is held one of the partners can not cancel a contract of the firm where cancellation would practically terminate the business for which it was formed: *W. D. Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171. <sup>5</sup> *Youtsey v. Lemley*, 169 Iowa 401, 151 N. W. 491.

<sup>6</sup> The other partner is not bound by the indorsement of the name of a mercantile firm upon a note for an



firm by a note under seal containing warrant of attorney authorizing confession of judgment.<sup>7</sup>

§ 4929. **Particular kinds of contracts—Mortgages.**—The rights of a partnership mortgagee were not prejudiced by an attempted transfer by one partner of his individual interest in partnership property.<sup>8</sup>

§ 4930. **Particular kinds of contracts—Employment.**<sup>9</sup>—It has also been held that a member of a partnership engaged in banking has no authority to bind his copartners by a contract to pay a commission for the sale of stock in a corporation to be organized to take over the business of the firm.<sup>10</sup>

individual debt of the partner who made the indorsement: *First Nat. Bank v. Sanders*, 162 Ky. 374, 172 S. W. 689. A partner who borrows money professedly for the firm, and executes therefor a note in the firm name, thereby binds all the partners, and the burden is not on the lender to show that he was not cognizant of the fraud: *Clement Nat. Bank v. Connelly*, 88 Vt. 55, 90 Atl. 794; *In re C. H. Kendrick & Co.*, 226 Fed. 978; *In re Evans*, 235 Fed. 635; *Stockhausen v. Johnson*, 173 Iowa 413, 155 N. W. 823; *Montgomery-Ferguson Co. v. Hardie*, 139 La. 644, 71 So. 931; *Frazier v. Cottrell*, 82 Ore. 614, 162 Pac. 834; *Hill v. First State Bank* (Tex. Civ. App.), 189 S. W. 984. But, the holder can not recover from the firm without showing the assent of all the partners, where the signature of a firm is designated as that of a surety on a note, or where there is anything in the appearance of a note to charge the holder with knowledge that the signature is used by way of accommodation: *Clement Nat. Bank v. Connelly*, 88 Vt. 55, 90 Atl. 794; *Lewis v. Isbell Nat. Bank* (Ala.), 73 So. 655. Where the intent appeared to bind the firm, where defendants were partners, the fact that only one of them had signed a notice and an order for the payment of money to plaintiff did not affect the right of the plaintiff to recover: *Behrenfeld v. Breedlove*, 27 Cal. App. 419, 150 Pac. 71. Where the payee was without notice and acted in good faith, a trading partnership is liable on a note made in its name by one of its

members, though he made it without authority and appropriated the proceeds to his own use: *First Nat. Bank v. Webster*, 130 Minn. 277, 153 N. W. 736. Proof that the firm is a trading partnership creates an implied authority in each partner to execute notes in furtherance of the partnership business: *Exchange State Bank v. Jacobs*, 97 Kans. 798, 156 Pac. 771; *Roberts v. Curry Grocery Co.*, 18 Ga. App. 53, 88 S. E. 796. In the absence of express authority or a showing that the sale was necessary to carry on the partnership business or pay its debts, a sale of bonds by one partner in a nontrading partnership formed for the construction of a drainage ditch held not binding on the partnership: *Tilden v. Pederson*, 88 Wash. 254, 152 Pac. 1021. One partner can not bind his former partner on a note made after dissolution of the firm in the absence of authority: *Shaw v. Gunby*, 188 Mo. App. 659, 176 S. W. 548.

<sup>7</sup> *Funk v. Young*, 254 Pa. 548, 99 Atl. 76.

<sup>8</sup> *National Citizens' Bank v. McKinley*, 129 Minn. 481, 152 N. W. 879.

<sup>9</sup> The plaintiff may recover from the individual defendants on the theory of partnership with the corporation though the corporation was to have exclusive charge of selling lands for which sale plaintiff was employed as agent: *Moore v. Thorpe*, 133 Minn. 244, 158 N. W. 235.

<sup>10</sup> *In re Farmers' & C. Bank*, 194 Mich. 200, 160 N. W. 601.

§ 4932. **Notice to partner.**<sup>11</sup>—All the partners are charged with notice, where one member of a partnership, holding a judgment against a bankrupt, had notice of the bankrupt proceedings.<sup>12</sup>

§ 4933. **Liability of partner upon firm obligations.**<sup>13</sup>—It is the rule in Oregon that primarily a partnership debt is the obligation of the partnership, and secondarily the obligation of the individual partners, and that the liability of the individuals is contingent and the assets of the partnership must be exhausted before the individuals are obliged to pay out of their own estates.<sup>14</sup>

§ 4934. **Creditors of partnership.**<sup>15</sup>

§ 4936. **Liability for debt on change of firm.**<sup>16</sup>—An agreement by a new firm which is formed from an old one by the addi-

<sup>11</sup> Notice to one partner is notice to all if it has reference to a matter relating to a transaction within the scope of the firm's business: *Northwestern Transfer Co. v. Investment Co.*, 81 Ore. 75, 158 Pac. 281. Co-partners are not imputed with the knowledge obtained by a partner outside the scope of the firm's business: *Anthony v. Jeffress*, 172 N. Car. 378, 90 S. E. 414. But knowledge of negligence on the part of the director of a corporation is not imputable to one dealing with the corporation merely because he is partner with one of the directors: *Anthony v. Jeffress*, 172 N. Car. 378, 90 S. E. 414.

<sup>12</sup> *Claffin v. Wolff*, 88 N. J. L. 308, 96 Atl. 73.

<sup>13</sup> Partners are jointly and severally liable: *Dinwiddie v. Glass*, 111 Miss. 449, 71 So. 745; *Bank of Tupelo v. Hulsey*, 112 Miss. 632, 73 So. 621; *Bakmazian v. Tatosian*, 161 N. Y. S. 450; *Anderson v. Stayton State Bank*, 82 Ore. 357, 159 Pac. 1033.

<sup>14</sup> *Anderson v. Stayton State Bank*, 82 Ore. 357, 159 Pac. 1033.

<sup>15</sup> The bank, after collecting proceeds, might apply them toward liquidation of partnership's past-due indebtedness, even though plaintiff had an individual interest in proceeds of note pledged by joint owner, without plaintiff's knowledge or consent, with defendant bank for its loan to part-

nership: *Bank of Tupelo v. Hulsey*, 112 Miss. 632, 73 So. 621. Without a showing that he was not a partner, plaintiff, suing bank for interest in note pledged to it to secure loan to partnership, could not recover his interest in proceeds which bank claimed to apply to past-due partnership obligations: *Bank of Tupelo v. Hulsey*, 112 Miss. 632, 73 So. 621.

<sup>16</sup> Notice to the creditor of the firm that a member had withdrawn from the firm did not relieve the retiring member of liability for the debt, unless the creditors agreed to the release: *Clinchfield Fuel Co. v. Lundy*, 130 Tenn. 135, 169 S. W. 563; *Webb v. Butler*, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916D, 815n; *Mission Fixture Co. v. Potter*, 26 Cal. App. 691, 148 Pac. 223; *Smith v. Jamison*, 170 App. Div. 78, 157 N. Y. S. 507. The retiring partner becomes a surety for his former partner, where one partner continues the business after retirement of the other and agrees to assume the firm's debts: *Grigg v. Empire State Chemical Co.*, 17 Ga. App. 385, 87 S. E. 149. A dissolution agreement, obligating the remaining partner to pay all the debts of the firm, obligates him to pay a note, although signed by the partner who had retired: *Keels v. Ashworth* (Tex. Civ. App.), 187 S. W. 1008. Where the creditor did not release the retiring

tion of a new member, to pay the debts of the original firm, must have the assent of all the members of the new firm.<sup>17</sup>

§ 4937. **Ratification.**<sup>18</sup>—It is held that a firm is bound, if a partner's indorsement of a note in the partnership name for the benefit of third persons is assented to by the partners.<sup>19</sup>

§ 4938. **Estoppel.**<sup>20</sup>—Where the seller did not rely on the application, defendant was not estopped from denying that he

partner, such retiring partner, who sold out to his two partners, who assumed a partnership indebtedness, was bound on the note, and the creditor was entitled to a judgment against him: *Abernathy Rigby Co. v. McDougle & Co.* (Tex. Civ. App.), 187 S. W. 503. Unless the creditor has actual knowledge of the dissolution, a retiring partner is not relieved from liability to a prior customer of the firm, continuing to deal with it. It is further held that publication in a newspaper is not actual notice to one previously dealing with the firm: *Wood v. J. W. Jefferies & Co.*, 117 Va. 193, 83 S. E. 1074; *Philadelphia & Iron Co. v. Kuecken*, 191 Ill. App. 161; *Lehigh Valley Coal Sales Co. v. Kuecken*, 194 Ill. App. 511; *Stockhausen v. Johnson*, 173 Iowa 413, 155 N. W. 823; *Ring Furniture Co. v. Bussell*, 171 N. Car. 474, 88 S. E. 484; *Hendley v. Bittinger*, 249 Pa. 193, 94 Atl. 831, L. R. A. 1915F, 711n. But, if there was nothing to induce a belief that he was still a member, a retiring partner is not liable to a creditor who first dealt with the firm thereafter, though he gave no notice of his retirement: *Raywinkle v. Southern Coal Co.*, 117 Ark. 283, 174 S. W. 524. It was held in an Illinois case that the subsequent partner became liable, even though an order for goods was given before he became a member of a partnership, where, after he became such, the partner ordering the goods agreed that the items of the account were correct and impliedly agreed to pay therefor: *Peterson & Co. v. Thompson*, 192 Ill. App. 589.

<sup>17</sup> *Webb v. Butler*, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916D, 815n.

<sup>18</sup> A deed in writing and under seal, which is made by one partner of the

firm, may be ratified by the other partner by parol: *National Citizens' Bank v. McKinley*, 129 Minn. 481, 152 N. W. 879. "Ratification" means the adoption by one of an act as done for him and for his benefit, that was done under circumstances that would not bind him but for the adoption: *Samstag v. Ottenheimer*, 90 Conn. 475, 97 Atl. 865; *McDougall v. McDonald*, 86 Wash. 334, 150 Pac. 628. Where the other partner had no notice or knowledge of the payment, there can be no ratification of one partner's payment of an individual debt with partnership funds or assets, without its consent: *Baker-McGrew Co. v. Union Seed & Co.*, 125 Ark. 146, 188 S. W. 571. A partner will be held to have ratified the trade, and will be bound by it, where he raised no objection to trade whereby defendant received two mules and a wagon until check for part of the money had been delivered: *Williams v. Carson*, 126 Ark. 618, 191 S. W. 401. The partner ratified the loan and was liable on the note where he had authorized his partner to manage the firm's business and to borrow money, and who with knowledge that money had been borrowed and applied to the partnership use did not object: *Bank of Morton v. Etheridge*, 112 Miss. 208, 72 So. 902.

<sup>19</sup> *Lewis v. Isbell Nat. Bank* (Ala.), 73 So. 655.

<sup>20</sup> Though not a partner in fact, one may be estopped by conduct to deny liability as a partner: *In re McDonald's Estate*, 167 Iowa 582, 149 N. W. 897; *Conner v. Ray*, 195 Ala. 170, 70 So. 130; *United States Wood Preserving Co. v. Lawrence*, 89 Conn. 633, 95 Atl. 8; *In re McDonald's Estate*, 167 Iowa 582, 149 N. W. 897; *Studebaker Corporation v. Dodds*, 161 Ky.

was a partner, in an action for the price of goods sold the firm, by the fact that he represented in an application for a liquor license that he was a partner.<sup>21</sup> Nor is one estopped to deny that he was in fact a partner when he held himself out as a partner if the party dealing with him knew that he was not a partner.<sup>22</sup>

542, 171 S. W. 167. Where a firm holds a person out as partner, or as authorized to represent it, held estopped from contesting liability for debts contracted by him: *State v. C. S. Jackson & Co.*, 137 La. 931, 69 So. 751; *Lockett v. Zimmerman*, 185 Ill. App. 58; *Schwier v. Hurlburt*, 184 Mich. 698, 151 N. W. 603. Plaintiff, after notice of dissolution, and after dealing with other partner, held

estopped from alleging defendant's liability for the goods in an action for conversion of gas and electric fixtures furnished by plaintiff to defendant's former firm: *Mission Fixture Co. v. Potter*, 26 Cal. App. 691, 148 Pac. 223.

<sup>21</sup> *Meharg Liquor Co. v. Davis*, 189 Ala. 483, 66 So. 576.

<sup>22</sup> *In re McDonald's Estate*, 167 Iowa 582, 149 N. W. 897.

## CHAPTER CLII

### DISSOLUTION

§ 4951. **By operation of law.**<sup>1</sup>—It was held in a recent case that the partnership estate was liable for damages for their employé's death, where the employé of two partners was so injured that he died afterward from a negligent explosion which instantly killed one of the partners.<sup>2</sup>

§ 4952. **By act of partners.**<sup>3</sup>—A sale, by one of two partners, of his entire interest in the business to the remaining partner dissolves the firm.<sup>4</sup>

§ 4953. **By decree.**<sup>5</sup>—It is held that neglect and injury to

<sup>1</sup> The death of a partner dissolves the firm: *Murray v. Keeley Institute*, 190 Mich. 295, 157 N. W. 87. Death dissolves a partnership, but the community of interest subsists long enough to enable the survivors to wind up and settle partnership affairs: *Big Four Implement Co. v. Keyser*, 99 Kans. 8, 161 Pac. 592, L. R. A. 1917C, 166n.

<sup>2</sup> *Fairfield v. Bichler*, 195 Mo. App. 45, 190 S. W. 32.

<sup>3</sup> When the particular transaction or venture for which it was organized is concluded the partnership is at an end: *Roberts v. Nunn* (Tex. Civ. App.), 169 S. W. 1086. A partnership at will may be terminated at any time at the pleasure of either partner: *Ruth v. Flynn*, 26 Colo. App. 171, 142 Pac. 194; *Marnet Oil & C. Co. v. Staley*, 218 Fed. 45, 133 C. C. A. 108; *First International Bank v. Brown*, 130 Minn. 210, 153 N. W. 522; *Mulvey v. Anderson*, 187 Mo. App. 430, 173 S. W. 738. A partnership is dissolved by any change in its personnel: *Webb v. Butler*, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916D, 815n. But a purchase of assets of the firm which is induced by fraudulent representations of the partners does not dissolve the firm, and a partner may bind the copartner: *Schwier v. Hurlburt*, 184 Mich. 698, 151 N. W. 603. A

dissolution is not effected by the wrongful exclusion of plaintiff from the business of a partnership, by defendant: *Smith v. Smith* (Mo. App.), 183 S. W. 1126. A mere settlement of firm obligations whereby one partner conveyed land to the other, in consideration of his assumption of the debts of the firm, does not work as a dissolution of the firm, but is only evidence thereof: *Stockhausen v. Johnson*, 173 Iowa 413, 155 N. W. 823. By mutual consent, a partnership may be terminated at any time: *Hardin v. Robinson*, 162 N. Y. S. 531; *Black v. Hunter*, 169 Cal. 632, 147 Pac. 463; *Ruth v. Flynn*, 26 Colo. App. 171, 142 Pac. 194. It was held that the partnership was dissolved where one partner acquiesced in the other's notice of dissolution by also sending out notices of dissolution, though the articles provided that it should continue until mutually dissolved: *Frear v. Lewis*, 166 App. Div. 210, 151 N. Y. S. 486.

<sup>4</sup> *In re Suprenant*, 217 Fed. 470; *Parry v. Parry*, 92 Misc. 490, 155 N. Y. S. 1072; *Haworth v. Jackson*, 80 Ore. 132, 156 Pac. 590.

<sup>5</sup> The partnership may be terminated by fraud in keeping the books which the contract made the basis for a division of the profits: *Frankfort Const. Co. v. Meneely* (Ind. App.), 112 N.

live stock and farm implements and destruction of a farm building are grounds for dissolution of a partnership.<sup>6</sup>

§ 4954. **Post-dissolution transactions.**<sup>7</sup>—The trust relation continues to exist between the partners as to the business and property after dissolution.<sup>8</sup>

§ 4955. **Surviving partner.**<sup>9</sup>—The surviving partner is vested with some discretion as to the manner of winding up the firm's business and the time to be taken therefor.<sup>10</sup>

E. 244. In spite of provisions of the contract to the contrary, a conversion of partnership funds to his own use by one of the partners is ground for a refusal to continue the relation: *Frankfort Const. Co. v. Meneely* (Ind. App.), 112 N. E. 244.

<sup>6</sup> *Lisco v. Husmann*, 98 Nebr. 276, 152 N. W. 383.

<sup>7</sup> Under a contract made by the firm before dissolution, a materialman can recover from it for material furnished after its dissolution: *Asbestos Mfg. &c. Co. v. Lennig-Rapple Engineering Co.*, 26 Cal. App. 177, 146 Pac. 188. A partnership can not terminate its liability under the contract by dissolving the firm, organizing a corporation, and transferring its agency contract to the corporation without plaintiff's consent where it contracted to pay plaintiff one-third of the net profits made from the sale of a player-piano: *Armstrong v. Henley*, 182 Mo. App. 320, 170 S. W. 402. The contract of a partnership to cut and haul the timber on certain lands is not for personal services, and one of the partners can carry it out on the retirement of the other partner: *W. D. Reeves Lumber Co. v. Davis*, 124 Ark. 143, 187 S. W. 171. After dissolution of the partnership, the remaining partner is not entitled to renew partnership obligations by paying them, so as to revive a deed of trust given by the outgoing partner to secure them: *Commercial Nat. Bank v. Brinton*, 45 Utah 265, 145 Pac. 42. That differences between the partners are not settled, will not make one

partner liable for an indebtedness incurred long after the dissolution when the partnership is terminated: *First International Bank v. Brown*, 130 Minn. 210, 153 N. W. 522. An action to recover the money does not abate on the death of one of the partners, where a sum of money was paid over by one member of a firm with the consent of the others, and judgment is valid, though neither his heirs nor legal representatives were made parties: *Broussard v. Le Blanc* (Tex. Civ. App.), 182 S. W. 78.

<sup>8</sup> *Smith v. Smith* (Mo. App.), 183 S. W. 1126.

<sup>9</sup> It is the survivor's duty to wind up the affairs of the firm on dissolution of the partnership by death of a partner; the partnership being continued for the collection and distribution of assets and performance of antecedent obligations: *Stem v. Warren*, 96 Misc. 362, 161 N. Y. S. 247. A surviving partner undertaking to wind up the firm business must do so within a reasonable time and in the most advantageous way, and after paying debts and expenses must distribute the assets among surviving partners and representatives of deceased partner: *Big Four Implement Co. v. Keyser*, 99 Kans. 8, 161 Pac. 592, L. R. A. 1917C, 166n; *Devine v. Cotunio*, 187 Ill. App. 414; *Stem v. Warren*, 96 Misc. 362, 161 N. Y. S. 247; *Roberts v. Nunn* (Tex. Civ. App.), 169 S. W. 1086.

<sup>10</sup> *Big Four Implement Co. v. Keyser*, 99 Kans. 8, 161 Pac. 592, L. R. A. 1917C, 166n.

## CHAPTER CLIV

### ELEMENTS AND FORMATION OF THE CONTRACT OF SALE

§ 4980. **Definition.**<sup>1</sup>—There must be certainty of description in the contract of sale and a contract to purchase six motor cars was held so indefinite as to the cars to be purchased that it was not binding.<sup>2</sup>

### § 4981. **Essential elements.**<sup>3</sup>

<sup>1</sup> A sale is transfer of property from one to another, made in consideration of a price or recompense in value, and includes not only transfers for a money consideration, but for any valuable consideration: *McDuffie v. State*, 19 Ga. App. 39, 90 S. E. 740.

<sup>2</sup> *Overland Southern Motorcar Co. v. Hill Bros.*, 145 Ga. 785, 89 S. E. 833. But an order for "one American slicing machine" is sufficient in its description of the machine, where the defendant who had possession knew that the machine he had was the identical one described in the order: *Brockett v. American Slicing Mach. Co.*, 18 Ga. App. 670, 90 S. E. 366. An agreement to purchase "3 carloads Crown silos, sizes to be specified within two years," is not too uncertain to support an action for damages for breach, for reason that sizes were left undetermined: *Holland-Cook Mfg. Co. v. Consolidated Wagon &c. Co. (Utah)*, 161 Pac. 922.

<sup>3</sup> Although it contains no express promise by the buyer to pay, a writing which recited that it was an agreement between the parties, which was signed by both parties, and by which one party agreed to sell to the other its make of butter for a certain period at a certain price, is a binding agreement for the sale: *Roundy &c. Co. v. Nicholson Produce Co.*, 166 Iowa 39, 147 N. W. 305. A contract for the sale of a growing crop of oats was valid though no certain number of bushels was agreed on as the amount to be delivered: *Cros-*

*by v. De Bord* (Tex. Civ. App.), 155 S. W. 647; *Namquit Worsted Co. v. Whitman*, 221 Fed. 49, 136 C. C. A. 575; *A. H. Andrews Co. v. Lautenschlager*, 191 Ill. App. 543. A sale is an agreement for the transfer of property from one person to another for valuable consideration: *Scoggin v. Morrilton*, 124 Ark. 585, 187 S. W. 445. A "sale" is a transfer of property in a thing for a price in money, and is the passing of title and possession of any property for money which the buyer pays or promises to pay: *Deal v. State*, 14 Ga. App. 121, 80 S. E. 537. To be a valid sale there must be an agreement as to the amount of consideration or as to the manner in which it is to be determined: *Stern v. Farah*, 17 N. Mex. 516, 133 Pac. 400; *In re Grand Union Co.*, 219 Fed. 353, 135 C. C. A. 237. Mere negotiations as to the subject-matter or terms of the sale are not sufficient to constitute a binding contract: *Hale v. Matteson*, 107 Ark. 224, 154 S. W. 516; *Van Meeruwen v. Swanson*, 121 Minn. 250, 141 N. W. 112; *Cline v. Schofield*, 17 Ga. App. 409, 87 S. E. 149; *United Roofing Co. v. Albany Mill Supply Co.*, 18 Ga. App. 184, 89 S. E. 177. The intention of the parties is the first consideration in determining whether a contract of sale has been made: *Hale v. Matteson* (Ark.), 154 S. W. 516. A distribution of common property among the common owners is not a sale: *State v. Country Club* (Tex. Civ. App.), 173 S. W. 570. Delivery is not essential, as between the parties to a complete sale, unless so intended by

## § 4983. Sale distinguished from other things.\*

them: *Loftus v. Behrens*, 187 Ill. App. 598. An executory agreement for the sale of goods which are to be delivered at a future date is valid: *Robson v. N. J. Weil & Co.*, 142 Ga. 429, 83 S. E. 207.

\* The distinction between an "actual sale" and an "executory contract to sell" is that in an actual sale, title immediately passes to the buyer even without delivery, while in an executory contract to sell, title remains in the seller until the contract is executed: *Oklahoma Moline Plow Co. v. Smith*, 41 Okla. 498, 139 Pac. 285; *C. H. Minge & Co. v. Barrett Bros. Shipping Co.*, 10 Ala. App. 592, 65 So. 671; *Decker v. Pierce*, 191 Mich. 64, 157 N. W. 384; *Uhlman v. Sullivan*, 242 Pa. 436, 89 Atl. 550. Contracts reserving title absolutely in the vendor are not conditional sales, within the meaning of the Iowa recording acts, but are bailments; but a contract of sale which contemplates resale by the buyer, is a conditional sale, and not a bailment: *Emerson-Brantingham Implement Co. v. Lawson*, 237 Fed. 877; *Miller Pasteurizing Mach. Co. v. Conway*, 214 Fed. 485; *McGaw v. Hanway*, 120 Md. 197, 87 Atl. 666, Ann. Cas. 1915A, 601n; *McConnon & Co. v. Haskins* (Mo. App.), 180 S. W. 21; *Dr. Koch Vegetable Tea Co. v. Malone* (Tex. Civ. App.), 163 S. W. 662. Where a customer picks up an article, knowing the price, and hands the proprietor or a clerk the price, which is received, and departs with the article, the transaction constitutes a "sale": *Peeters v. State*, 154 Wis. 111, 142 N. W. 181. The principal difference between the relation of seller and buyer and that of principal and factor is that title passes to the buyer, where there is a sale, while in a consignment, title remains in the principal and only possession passes to the factor: *McGaw v. Hanway*, 120 Md. 197, 87 Atl. 666, Ann. Cas. 1915A, 601n; *In re Harris & Bacherig*, 214 Fed. 482; *Mitchell Wagon Co. v. Poole*, 235 Fed. 817, 149 C. C. A. 129; *D. M. Ferry & Co. v. Hall*, 188 Ala. 178, 66 So. 104; *Federal Rubber Co. v. King*, 12 Ga. App. 261, 76 S. E. 1083; *Foley v. Nimocks*, 175 Iowa 464, 157 N. W. 178; *Van*

*Arsdale v. Peacock*, 90 Kans. 347, 133 Pac. 703; *Baskerville v. Bates*, 123 Minn. 339, 143 N. W. 909; *Commercial Credit Co. v. Girard Nat. Bank*, 246 Pa. 88, 92 Atl. 44; *Davis v. Woolsey*, 34 S. Dak. 236, 147 N. W. 977; *Eilers Music House v. Fairbanks*, 80 Wash. 379, 141 Pac. 885; *Ransom v. Joseph E. Wickstrom & Co.*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588n. The test to determine whether a contract under which a stock of shoes was shipped was a consignment for sale or was a sale in fact, is whether the specific goods were to be returned if not sold, or another thing of value might be returned instead: *Ellot-Kendall Shoe Co. v. Martin*, 222 Fed. 851, 138 C. C. A. 277; *Corbett v. Riddle*, 209 Fed. 811, 126 C. C. A. 535; *In re Vandewater & Co.*, 219 Fed. 627; *In re Wegman Piano Co.*, 221 Fed. 128; *Oaks v. Singer Sewing Mach. Co.*, 17 Ga. App. 517, 87 S. E. 719; *Franklin Motor Car Co. v. Hamilton*, 113 Maine 63, 92 Atl. 1001; *Gardner v. Cameron*, 155 App. Div. 750, 140 N. Y. S. 634; *Bramhall Deane Co. v. McDonald*, 172 App. Div. 780, 158 N. Y. S. 736; *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.* (Tex. Civ. App.), 159 S. W. 1013; *Overstreet v. Hancock* (Tex. Civ. App.), 177 S. W. 217; *Grand Isle v. McGowan*, 88 Vt. 140, 92 Atl. 6. Delivery of personalty as security for a debt is a pledge, but, where a debtor delivers personalty in payment of the debt, though the surplus, if any, from the sale of the property is to be returned, it is a sale: *Rauer v. Rynd*, 27 Cal. App. 556, 150 Pac. 780; *Home Bond Co. v. McChesney*, 239 U. S. 568, 60 L. ed. 444, 36 Sup. Ct. 170; *In re Grand Union Co.*, 219 Fed. 353, 135 C. C. A. 237; *Gilbert v. State* (Ga. App.), 85 S. E. 86; *Mercantile Trust Co. v. Kastor*, 191 Ill. App. 219; *American Lumber Co. v. Quiett Mfg. Co.*, 162 N. Car. 395, 78 S. E. 284. By a sale it is contemplated that, at some time, the title shall pass to the vendee, and that, at some time and in some manner, he shall pay the price to the seller. By a bailment it is contemplated that the title shall not pass to the bailee, but remain in the bailor, and that the



§ 4984. Making the contract—Offer and acceptance.<sup>5</sup>—

property shall return to the bailor, or be disposed of as he may direct: *Norris v. Boston Music Co.*, 129 Minn. 198, 151 N. W. 971; *Berry v. Snowdon*, 209 Fed. 336, 126 C. C. A. 262; *In re Thomas*, 231 Fed. 513; *Holbert v. Keller*, 161 Iowa 723, 142 N. W. 962; *Kennedy v. Drake*, 225 Mass. 303, 114 N. E. 310; *Atkinson v. Japink*, 186 Mich. 335, 152 N. W. 1079; *Norris v. Boston Music Co.*, 129 Minn. 198, 151 N. W. 971; *Kingman Plow Co. v. Joyce*, 194 Mo. App. 367, 184 S. W. 490; *Litzenberg v. Cole*, 166 App. Div. 134, 151 N. Y. S. 687; *Samuel Gordon & Co. v. Farmers' Trading Co.*, 36 Okla. 163, 128 Pac. 1082; *Akin v. Baldwin Piano Co. (Okla.)*, 162 Pac. 221; *Reading Automobile Co. v. De Haven*, 53 Pa. Super. Ct. 344; *Eilers Music House v. Archer*, 81 Wash. 698, 142 Pac. 453. That a contract was designated a "sale" did not make it such, it being apparent that the parties were making a lease: *Long v. Sun Co.*, 132 La. 601, 61 So. 684; *Cutler Mail Chute Co. v. Crawford*, 167 App. Div. 246, 152 N. Y. S. 750; *Girard Trust Co. v. Delaware & Co.*, 246 Pa. 161, 92 Atl. 129. A transaction between an automobile company and dealer whereby the company shipped a new part to the dealer, who, on installing it in a customer's machine, was to return the old part, held an exchange, and not a sale: *Studebaker Corporation v. Gollmar*, 159 Wis. 336, 150 N. W. 442.

<sup>5</sup> In the absence of statute a conditional sale may be verbal: *In re Farmers' Dairy Assn.*, 234 Fed. 118. There is no binding contract of sale until the minds of the parties have met, and the meeting of an offer by counter offer creates no contract: *Porter v. Gossell*, 112 Ark. 380, 166 S. W. 533; *Allen v. Nothern*, 121 Ark. 150, 180 S. W. 465; *Las Palmas & Co. Distillery v. Garrett & Co.*, 167 Cal. 397, 139 Pac. 1077; *Timmons v. Bostwick*, 141 Ga. 713, 82 S. E. 29; *Robson v. N. J. Weil & Co.*, 142 Ga. 429, 83 S. E. 207; *Miller v. McGhee Cotton Co.*, 144 Ga. 392, 87 S. E. 387; *Chunn v. Evans*, 15 Ga. App. 57, 82

S. E. 631; *Chicago v. Truax Greene & Co.*, 192 Ill. App. 528; *Cincinnati Equipment Co. v. Big Muddy River Consol. Coal Co.*, 158 Ky. 247, 164 S. W. 794; *Nolin Milling Co. v. White Grocery Co.*, 168 Ky. 417, 182 S. W. 191; *Isaacs v. MacDonald*, 214 Mass. 487, 102 N. E. 81; *Kraus v. Hansen*, 182 Mich. 52, 148 N. W. 373; *B. F. Sturtevant Co. v. Fireproof Film Co.*, 216 N. Y. 199, 110 N. E. 440; *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619; *Morrison v. Parks*, 164 N. Car. 197, 80 S. E. 85; *Farmers' & Co. Cotton Oil Co. v. Cleburne Oil Mill Co. (Tex. Civ. App.)*, 187 S. W. 350. To complete a contract of sale there must be a definite offer, and an acceptance identical with its terms, silence not usually amounting to acceptance, though in some instances the facts may require an express refusal of the offer, when a failure to do so may result in a contract: *Weishut v. Layton*, 5 Del. 364, 93 Atl. 1057; *Peck v. Edwards*, 90 Conn. 669, 98 Atl. 325. A telegram asking for an offer for eggs, an answer by telegraph, "For good stock will give \$8.25, Chicago, prompt acceptance," and a reply the same day also by telegraph, "Accept offer of \$8.25 per case," constitute a contract: *Holcomb v. Linn*, 174 Ill. App. 419; *Cannon v. Turner-Hudnut Co.*, 185 Ill. App. 9; *Slaymaker Lock Mfg. Corp. v. Olmsted*, 197 Ill. App. 496; *American Seeding Machine Co. v. Commonwealth*, 152 Ky. 589, 153 S. W. 972; *Sutter-Van Horn Co. v. Mississippi Home Tel. Co.*, 110 Miss. 169, 69 So. 996; *Royal Brewing Co. v. St. Louis Brewing Assn.*, 188 Mo. App. 673, 176 S. W. 553; *Glens Falls Lumber Co. v. Ryerson*, 175 App. Div. 769, 162 N. Y. S. 427; *Durant-Dort Carriage Co. v. Karth*, 33 Ohio Cir. Ct. 343; *Glenn v. S. Birch & Co. Const. Co. (Wash.)*, 158 Pac. 834. Where the offer is withdrawn prior to its acceptance, there is no sale: *James Bradford Co. v. United Leather Co. (Del.)*, 97 Atl. 620; *Holmes v. Bloch (Ala.)*, 71 So. 670; *Outcault Advertising Co. v. Young Hardw. Co.*, 110 Ark. 123, 161 S. W. 142; *Grande Ronde Lumber Co. v.*

That the parties agreed to have a verbal contract reduced to writing does not prevent the verbal contract from being complete.<sup>6</sup>

### § 4985. Subject of sale.<sup>7</sup>

Des Moines Casket Co., 177 Iowa 84, 158 N. W. 498; Seneca Co. v. Ellison (Mo. App.), 184 S. W. 1177; Hayman v. Canton Art Metal Co., 174 App. Div. 923, 160 N. Y. S. 42; Davidge v. Velie, 95 Misc. 511, 160 N. Y. S. 820; Owen M. Bruner Co. v. Standard Lumber Co., 63 Pa. Super. Ct. 283; Glenn v. S. Birch & Co. Const. Co. (Wash.), 158 Pac. 834. Where one makes an offer to sell to one party, who accepts, requiring a written contract, and sends a contract obligating another than himself to buy, the offerer has the right to reject the contract: Glenn v. S. Birch & Co. Const. Co., 52 Mont. 414, 158 Pac. 834. Acceptance of an order may be made by shipping the goods ordered: Petroleum Products Distributing Co. v. Alton Tank Line, 165 Iowa 398, 146 N. W. 52. Statement of the price at which property is held is not an offer to sell: Nebraska Seed Co. v. Harsh, 98 Nebr. 89, 152 N. W. 310, L. R. A. 1915F, 824n. If offer to sell does not limit time for acceptance, it must be accepted within a reasonable time, and if it does, it may, at any time within limit, be accepted or rejected, or withdrawn by maker: Peck v. Edwards, 90 Conn. 669, 98 Atl. 325. Where time of acceptance was not limited, the acceptance by telegram of an offer by letter three days after receipt held sufficiently prompt: South Branch Cheese Co. v. American Butter & Co., 191 Mich. 507, 158 N. W. 158. A notice inserted in a publication, which states that the signer thereof guarantees to pay a stated price for certain goods, to be delivered during a designated period in the future, amounts to an offer, the acceptance of which, before revocation, constitutes a sufficient compliance to ripen the offer into a binding promise to pay: Schmidt v. Marine Milk Condensing Co., 197 Ill. App. 279. If the goods were of the kind and quality offered, a seller's telegram and the buyer's reply, followed by an imme-

diately shipment and the rendering of a bill, held to constitute a binding contract of sale: Ladies' Tailoring Co. v. Brown, 76 W. Va. 725, 86 S. E. 767; Sturdivant v. Mt. Dixie Sanitarium & Co., 197 Ala. 280, 72 So. 502. In an action against church trustees for price of pipe organ originally sold to choir association, merely retaining and using organ while unsuccessful attempts are made to have church assume responsibility for price does not raise implied promise of trustees to pay therefor: Henry Pilcher's Sons v. Thompson, 145 Ga. 604, 89 S. E. 698. An order must be accepted to become binding, but it is not necessary that acceptance be in writing: King v. Edward Thompson Co., 56 Ind. App. 274, 104 N. E. 106. Placing an acceptance of a proposal to sell in the postoffice consummates a contract to sell goods: Farmers' Produce Co. v. McAlester Storage & Co., 48 Okla. 488, 150 Pac. 483; Farmers' Produce Co. v. Central Fruit & Co., 48 Okla. 754, 150 Pac. 664.

<sup>6</sup> Walle v. Douglas, 136 La. 70, 66 So. 542.

<sup>7</sup> Though the property is in the hands of a third party, who does not claim to own it, the owner of personal property may convey title thereof to another: L. C. Smith & Co. Type-writer Co. v. Blakemore, 183 Ill. App. 14. It is held that things not in esse actual or potential can not be the subject of sale, but may be the subject of an agreement to sell: Hamil v. Flowers, 184 Ala. 301, 63 So. 994. And an acceptance of an order for goods to be manufactured held to create a contract: Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613. It was not necessary that plaintiff have title to the stock when the contract was made to constitute a binding contract by plaintiff to purchase stock for resale to defendant: Dudley A. Tyng & Co. v. Converse, 180 Mich. 195, 146 N. W. 629.

§ 4988. **The price.**<sup>8</sup>—Where the contract provides for a method of ascertaining the price, the method provided thereby must be followed, and it was held in a recent case that neither the other valuer nor one of the parties can, without the consent of both parties, select a third person to act in the place of the person refusing, where one of the two persons nominated in an executory agreement of sale as a valuer to fix the consideration refuses to act.<sup>9</sup>

<sup>8</sup> If there was any consideration, no matter how small, defense of want of consideration is not available in action on notes for balance of price of automobile: *Vreeland v. Murray* (Colo.), 162 Pac. 148. Where buyer offered to pay for goods by set-off of valid claim against the seller, it was a virtual compliance with the alleged usage that contract-price must be paid in cash: *Rylance v. James Walker Co.*, 129 Md. 475, 99 Atl. 597. A contract was held to require the buyer to pay the daily quoted price on the day of delivery when the contract provided for the sale of rosin and turpentine for delivery in instalments at a price fixed by the board of trade at Savannah: *Union Naval Stores Co. v. Patterson*, 179 Ala. 525, 60 So. 807. It was held that the average price for bark from the lower peninsula of Michigan, where the seller's bark was situated, excluding bark from the upper peninsula, which was not so valuable, should govern under contract for sale of bark providing that the price should be the average contract-price in certain cities for the current year: *Cobbs v. Boyne City Tanning Co.*, 178 Mich. 88, 144 N. W. 487. The seller, who notified the buyer's clerk, and attempted to notify the buyer, but was unable to see him, because of his illness, is entitled to have the sale price fixed as of the day he selected, where cotton was sold under an agreement that the sale price might be fixed at the market price of any day between delivery and the succeeding March 1: *Charles B. Smith & Co. v. Duncan* (Tex. Civ. App.), 167 S. W. 233. The Chicago price for

that grade on the day it is delivered governs, where plaintiff ships butter to defendants in Chicago who offer to pay Elgin price in case it grades extra, and the evidence shows it did not grade as high as extra: *Connersville-Co-operative Creamery Assn. v. Baltz*, 180 Ill. App. 376. Under a contract for the appraisal of a stock of merchandise "at the invoice purchase-price" means that the goods are to be appraised at what had been paid for them when they were bought: *Swisher v. Dunn*, 89 Kans. 412, 131 Pac. 571, 45 L. R. A. (N. S.) 810n. It was held that the contract did not fix the price with reasonable certainty and was unenforceable, where an executory contract provided for sale of lots of tobacco at their original cost, plus the cost of handling and a "nice" or reasonable profit thereon: *Gaines v. R. J. Reynolds Tobacco Co.*, 163 Ky. 716, 174 S. W. 482. A buyer who accepts property bought under an executory contract of sale, which is silent as to price, is liable for its reasonable value, generally market value: *Gaines v. R. J. Reynolds Tobacco Co.*, 163 Ky. 716, 174 S. W. 482. F. o. b. scow at Seattle means that the goods should be delivered on board a scow at Seattle without expense to the purchaser: *Skinner v. Griffiths*, 80 Wash. 291, 141 Pac. 693. In the absence of any provision to the contrary, under a contract for sale and delivery of lumber f. o. b. cars, it is the buyer's duty to provide the cars: *Wiggin v. Marsh Lumber Co.*, 77 W. Va. 7, 87 S. E. 194.

<sup>9</sup> *Stern v. Farah Bros.*, 17 N. Mex. 516, 133 Pac. 400.

## CHAPTER CLV

### ELEMENTS AND FORMATION OF CONTRACTS OF SALE—CONDITIONS AND WARRANTIES

§ 4995. Conditions and warranties defined and distinguished.<sup>1</sup>—The seller is bound by his warranty, though he does not know of its falsity at the time of sale.<sup>2</sup>

<sup>1</sup>The fact that the contract provided for tests before final settlement did not change the warranty into a condition precedent so as to require the seller to prove performance before it could recover the balance of the price, where the contract of sale warranted the efficiency of water power machinery: *Sanderson v. Trump Mfg. Co.*, 180 Ind. 197, 102 N. E. 2. It is not a condition precedent, but a warranty, where the seller agrees that he will make the article right if it is not as represented: *State Nat. Bank v. Roseberry*, 46 Okla. 708, 148 Pac. 1034. A warranty is a statement of something, either express or implied, which a party undertakes shall be a part of a contract, but collateral to the express object of it: *United Iron Works Co. v. Henryetta Coal &c. Co. (Okla.)*, 162 Pac. 209. Though made orally, material misrepresentations by seller held admissible as warranties, whether made fraudulently or not: *Bolt v. State Savings Bank (Tex. Civ. App.)*, 179 S. W. 1119; *American Fruit Product Co. v. Davenport Vinegar &c. Works*, 172 Iowa 683, 154 N. W. 1031; *Brown v. Nevins*, 84 N. J. L. 215, 86 Atl. 938. Every affirmation by a seller as a fact and as an inducement to the sale, made at the time of sale, if relied on by the buyer, amounts to a warranty: *Virginia Kid Co. v. New Castle Leather Co.*, 4 Del. 511, 89 Atl. 367. A printed warranty in a contract of sale, that the manufacturer of an automobile will replace defective parts broken or worn out within one year, can not be enforced against the manufacturer unless he is a party to the contract: *Rittenhouse-Winter-son Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361. But see *Hackney Mfg.*

*Co. v. Celum (Tex. Civ. App.)*, 189 S. W. 988. Goods must be equal to the sample and also be of the kind described where they are sold both by sample and description: *Wabash Canning Co. v. Nicholls*, 187 Ill. App. 176; *Brown v. Max Malter Co.*, 184 Ill. App. 621; *Schwartz v. Kohn*, 155 N. Y. S. 547; *Hanhart v. Labe Importing Co.*, 157 N. Y. S. 897. Where the seller delivers goods, not complying with the terms of the contract of sale, no obligation is imposed on the buyer to receive and pay therefor: *Cheboygan Paper Co. v. Eichberg*, 184 Mich. 30, 150 N. W. 312; *Cartersville Grocery Co. v. Rowland*, 17 Ga. App. 42, 86 S. E. 402; *Yamaoka v. Kloeber*, 71 Wash. 598, 129 Pac. 387; *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915B, 1131n, Ann. Cas. 1916A, 948n; *Leach v. Koch*, 161 Wis. 236, 152 N. W. 453, 154 N. W. 381. A seller who contracts to furnish a particular brand of article fulfils his contract by furnishing such brand, irrespective of its merits in relation to other brands of the same type of goods: *Lindsborg Milling &c. Co. v. Danzero*, 189 Mo. App. 154, 174 S. W. 459; *Whitcomb v. Shultz*, 215 Fed. 75, 131 C. C. A. 383. Where the purchaser contracted for beef cattle, he can not be compelled to receive cattle not ready for immediate butchering: *McFadden v. Shanley*, 16 Ariz. 91, 141 Pac. 732; *Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279; *International Harvester Co. of America v. Bean*, 159 Ky. 842, 169 S. W. 549; *Meraux v. Kenilworth Sugar Co.*, 135 La. 39, 64 So. 974.

<sup>2</sup>*Flood v. Yeager*, 52 Pa. Super. Ct. 637.

§ 4997. Severable and entire contracts.<sup>3</sup>§ 4998. Waiver of condition by buyer.<sup>4</sup>

<sup>3</sup> Each item necessarily constitutes a separate contract in a sale of goods consisting of independent items, of different articles with different prices: *Decker v. Braverman*, 196 Ill. App. 387.

<sup>4</sup> Where defects are readily apparent or ascertainable on inspection, the warranty is waived where no complaint is made within a reasonable time after their acceptance: *Sturges & Co. v. Root Dairy Supply Co.*, 186 Ill. App. 52. Where the seller has been notified of fact that goods are not as warranted and has promised and attempted to remedy them, the purchaser may retain and try the machinery a reasonable time without waiving the warranty: *Hull v. Prairie Queen Mfg. Co.*, 92 Kans. 538, 141 Pac. 592; *George O. Richardson Mach. Co. v. Brown*, 95 Kans. 685, 149 Pac. 434; *Nichols & Co. v. Stubbs Thresher Co.*, 160 Ky. 694, 170 S. W. 4; *Louis Eckels & Co. Ice Mfg. Co. v. Cornell Economizer Co.*, 119 Md. 107, 86 Atl. 38; *Nathan Kronman & Co. v. Gardella*, 190 Mich. 645, 157 N. W. 377; *J. I. Case Threshing Mach. Co. v. McCoy*, 111 Miss. 715, 72 So. 138; *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653; *Silberstein v. Blum*, 167 App. Div. 660, 153 N. Y. S. 34; *A. S. Cameron Steam Pump Works v. Lubbock Light & Co.* (Tex. Civ. App.), 167 S. W. 256; *Avery Co. v. Staples Mercantile Co.* (Tex. Civ. App.), 183 S. W. 43; *Fink v. Marr*, 81 Wash. 92, 142 Pac. 482. By express provision of Sale of Goods Act (Laws 1911, ch. 571), § 130, buyer's acceptance of goods does not discharge the seller from liability in damages for breach of any promise or warranty in the contract: *Nelson Co. v. Silver*, 160 App. Div. 445, 145 N. Y. S. 124; *Harris v. Marsh*, 217 Fed. 555, 133 C. C. A. 407; *Ryerson Grain Co. v. Moyer*, 9 Ala. App. 254, 63 So. 13; *W. R. Grace & Co. v. Levy*, 30 Cal. App. 231, 156 Pac. 626; *Staver Carriage Co. v. American & Co. Mfg. Co.*, 188 Ill. App. 634; *Greer v. Whalen*, 125 Md. 273, 93 Atl. 521; *Eversole v. Hanna*, 184 Mo. App. 445,

171 S. W. 25; *Powell v. New England Cotton Yarn Co.*, 154 App. Div. 875, 139 N. Y. S. 569; *Marx v. Locomobile Co.*, 82 Misc. 468, 144 N. Y. S. 937; *Sipe v. National Silk Dyeing Co.*, 95 Misc. 620, 159 N. Y. S. 846; *Levy v. John C. Dettra & Co.*, 91 Misc. 41, 154 N. Y. S. 176; *G. B. Shearer Co. v. Kakoulis*, 144 N. Y. S. 1077; *English Lumber Co. v. Smith*, 157 N. Y. S. 233; *T. H. Rogers Lumber Co. v. M. W. Judd Lumber Co.*, 52 Okla. 387, 153 Pac. 150; *Southern Gas & Gasoline Engine Co. v. Richolson* (Tex. Civ. App.), 181 S. W. 529; *Jacot v. Grossmann Seed & Co.*, 115 Va. 90, 78 S. E. 646. But see *American Multigraph Sales Co. v. Globe Mutual Life Ins. Assn.*, 187 Ill. App. 17; *Cheboygan Paper Co. v. Eichberg*, 184 Mich. 30, 150 N. W. 312; *Rich v. Minolfi*, 157 App. Div. 783, 142 N. Y. S. 771; *Schmidt v. Jutting*, 31 S. Dak. 69, 139 N. W. 769; *Unadilla Silo Co. v. M. A. Hull & Son*, 90 Vt. 134, 96 Atl. 535. An implied warranty does not survive acceptance at common law, but an express warranty does: *Regina Co. v. Gately Furniture Co.*, 171 App. Div. 817, 157 N. Y. S. 746; *Stearns Salt & Co. v. Dennis Lumber Co.*, 188 Mich. 700, 154 N. W. 91; *Sherman v. Sheffield Cast Iron & Co.*, 50 Okla. 109, 150 Pac. 1062; *Jones & Co. Steel Co. v. Wood*, 249 Pa. 423, 94 Atl. 1067. Implied warranty held to survive acceptance, unless the acceptance is with full knowledge of all conditions affecting the character and quality of the article: *Kansas City Bolt & Co. v. Rodd*, 220 Fed. 750, 136 C. C. A. 356. Plaintiff's acceptance was conditional only, and did not waive the warranty where defendant furnished brick to plaintiff warranted white, and they were rejected because of different color, but were subsequently accepted on defendant's representation that they would turn white when dry: *Jorgensen v. Gessell Pressed Brick Co.*, 45 Utah 31, 141 Pac. 460, Ann. Cas. 1917C, 309n. Where the purchaser of machinery, warranted, finds defects, which are remedied

§ 4999. **Express conditions and warranties.**<sup>5</sup>—Warranties, though collateral to the contract, enter into it as an element on which the minds of the parties met and as part of the consideration. It has been held that it is not necessary that the buyer should have been deceived by the warranty, nor need it appear that the buyer would not have bought without it.<sup>6</sup>

§ 5001. **Known or obvious defects—Special and general warranties.**<sup>7</sup>

§ 5003. **Implied conditions and warranties—Title.**<sup>8</sup>

upon demand to his satisfaction, and who then accepts and executes a note for the price, is not entitled to set up such defects in a suit on the note: *Doak Gas Engine Co. v. Fraser*, 168 Cal. 624, 143 Pac. 1024.

<sup>5</sup> A "warranty" is an express or implied statement of something undertaken as a part of a contract of sale, but is collateral to its express object: *Brown v. Davidson*, 42 Okla. 598, 142 Pac. 387; *Morris v. Fiat Motor Sales Co.*, 32 Cal. App. 315, 162 Pac. 663; *E. F. Houghton & Co. v. Alpha Process Co.*, 5 Del. 383, 93 Atl. 669; *Vaupel v. Lamplly*, 181 Ind. 8, 103 N. E. 796; *Barnard v. Napier*, 167 Ky. 824, 181 S. W. 624; *Burns v. Limerick*, 178 Mo. App. 145, 165 S. W. 1166; *Mason v. Crabtree* (Mo. App.), 186 S. W. 553; *Davis v. Cramer*, 188 Mo. App. 718, 176 S. W. 468; *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 140 Pac. 381, Ann. Cas. 1916A, 948n. Where parties deal upon equal terms, mere matters of opinion or "puffing" a commodity do not constitute a warranty: *Central Commercial Co. v. Lehon Co.*, 173 Ill. App. 27; *Alexander v. Stone*, 29 Cal. App. 488, 156 Pac. 998; *Menard v. Thompson*, 90 Conn. 30, 96 Atl. 177; *Smith v. Frazer*, 144 Ga. 85, 86 S. E. 225; *Greer v. Whalen*, 125 Md. 273, 93 Atl. 521; *Frey v. Failes*, 37 Okla. 297, 132 Pac. 342; *St. Louis Cordage Mills v. Western Supply Co.* (Okla.), 154 Pac. 646; *International Harvester Co. v. Lawyer* (Okla.), 155 Pac. 617. It is not necessary to use any particular words to create an "express warranty, any affirmation of the quality of the thing sold, made to assure the buyer and induce him to purchase, being suffi-

cient if relied on": *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Coats v. Hord*, 29 Cal. App. 115, 154 Pac. 491; *Morris v. Fiat Motor Sales Co.*, 32 Cal. App. 315, 162 Pac. 663; *Able Transfer Co. v. William E. Dee Co.*, 192 Ill. App. 14. If there is a warranty, caveat emptor does not apply: *Reval v. Miller*, 178 Ill. App. 208.

<sup>6</sup> *McCarty v. Williams*, 58 Ind. App. 440, 108 N. E. 370. But see to effect that seller is not bound by his warranty if buyer is not deceived: *Degenhardt v. Billings*, 33 Ohio Cir. Ct. 232; *Dietrich v. Badders*, 4 Del. 499, 90 Atl. 47; *Loper v. Lingo* (Del. Super.), 97 Atl. 585.

<sup>7</sup> When the buyer knows of a defect or it is obvious, there is no implied warranty: *Berger Mfg. Co. v. Crites*, 178 Mo. App. 218, 165 S. W. 1163. The purchaser is bound to know what is discoverable in regard thereto by the exercise of ordinary care where he is put upon inquiry as to the quality of the thing offered for sale: *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124; *Buchanan v. Caine*, 57 Ind. App. 274, 106 N. E. 885; *Boston v. Alexander*, 185 Mo. App. 16, 171 S. W. 582. The rule of caveat emptor does not apply to the sale of a mule with a bone spavin not easily discoverable: *Glover v. Phillips* (Tex. Civ. App.), 174 S. W. 657; *Alexander v. Stone*, 29 Cal. App. 488, 156 Pac. 998; *Showalter v. Chambers*, 77 W. Va. 720, 88 S. E. 1072.

<sup>8</sup> There is an implied warranty in the sale of personality under Civ. C de 1910, § 4135, unless excluded expressly or from the nature of the transaction, that the seller has a valid

**§ 5005. Sale of goods by description—Implied condition or warranty.<sup>9</sup>**

**§ 5006. Implied warranty or condition as to quality or fitness—Caveat Emptor.<sup>10</sup>**—Where there is fraud, the rule of caveat emptor does not apply.<sup>11</sup>

**§ 5007. Exceptions—Where there is an implied condition or warranty as to fitness.<sup>12</sup>**

title and right to sell: *Battle v. Sherlock*, 18 Ga. App. 776, 90 S. E. 727; *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954. See also *Jordan v. Van Duzee* (Minn.), 165 N. W. 877; *Kirkpatrick v. Kepler*, 164 Wis. 558, 160 N. W. 1047. Unless at the time of delivery the seller refuses or is unable to make delivery, no breach of contract of sale can be based on the fact that, at the time of sale, the seller was not the owner and had no authority to sell: *Consolidated Nat. Bank v. Giroux*, 18 Ariz. 253, 158 Pac. 451; *Page v. Ford*, 65 Ore. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247n, Ann. Cas. 1915A, 1048n. Since, whether the liens were valid or not, he was not required to take them subject to possible litigation with the mortgagees, a buyer of ties is entitled to have them delivered free of incumbrance: *Stuart v. University Lumber & Co.*, 66 Ore. 546, 132 Pac. 1, 1164, 135 Pac. 165.

<sup>9</sup> There is an implied warranty on the part of every seller that the article sold is identical with the article bought: *Coleman v. Simpson*, 158 App. Div. 461, 143 N. Y. S. 587. Goods sold by description are impliedly warranted to be as described: *Nathan Kronman & Co. v. Gardella*, 190 Mich. 645, 157 N. W. 377; *Whipple v. Brown Bros. Co.*, 170 App. Div. 531, 156 N. Y. S. 63; *Handy v. Roberts* (Tex. Civ. App.), 165 S. W. 37; *Avery Co. v. Staples Mercantile Co.* (Tex. Civ. App.), 183 S. W. 43; *Wilson v. Wiggin*, 73 W. Va. 560, 81 S. E. 842; *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124.

<sup>10</sup> Where there was no express warranty as to its utility when deliverable, under the contract of sale no such warranty can be implied: *General Electric Co. v. United States*, 50 Ct. Cl. 287; *Baer Grocer Co. v.*

*Barber Milling Co.*, 223 Fed. 969, 139 C. C. A. 449; *Johnson v. Carden*, 187 Ala. 142, 65 So. 813; *Woods v. Nicholas*, 92 Kans. 258, 140 Pac. 862; *Baker v. Kamantowsky*, 188 Mich. 569, 155 N. W. 430; *Jones v. Armstrong*, 50 Mont. 168, 145 Pac. 949; *Griffin v. Runion*, 74 W. Va. 641, 82 S. E. 686. Under the rule of caveat emptor one can not recover for misrepresentations as to visible defects: *Morbros Inv. Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189; *Wellman v. O'Connor-Martin Co.*, 178 Mich. 682, 146 N. W. 289.

<sup>11</sup> *Reval v. Miller*, 178 Ill. App. 208; *Falls City Tannery v. W. D. Allen Mfg. Co.*, 186 Ill. App. 13.

<sup>12</sup> In contracts for the sale of personal property, as between dealers, there is an implied warranty that the goods shall be salable; it being the seller's duty to furnish property in compliance with the contract of sale: *Ashford v. H. C. Schrader Co.*, 167 N. Car. 45, 83 S. E. 29; *Pfoh v. Porter*, 23 Cal. App. 59, 137 Pac. 44; *Stephens v. Brill*, 159 Iowa 620, 140 N. W. 809; *Stevens Tank & Co. v. Berlin Mills Co.*, 112 Maine 336, 92 Atl. 180; *Interstate Grocer Co. v. George Wm. Bentley Co.*, 214 Mass. 227, 101 N. E. 147; *D. Rosenbaum's Sons v. Davis & Co.*, 111 Miss. 278, 71 So. 388; *Standard Milling Co. v. De Pass*, 154 App. Div. 525, 139 N. Y. S. 611; *Miller v. Winters*, 144 N. Y. S. 351; *Dr. Shoop Family Medicine Co. v. Davenport*, 163 N. Car. 294, 79 S. E. 602; *Berry v. Wadhams Oil Co.*, 156 Wis. 588, 146 N. W. 783. Where machinery is sold for a particular purpose, it carries with it a warranty that it is reasonably fit for such purpose: *Western Union Tel. Co. v. Jackson Lumber Co.*, 187 Ala. 629, 65 So. 962; *Kansas City Bolt & Co. v. Rodd*, 220 Fed. 570, 136 C. C. A.

# § 5008. Implied conditions or warranties in sale by sample.<sup>13</sup>

356; Marmet Coal Co. v. People's Coal Co., 226 Fed. 646, 141 C. C. A. 402; Brought v. Redewill Music Co., 17 Ariz. 393, 153 Pac. 285; Weaver-Dowdy Co. v. Fritz, 110 Ark. 90, 160 S. W. 1085; Lichtenthaler v. Samson Iron Works, 32 Cal. App. 220, 162 Pac. 441; Virginia Kid Co. v. New Castle Leather Co., 4 Del. 511, 89 Atl. 367; John A. Roebbling's Sons Co. v. Southern Power Co., 142 Ga. 464, 83 S. E. 138, L. R. A. 1915B, 900; Bateman v. Warfield, 12 Ga. App. 259, 77 S. E. 104; Chapman v. Roggenkamp, 182 Ill. App. 117; Lidgerwood Mfg. Co. v. Robinson & Co. Cont. Co., 183 Ill. App. 431; Madsen v. Cordell, 188 Ill. App. 564; Sloan v. F. W. Woolworth Co., 193 Ill. App. 620; New Idea Arc Light Co. v. G. C. Renneker Co., 195 Ill. App. 290; Dravo Doyle Co. v. Sulzberger & Co., 197 Ill. App. 547; Winnemucca Water & Co. v. Model Gas Engine Works, 179 Ind. 542, 101 N. E. 1007; Hart-Kraft Motor Co. v. Indianapolis Motor Car Co., 183 Ind. 311, 109 N. E. 39; Edwards Mfg. Co. v. Stoops, 54 Ind. App. 361, 102 N. E. 980; Penn American Plate Glass Co. v. De La Vergne Mach. Co., 58 Ind. App. 333, 106 N. E. 722; Merchants' Nat. Bank v. Nees, 62 Ind. App. 290, 110 N. E. 73; S. F. Bowser & Co. v. Bathurst, 91 Kans. 611, 138 Pac. 585; Parks v. G. C. Yost Pie Co., 93 Kans. 334, 144 Pac. 202, L. R. A. 1915C, 179; International Harvester Co. v. Bean, 159 Ky. 842, 169 S. W. 549; International Harvester Co. v. Porter, 160 Ky. 509, 169 S. W. 993; Philbrick v. Kendall, 111 Maine 198, 88 Atl. 540; Steering Wheel Co. v. Fee Electric Car Co., 174 Mich. 512, 140 N. W. 1016; Pentland v. Jacobson, 189 Mich. 339, 155 N. W. 468; Berger Mfg. Co. v. Crites, 178 Mo. App. 218, 165 S. W. 1163; Harvey v. Buick Motor Co. (Mo. App.), 177 S. W. 774; Mason v. Crabtree (Mo. App.), 186 S. W. 553; Monroe v. Arthaud (Mo. App.), 186 S. W. 554; Emerson-Brantingham Implement Co. v. England (Mo. App.), 186 S. W. 1181; Antrim Lumber Co. v. Daly (Mo. App.), 190 S. W. 971; Toledo Computing Scale Co. v. Fredericksen, 95 Nebr. 689, 146 N.

W. 957; Underfeed Stoker Co. v. Farmers' Co-operative Creamery & Co., 98 Nebr. 377, 152 N. W. 741; Oxygenator Co. v. Johnson, 99 Nebr. 641, 157 N. W. 339; Race v. Krum, 163 App. Div. 924, 147 N. Y. S. 818; Leahy v. Essex Co., 164 App. Div. 903, 148 N. Y. S. 1063; Marx v. Locomobile Co., 82 Misc. 468, 144 N. Y. S. 937; Bonwit v. Kinlen, 85 Misc. 62, 147 N. Y. S. 54; G. B. Shearer Co. v. Kakoulis, 144 N. Y. S. 1077; Standard Sewing Mach. Co. v. New State Shirt & C. Mfg. Co., 42 Okla. 554, 141 Pac. 1111; Kitchen v. Oregon Nursery Co., 65 Ore. 20, 130 Pac. 408, 1133, 132 Pac. 956; Bouchet v. Oregon Motor Car Co., 78 Ore. 230, 152 Pac. 888; Jones & Co. Steel Co. v. Wood, 249 Pa. 423, 94 Atl. 1067; A. S. Cameron Steam Pump Works v. Lubbock Light & Co. (Tex. Civ. App.), 167 S. W. 256; Missouri & Co. v. Interstate Chemical Co. (Tex. Civ. App.), 169 S. W. 1120; Buffalo Pitts Co. v. Alderdice (Tex. Civ. App.), 177 S. W. 1044; Kelly v. Lum, 75 Wash. 135, 134 Pac. 819, 49 L. R. A. (N. S.) 1151n; Flessner v. Carstens Packing Co., 93 Wash. 48, 160 Pac. 14; Kelsey v. J. W. Ringrose Net Co., 152 Wis. 499, 140 N. W. 66. But there is no implied warranty that an article sold will answer a particular purpose not contemplated by the seller: Buffalo Collieries Co. v. Indian Run Coal Co., 73 W. Va. 665, 81 S. E. 1055; Middletown Mach. Co. v. Chaffin, 108 Ark. 254, 157 S. W. 398; Western Cabinet & C. Mfg. Co. v. Davis, 121 Ark. 370, 181 S. W. 273; Central Commercial Co. v. Lehon Co., 173 Ill. App. 27; American Player Piano Co. v. American Pneumatic Action Co., 172 Iowa 139, 154 N. W. 389; Glover Mach. Works v. Cooke-Jellico Coal Co., 173 Ky. 675, 191 S. W. 516; Sure Seal Co. v. Loeber, 171 App. Div. 225, 157 N. Y. S. 327; American Mfg. Co. v. Brady, 51 Pa. Super. Ct. 619; Schager v. Dinneen, 36 S. Dak. 107, 153 N. W. 935; F. A. Piper Co. v. Oppenheimer (Tex. Civ. App.), 158 S. W. 777; Mianus Motor Works v. Vollans, 83 Wash. 680, 145 Pac. 997.

<sup>13</sup> The sale is by sample where the



**§ 5009. When implied warranty is negated by express warranty.<sup>14</sup>**

designation of quality is by reference to sample: *Robert McLane Co. v. Swernemann* (Tex. Civ. App.), 189 S. W. 282. There was an implied warranty that the brick to be furnished would be as good as the sample, where a sale of brick was made by a manufacturer by sample without condition: *Jorgensen v. Gessell Pressed Brick Co.*, 45 Utah 31, 141 Pac. 460, Ann. Cas. 1917C, 309n; *Gascoigne v. Cary Brick Co.*, 217 Mass. 302, 104 N. E. 734, Ann. Cas. 1917C, 336n; *Regina Co. v. Gately Furniture Co.*, 171 App. Div. 817, 157 N. Y. S. 746; *Pickrell & Craig Co. v. Wilson Wholesale Co.*, 169 N. Car. 381, 86 S. E. 187, Ann. Cas. 1917C, 344n; *Greenwood Cotton Mill v. Tolbert*, 105 S. Car. 273, 89 S. E. 653, Ann. Cas. 1917C, 338n; *Mueller v. Simon* (Tex. Civ. App.), 183 S. W. 63; *Robert McLane Co. v. Swernemann* (Tex. Civ. App.), 189 S. W. 282; *Perine Machinery Co. v. Buck*, 90 Wash. 344, 156 Pac. 20, Ann. Cas. 1917C, 341n. Where goods are sold by sample, it is contemplated that the

goods are in esse and that they are equal to the sample: *Lowenberg Co. v. Block*, 140 N. Y. S. 375; *American Mfg. Co. v. Brady*, 51 Pa. Super. Ct. 619. It is held that an order for bartender coats to be manufactured by plaintiff according to a sample furnished by defendant according to specified sizes, was not a sale by sample: *Lowenberg Co. v. Block*, 140 N. Y. S. 375. A contract of sale of jar caps which binds the seller to ship caps fitting any Mason jar held not a sale by sample: *Pickrell & Co. v. Wilson Wholesale Co.*, 169 N. Car. 381, 86 S. E. 187, Ann. Cas. 1917C, 344n.

<sup>14</sup> Where an express warranty exists, the doctrine of implied warranty does not apply: *Glover Mach. Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516; *Slinger v. Totten*, 38 S. Dak. 249, 160 N. W. 1008. See also *Armour Fertilizing Works v. Aiken* (N. Car.), 95 S. E. 657, and ante § 129, for other cases as to the general rule and its exceptions or limitations.

## CHAPTER CLVI

### EFFECTS OF THE CONTRACT—TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

§ 5015. **Transfer of title—Unascertained goods—Part of uniform bulk.**<sup>1</sup>—To appropriate goods so as to pass title to goods not specified, it is essential that the goods be identified and applied irrevocably to the contract; but no particular words or acts are required, and the intent of the parties controls.<sup>2</sup>

§ 5016. **Transfer of title—Specific goods—Intention.**<sup>3</sup>

§ 5018. **Title does not pass where seller is bound to do something to put in deliverable state.**<sup>4</sup>—It seems to be the rule that no title passes until the chattel is accepted, where the

<sup>1</sup> The contract is executory, where the goods sold are not specified at the time the contract is made, and title passes at the time specific goods are appropriated to it: *E. L. Welch Co. v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828. There being no transfer of title, where a milling company contracted to sell meal, and the mill and contents were burned before the meal was designated, or set aside, the milling company was liable in damages for failure to deliver the meal: *Chandler Grain & Co. v. Shea*, 213 Mass. 398, 100 N. E. 663; *Howell v. Home Nat. Bank*, 195 Ala. 73, 70 So. 686; *Churchill Grain & Co. v. Newton*, 88 Conn. 130, 89 Atl. 1121; *Watson v. Cameron*, 111 Maine 343, 89 Atl. 143; *Boyer v. Ledigh & Co. v. Lumber Co.*, 187 Mo. App. 523, 174 S. W. 113.

<sup>2</sup> *E. L. Welch Co. v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828.

<sup>3</sup> The intention of the parties is determinative of the question of whether or not title passes at the time the contract of sale is executed: *Lundberg v. Kitsap County Bank*, 79 Wash. 75, 139 Pac. 769; *G. I. Frazier Co. v. Owensboro Stave & Co.*, 162 Ky. 301, 172 S. W. 652; *Presley Fruit Co. v. St. Louis & Co. R. Co.*, 130 Minn. 121, 153 N. W. 115; *Barnard v. Tidrick*, 35 S. Dak. 403, 152 N. W. 690; *Hey-*

*brook v. Beard*, 75 Wash. 646, 135 Pac. 626. Unless a contrary intention appears in case of a sale of specific designated goods, title passes at the time the contract is made: *E. L. Welch Co. v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828. If the goods are in a deliverable state, irrespective of payment, title passes when the contract is made: *Bondy v. Hardina*, 216 Mass. 44, 102 N. E. 935; *Stewart v. Henningsen Produce Co.*, 88 Kans. 521, 129 Pac. 181, 50 L. R. A. (N. S.) 111n, Ann. Cas. 1914B, 701n. But it is held that one who has contracted to furnish materials to be used in the performance of a building improvement does not part with title until they are actually incorporated into or attached to the building in the absence of a special agreement: *Lord v. Woolley*, 82 Misc. 656, 144 N. Y. S. 385. See as to effect of agreement as to risk, *L. R. A.* 1918B, 821, 822n.

<sup>4</sup> If anything remains to be done on the part of the seller such as measuring, etc., before delivery, the title does not vest before that is done: *Rolfe v. Huntsville Lumber Co.*, 8 Ala. App. 487, 62 So. 537. See also *Hart-Parr Co. v. Finley*, 31 N. Dak. 130, 153 N. W. 137, Ann. Cas. 1917F, 706. Title did not pass as to lumber not loaded where defendants contracted to pur-

seller is to do something to the chattels before the buyer must accept.<sup>5</sup>

§ 5020. Passing of title where goods are delivered on approval, or the like.<sup>6</sup>

§ 5022. Seller may reserve right of disposal—Title does not pass until condition has been performed—Statutes.<sup>7</sup>—A

chase lumber from plaintiff, who was to sort, grade, and load it on cars: Russell v. Clark, 112 Maine 160, 91 Atl. 602. Where a contract for the sale of boxes provided for delivery f. o. b. scow, but made no provision in regard to inspection, and the seller made delivery on the scow, title passed upon such delivery, though the seller had not examined the goods: Skinner v. Griffiths, 80 Wash. 291, 141 Pac. 693. Title did not pass by the mere execution of the contract, nor until the conditions had been complied with, where a contract for the sale of sewer pipe required that the quantity of pipe should be ascertained, the quality graded, and the price computed: Robinson Bros. & Co. v. Patterson, 210 Fed. 839, 127 C. C. A. 389; Snare & Co. v. United States, 50 Ct. Cl. 370; In re Syracuse Gardens Co., 231 Fed. 284; Oklahoma City Mill & Co. v. Pampa Grain Co., 237 Fed. 715; Stewart v. Henningsen Produce Co., 88 Kans. 521, 129 Pac. 181, 50 L. R. A. (N. S.) 111n, Ann. Cas. 1914B, 701n; G. I. Frazier Co. v. Owensboro Stave & Co., 162 Ky. 301, 172 S. W. 652; Early v. Meadow, 168 Ky. 800, 183 S. W. 229; Harmon v. Flood, 115 Maine 116, 97 Atl. 834; Bondy v. Hardina, 216 Mass. 44, 102 N. E. 935; North Idaho Grain Co. v. Callison, 83 Wash. 212, 145 Pac. 232; R. H. Thomas Co. v. Lewis (W. Va.), 90 S. E. 816. But see to effect that the transaction is an appropriation by the seller and an acceptance by the purchaser and that the title vests in the latter, where a purchaser selects a piece of cloth, directs the seller to make it into a dress for her, and agrees to return to be fitted and the seller cuts the cloth and trimmings into a garment according to her measure, and advances its manufacture to the stage where it is ready to be fitted: Larkin v. Schwitzer, 54 Pa. Super. Ct. 238. See also Stewart v.

Henningsen Produce Co., 88 Kans. 521, 129 Pac. 181, 50 L. R. A. 111n, Ann. Cas. 1914B, 701n. A written contract, by which seller agreed to sell to the buyer his entire crop of apples then growing, held not a contract of sale, but an agreement to sell, under which title to the apples remained in the seller until they were picked and delivered by him: Hartley v. Lapidus & Co., 216 Fed. 92, 132 C. C. A. 336.

<sup>5</sup> State Nat. Bank v. Roseberry 46 Okla. 708, 148 Pac. 1024; Price v. J. B. Faircloth & Co. (Tex. Civ. App.), 181 S. W. 707.

<sup>6</sup> The title passing to the buyer is divested by the exercise of his option within a reasonable time, where goods are sold and delivered, but the buyer reserves the right to reject or return: J. T. McTeer Clothing Co. v. T. L. Farrow Mercantile Co., 9 Ala. App. 104, 62 So. 378. But if the time is made definite for the purchaser to make his decision, he must reject before the specified time or title will vest: Dinsmore v. Rice, 128 Md. 209, 97 Atl. 537. See also F. O. Evans Piano Co. v. Tully (Miss.), 76 So. 833, L. R. A. 1918B, 870n. The title does not pass to the buyer, under Uniform Sales Act, § 19a, on the sale of a machine on approval for one month and rejection of same within the month: George A. Ohl & Co. v. Barnet Leather Co., 87 N. J. L. 300, 93 Atl. 715; Isaacs v. MacDonald, 214 Mass. 487, 102 N. E. 81.

<sup>7</sup> By "conditional sale" is commonly meant transactions whereby possession is delivered to buyer, but the property remains in seller till payment of price: Kingman Plow Co. v. Joyce, 194 Mo. App. 367, 184 S. W. 490; Bailey v. Baker Ice Mach. Co., 239 U. S. 268, 60 L. ed. 275, 36 Sup. Ct. 50; Tarr v. Stearman, 185 Ill. App. 45; Arthur E. Guth Piano Co. v. Adams, 114 Maine 390, 96 Atl. 722; Bay State Paper Co. v. Duggan, 214

reservation of title in the seller may be implied and need not be expressed in any set form.<sup>5</sup>

Mass. 166, 100 N. E. 1083; Toledo Scale Co. v. Gogo, 186 Mich. 442, 152 N. W. 1046; American Clay Machinery Co. v. Sedalia Brick & Tile Co., 174 Mo. App. 485, 160 S. W. 902; State v. Justice of Peace Court, 51 Mont. 133, 149 Pac. 709; Central Union Gas Co. v. Browning, 210 N. Y. 10, 103 N. E. 822; Breakstone v. Buffalo Foundry & Co., 79 Misc. 496, 141 N. Y. S. 159; Ostrander v. Bricka, 91 Misc. 255, 154 N. Y. S. 786; Francis v. Bohart, 76 Ore. 1, 143 Pac. 920, 147 Pac. 755; International Harvester Co. v. Pott, 32 S. Dak. 82, 142 N. W. 652, Ann. Cas. 1916A, 327n; Shaw v. Webb, 131 Tenn. 173, 174 S. W. 273, L. R. A. 1915D, 1141n, Ann. Cas. 1916A, 626n; Lundberg v. Kitsap County Bank, 79 Wash. 75, 139 Pac. 769; Duarte v. Minnick, 85 Wash. 539, 148 Pac. 600; John Deere Plow Co. v. Edgar Farmer Store Co., 154 Wis. 490, 143 N. W. 194. A reservation of title in the seller until payment of purchase-price in contract of sale is valid and enforceable between the parties: G. W. Parsons Co. v. United States Fidelity & Guaranty Co., 225 Fed. 252. Conditional sale contracts between manufacturers and retailers will be construed so as to protect a consumer who buys from the retailer without notice of the terms of such contracts: Trousdale v. Winona Wagon Co., 25 Idaho 130, 137 Pac. 372. In some of the states a contract of conditional sale must be recorded to be valid against subsequent lienors: In re Rose, 206 Fed. 991; In re Raney, 202 Fed. 1003; Corbett v. Riddle, 209 Fed. 811, 126 C. C. A. 535; Arthur v. G. W. Parsons Co., 224 Fed. 47, 139 C. C. A. 511; In re Bondurant Hardw. Co., 231 Fed. 247; McNatt v. Clarke Bros., 143 Ga. 159, 84 S. E. 447; Tremere v.

Barfield, 12 Ga. App. 774, 78 S. E. 729; Oaks v. Singer Sewing Mach. Co., 17 Ga. App. 517, 87 S. E. 719; G. A. Crancer Co. v. Williams, 191 Ill. App. 451; Arthur E. Guth Piano Co. v. Adams, 114 Maine 390, 96 Atl. 722; American Clay Machinery Co. v. Sedalia Brick & Co., 174 Mo. App. 485, 160 S. W. 902; S. S. Bowser & Co. v. Garwitz, 185 Mo. App. 420, 170 S. W. 927; Musselman v. Joplin (Mo. App.), 180 S. W. 1058; G. A. Crancer Co. v. Cooper, 98 Nebr. 153, 152 N. W. 304; Crocker-Wheeler Co. v. Genesee Recreation Co., 160 App. Div. 373, 145 N. Y. S. 477; Cutler Mail Chute Co. v. Crawford, 167 App. Div. 246, 152 N. Y. S. 750; Montesano Lumber & Mfg. Co. v. Portland Iron Works, 78 Ore. 53, 152 Pac. 244; Wing v. Padgett (Tex. Civ. App.), 160 S. W. 422; Woods v. McIvor, 74 Wash. 359, 133 Pac. 590; Malmo v. Washington Rendering & Co., 79 Wash. 534, 140 Pac. 569, L. R. A. 1917C, 440n; Eilers Music House v. Fairbanks, 80 Wash. 379, 141 Pac. 885; Anderson v. Langford, 91 Wash. 176, 157 Pac. 456; Regina Co. v. Toynbee, 163 Wis. 551, 158 N. W. 313. In other states it is not necessary that they be filed or recorded to be good as against third parties: Meier & Co. v. Sabin, 214 Fed. 231, 130 C. C. A. 605; Starr Piano Co. v. Baker, 8 Ala. App. 449, 62 So. 549; Fuller v. Webster, 5 Del. 538, 95 Atl. 335; Praeger v. Emerson-Brantingham Implement Co., 122 Md. 303, 89 Atl. 501, Ann. Cas. 1916A, 1255n; Burkhalter v. Mitchell, 106 Miss. 92, 64 So. 967; Musselman v. Joplin (Mo. App.), 180 S. W. 1058; Oconto Land Co. v. Wall-schlaeger, 155 Wis. 418, 144 N. W. 979.

<sup>5</sup> Lundberg v. Kitsap County Bank, 79 Wash. 75, 139 Pac. 769.

## CHAPTER CLVII

### EFFECTS OF THE CONTRACT—TRANSFER OF TITLE

§ 5030. **Attempted sale by one not the owner.**—In one of the cases it was declared that though the seller did not own the truck at the time of the sale, an executory contract for the sale of an automobile truck was none the less valid and binding on the buyer.<sup>1</sup> It is not essential to the validity of a sale that the seller have ownership or possession of cotton at the time of his contract to sell.<sup>2</sup> But a buyer of chattels acquires only such title as his seller has and is authorized to transfer, as a general rule.<sup>3</sup>

§§ 5032, 5033. **Conditional sales—Factors and recording acts—Sales in bulk.**—Statutes exist in many states requiring the recording of conditional sale contracts under certain circumstances in order to prevent bona fide purchasers or other specified classes of persons from getting a good title,<sup>4</sup> and such a sale contract is governed in this regard by the law of the state in which the property is delivered and to be resold.<sup>5</sup>

<sup>1</sup> Meyer v. Shapton, 178 Mich. 417, 144 N. W. 887.

<sup>2</sup> Baker v. Lehman, 186 Ala. 493, 65 So. 321.

<sup>3</sup> Rocky Mountain Fuel Co. v. George N. Sparling Coal Co., 26 Colo. App. 260, 143 Pac. 815.

<sup>4</sup> See authorities cited in last note to § 5022, ante. And as to bulk sales acts see notes in L. R. A. 1915E, 917; 1917D, 619, 1067; 1917E, 549.

<sup>5</sup> Columbus Merchandise Co. v. Kline, 248 Fed. 296.

## CHAPTER CLVIII

### PERFORMANCE OF THE CONTRACTS OF SALE—CONTRACTUAL OBLIGATIONS

§ 5040. **Duty of seller to deliver and buyer to accept and pay.**<sup>1</sup>—The seller can not impose other conditions precedent

<sup>1</sup> There may be a sale and title passed where there is no delivery, and there may be a sale in which delivery is necessary to pass title; but whether title passes by sale or by delivery is to be determined by the facts surrounding the transaction: *Kentucky Motor Car Co. v. Darenkamp*, 162 Ky. 219, 172 S. W. 524. Unless it is stipulated to the contrary, title does not vest in a buyer until delivery and acceptance: *Hart-Parr Co. v. Finley*, 31 N. Dak. 130, 153 N. W. 137, L. R. A. 1915E, 851. Title passes on delivery, under the seller's agreement that he will make the article right if it is not as represented: *State Nat. Bank v. Roseberry*, 46 Okla. 708, 148 Pac. 1034. Title does not pass until delivery, where there is a special contract that goods are to be delivered to a particular place: *Robert McLane Co. v. Swernemann* (Tex. Civ. App.), 189 S. W. 282; *Robbins v. Brazil Syndicate R. & B. Co.* (Ind. App.), 114 N. E. 707. The seller must inform the buyer on what day he proposes to make delivery, where a seller has the option to deliver the goods sold on any one of a number of days, it being the duty of the buyer to furnish cars or vessel: *Culp v. Sandoval* 22 N. Mex. 71, 159 Pac. 956, L. R. A. 1917A, 1157. The ownership of sand did not pass until its delivery where sold defendant f. o. b. its station: *Central of Georgia R. Co. v. Southern Ferro Concrete Co.*, 193 Ala. 108, 68 So. 981, Ann. Cas. 1916E, 376n. Delivery is complete where the goods are put completely and unconditionally at the buyer's disposal: *Schneider v. C. H. Little Co.*, 184 Mich. 315, 151 N. W. 587. It is not necessary that the buyer shall take manual possession

or remove the mare from the seller's premises, but is sufficient that both parties agree that the buyer shall take her and recognize his ownership to constitute the delivery necessary to a completed sale: *Elgin v. Barker*, 106 Ark. 482, 153 S. W. 598; *Harris v. Egger*, 226 Fed. 389, 141 C. C. A. 219; *Loval v. Wolf*, 179 Ala. 505, 60 So. 298; *Poindexter v. Wilkes*, 112 Ark. 608, 165 S. W. 959; *Payne v. Brownlee*, 196 Ill. App. 108; *Talcott v. Slater Bros. Cloak & Co.*, 171 App. Div. 395, 157 N. Y. S. 499. Where a contract of sale fixed no date of delivery, delivery within a reasonable time is sufficient: *Weinberg v. Gash*, 94 Misc. 303, 158 N. Y. S. 179; *Riegall Sack Co. v. Tidewater Portland Cement Co.*, 95 Misc. 202, 158 N. Y. S. 954; *S. A. Stone & Co. v. Davis* (Tex. Civ. App.), 175 S. W. 772; *Thompson-Starrett Co. v. Plunkett*, 89 Vt. 177, 94 Atl. 845; *MacLeod v. Aberdeen Brewing Co.*, 82 Wash. 74, 143 Pac. 440; *State v. Hanna*, 87 Wash. 29, 151 Pac. 83, 1087. Where delivery was to be made on or about a given date, though time was made of the essence, it is sufficient if the property sold was delivered within a reasonable time of the day fixed: *Pasow v. Harris*, 29 Cal. App. 559, 156 Pac. 997; *Velleman v. Sidney Blumenthal & Co.*, 172 App. Div. 331, 158 N. Y. S. 393; *Levy v. John C. Dettra & Co.*, 91 Misc. 41, 154 N. Y. S. 176. A sale of personal property for a valuable consideration may be complete between the parties without an actual delivery, in the absence of a claim of fraudulent intent: *Gilbert v. First Nat. Bank*, 53 Ind. App. 611, 101 N. E. 395. The buyer was entitled to recover his damages, where

to delivery, where a contract of sale specifies the manner of delivery.<sup>2</sup>

**§ 5041. Delivery and payment concurrent conditions.**<sup>3</sup>—A shipper retains title until payment of the draft where goods are consigned to the shipper's order with draft attached to

the buyer prepared to receive lumber on the day which the sellers notified him was "about" the day on which it would arrive, and the sellers' conduct showed that they considered this notice as the one provided for by the contract, and the buyer was damaged by failure of the lumber to arrive until twelve days later: *Holmes v. Stearns Lumber & Co. Co.*, 66 Fla. 259, 63 So. 449. Where goods are sold and the seller agrees to ship them, delivery to the carrier is delivery to the buyer: *Capitol Food Co. v. Mode*, 112 Ark. 165, 165 S. W. 637; *Alabama Great Southern R. Co. v. H. Altman & Co.*, 191 Ala. 429, 67 So. 589; *Trousdale v. Arkadelphia Milling Co.*, 106 Ark. 477, 153 S. W. 618; *Isbel Brown Co. v. Stevens Grocer Co.*, 118 Ark. 17, 175 S. W. 1158; *Planters' Fertilizer & Chemical Co. v. Columbia Cotton Oil Co.*, 126 Ark. 19, 189 S. W. 166; *Home Pattern Co. v. W. W. Mertz Co.*, 86 Conn. 494, 86 Atl. 19; *Home Pattern Co. v. W. W. Mertz Co.*, 88 Conn. 22, 90 Atl. 33; *Virginia Kid Co. v. New Castle Leather Co.*, 4 Del. 511, 89 Atl. 367; *Foster Drug Co. v. Zeller & Sons Co.*, 191 Ill. App. 508; *Commonwealth v. McGarvey*, 158 Ky. 570, 165 S. W. 973; *G. I. Frazier Co. v. Owensboro Stave & Co. Co.*, 162 Ky. 301, 172 S. W. 652; *Bay State Paper Co. v. Duggan*, 214 Mass. 166, 100 N. E. 1083; *Elliott Supply Co. v. Green*, 35 N. Dak. 641, 160 N. W. 1002; *State v. Bayer*, 93 Ohio 72, 112 N. E. 197; *Pabst Brewing Co. v. Smith (Okla.)*, 135 Pac. 381; *Buckeye Cotton Oil Co. v. Matheson*, 104 S. Car. 430, 89 S. E. 478; *Robert McLane Co. v. Swernemann (Tex. Civ. App.)*, 189 S. W. 282; *McCollum v. Minneapolis & C. R. Co.*, 152 Wis. 435, 139 N. W. 1129. See *George Gifford Co. v. Willman*, 187 Mo. App. 29, 173 S. W. 53. But delivery to a carrier does not vest title in the buyer where the seller has not complied with his

agreement as to time of delivery: *Arkansas Grocer Co. v. Deusch (Mo. App.)*, 186 S. W. 579; *Craven v. Stone Store & Co. Co.*, 191 Ill. App. 566.

<sup>2</sup> *Petersburg Fire Brick & Co. v. American Clay Machinery Co.*, 89 Ohio 365, 106 N. E. 33, L. R. A. 1915B, 536n.

<sup>3</sup> The title does not pass until payment where neither party intended that it should pass until inspection and acceptance and payment of the price: *Half Co. v. Jones (Tex. Civ. App.)*, 169 S. W. 906; *Canadian Northern R. Co. v. Northern Mississippi R. Co.*, 209 Fed. 758, 126 C. C. A. 482; *Bowen v. De Loach*, 13 Ga. App. 458, 79 S. E. 371; *Wilson v. International R. Co.*, 160 N. Y. S. 367; *Green River Land Co. v. Bostic*, 168 N. Car. 99, 83 S. E. 747; *Orange Iron Works v. Stafford (Tex. Civ. App.)*, 178 S. W. 683. The buyer becomes the owner thereof, as though the price had been paid before delivery where the seller sells and delivers a trunk without reserving title: *Toole v. Davis*, 13 Ga. App. 122, 78 S. E. 865; *Elgin v. Barker*, 106 Ark. 482, 153 S. W. 598; *Murray Co. v. Satterfield*, 125 Ark. 85, 187 S. W. 927; *Hibbard v. Estridge*, 156 Ky. 122, 160 S. W. 746; *E. L. Welch Co. v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828; *Brinn v. Independent Steamboat Line*, 168 N. Car. 390, 84 S. E. 530. It is held that title passed where the seller of goods accepted the buyer's check in payment of the price: *Cox Hat Co. v. Adams*, 14 Ala. App. 426, 70 So. 203. The title does not pass if the purchase-money is not paid in accordance with the terms of the contract, and in such case the seller may reclaim his property, provided he has not waived cash payment after the buyer has taken possession or been guilty of laches or conduct which amounts to an estoppel, where a sale of personal property is for cash: *Skinner & Co. Stationery Co. v. Lam-*

the bill of lading.<sup>4</sup> The title did not pass at the time of the sale, but at the time delivery was made where a contract for sale of one thousand barrels of vinegar provided for delivery f. o. b. cars at Memphis, Tenn., payment to be made thirty days after the receipt of each carload by the buyer.<sup>5</sup>

§ 5042. **Place of delivery.**<sup>6</sup>—The place of delivery is ordi-

mert Furniture Co., 182 Mo. App. 549, 166 S. W. 1079; Ocean S. S. Co. v. Southern States Naval Stores Co., 145 Ga. 798, 89 S. E. 838; Boyd v. Bank of Mercer County, 174 Mo. App. 431, 160 S. W. 587; C. M. Keys Commission Co. v. Beatty, 42 Okla. 721, 142 Pac. 1102; Allen Lumber Co. v. Higuera, 86 Vt. 453, 85 Atl. 979. But the seller may be estopped by laches or by conduct showing that he considered the title as passed: Lehmann v. People's Furniture Co., 42 Okla. 761, 142 Pac. 986, L. R. A. 1915D, 355n; In re O'Callaghan, 225 Fed. 133.

<sup>4</sup>Sessoms Grocery Co. v. International Sugar Feed Co., 188 Ala. 232, 66 So. 479; Isbel-Brown Co. v. Stevens Grocer Co., 118 Ark. 17, 175 S. W. 1158; Delgado Mills v. Georgia &c. Banking Co., 144 Ga. 175, 86 S. E. 550; Moore v. State, 12 Ga. App. 576, 77 S. E. 1132; Georgia &c. R. Co. v. Blish Milling Co., 15 Ga. App. 142, 82 S. E. 784; Cartersville Grocery Co. v. Rowland, 17 Ga. App. 42, 86 S. E. 402; B. F. Swartz & Co. v. Woldert Grocery Co., 151 Ky. 743, 152 S. W. 934; People's Nat. Bank of Boston v. Mulholland, 224 Mass. 448, 113 N. E. 365; Presley Fruit Co. v. St. Louis &c. R. Co., 130 Minn. 121, 153 N. W. 115; Roaring Fork Potato Growers v. C. C. Clemons produce Co., 193 Mo. App. 653, 187 S. W. 617; A. E. Myers & Co. v. Norfolk Southern R. Co., 171 N. Car. 190, 88 S. E. 149; St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank, 35 Okla. 434, 130 Pac. 280; Sanders v. D. Landreth Seed Co., 100 S. Car. 389, 84 S. E. 880. The title to the third car did not pass where the seller of three automobiles shipped them, omitting price of one car from draft attached to bill of lading: Fin-

ney v. Studebaker Corp., 196 Ala. 422, 72 So. 54.

<sup>5</sup>Burgie v. Hicks, 203 Fed. 340.

<sup>6</sup>[Main section cited in Robbins v. Brazil Syndicate R. & B. Co. (Ind. App.), 114 N. E. 707, 709.]

Unless the contract provides otherwise, the place of delivery is the place where the goods are located when sold: Lodwick Lumber Co. v. E. A. Butt Lumber Co., 35 Okla. 797, 131 Pac. 917; Gwin v. Hopkinsville Milling Co., 190 Ala. 346, 67 So. 382. Where the contract contains no provision as to where delivery is to be made, the place of delivery is presumptively the place of business of seller, or place of sale: Woldert Grocery Co. v. Pillman, 191 Mo. App. 15, 176 S. W. 457; Schiff v. Winton Motor Car Co., 90 Misc. 590, 153 N. Y. S. 961. The manufacturer's place of business is the place of delivery of goods manufactured to order, in absence of agreement to contrary: Dressler-Beard Mfg. Co. v. Winter Garden Co., 158 N. Y. S. 875. The place of delivery was Milwaukee, and the buyer was liable for the price, though the cabbage was injured by frost in transit, under a contract for sale of two carloads of cabbage in Milwaukee to a commission house in Kansas City: Gehl v. Peycke Bros. Commission Co., 158 Wis. 494, 149 N. W. 275. No formal ceremony is necessary to a delivery of property sold; any act which has the effect of transferring dominion, coupled with intent to change ownership, is a "delivery": Rairden v. Hedrick, 46 Mont. 510, 129 Pac. 498; First Nat. Bank v. Cook, 171 Iowa 41, 153 N. W. 169; Kentucky Motor Car Co. v. Darenkamp, 162 Ky. 219, 172 S. W. 524; Flynn v. Badger, 173 App. Div. 71, 158 N. Y. S. 859.



narily the place of inspection in a contract for the sale and delivery of lumber f. o. b. cars.<sup>7</sup>

§ 5043. **Time of delivery.**<sup>8</sup>—It was held in a recent case, time being ordinarily of essence in contracts of merchants, a contract for sale of flour to be shipped by steamer sailing during February was broken where the steamer did not sail until March 8.<sup>9</sup>

### § 5047. **Incomplete delivery — Smaller quantity than**

<sup>7</sup> Robert McLane Co. v. Sweremmann (Tex. Civ. App.), 189 S. W. 282; Wiggin v. Marsh Lumber Co. 77 W. Va. 7, 87 S. E. 194. Compare Todd v. Toll (Ark.), 197 S. W. 1179; Cuero Cotton Oil & Co. v. Feeders Supply Co. (Tex. Civ. App.), 203 S. W. 79.

<sup>8</sup> A delivery within a reasonable time is sufficient in the absence of a requirement of the contract to the contrary; what constitutes a reasonable time is to be determined from all of the circumstances of the individual case: Martyn v. Western Pac. R. Co., 21 Cal. App. 589, 132 Pac. 602; Ward v. Cotton Seed Products Co., 193 Ala. 101, 69 So. 514; Jenkins v. Brittin, 185 Ill. App. 67; Citizens' Bank v. Adam Schillo Lumber Co., 188 Ill. App. 535; Homer v. Baker Yacht Basin, 223 Mass. 500, 112 N. E. 151; Barlow v. Lincoln-Williams Twist Drill Co., 186 Mich. 46, 152 N. W. 1034; Heller v. Ferguson, 189 Mo. App. 484, 176 S. W. 1126; Morse v. Canasawacta Knitting Co., 154 App. Div. 351, 139 N. Y. S. 634; Sturges & Co. v. American Separator Co., 158 App. Div. 63, 142 N. Y. S. 697; Sturges & Co. v. American Separator Co., 171 App. Div. 429, 156 N. Y. S. 872; General Electric Co. v. Camden Iron Works, 239 Pa. 411, 86 Atl. 1012. A contract calling for the delivery of merchandise about December 20th is complied with where the goods are shipped on December 22d: Hughes v. Constantin, 139 N. Y. S. 865. Where an order provided that a cash register should be shipped "as soon as possible" it was not complied with by the seller shipping it in ten weeks, the same as other orders in the ordinary course of business: National Cash Register Co. v. McCann, 80 Misc. 165, 140 N. Y. S. 916. The seller is entitled to a

reasonable extension of time, where the seller's failure to have lumber in pile at the time specified in the contract is due in part to the buyer's failure to remove certain lumber as agreed: North Shore Lumber Co. v. South Side Lumber Co., 176 Ill. App. 96. The buyers were not liable for the price unless the potatoes were delivered or tendered at such a point within a reasonable time after the seller received the order to ship where the sellers of potatoes contracted to deliver at a Texas common point: J. & G. Lippman v. Jeffords-Schoenmann Products Co. (Tex. Civ. App.), 184 S. W. 534. A contract for the sale of hay providing for delivery of all of it within 90 days, subject to the securing of cars and weather conditions, does not require delivery under any circumstances, but delivery is contingent on the exceptions made: Norton v. Huffine & Co., 50 Okla. 330, 150 Pac. 1099; Durdin-Coleman Lumber Co. v. William H. Wood Lumber Co., 221 Mass. 564, 109 N. E. 648; Erie City Iron Works v. Cushnoc Paper Co., 113 Maine 222, 93 Atl. 356; Turner Lumber Co. v. Tonopah Lumber Co., 38 Nev. 338, 145 Pac. 914, 153 Pac. 254; International Paper Co. v. Rockefeller, 161 App. Div. 180, 146 N. Y. S. 371. "Prompt delivery" means within a few days at most: Acme-Evans Co. v. Hunter, 194 Ill. App. 542. When time for delivery of goods sold is at the buyer's option, he must exercise his option within a reasonable time, and the seller is entitled to a reasonable time after notice to make delivery: Brunner v. Mobile-Gulfport Lumber Co., 188 Ala. 248, 66 So. 438.

<sup>9</sup> Connell Bros. Co. v. H. Diedrichsen & Co., 213 Fed. 737, 130 C. C. A. 251. See also The Lark, 245 Fed. 909.

**agreed.**<sup>10</sup>—It is held that a buyer waives the time of delivery by accepting a part of the goods after time fixed for delivery and requesting further deliveries.<sup>11</sup>

**§ 5049. Delivery of excessive quantity.**<sup>12</sup>

**§ 5053. Delivery in instalments.**—The seller is required to make deliveries in reasonable times, under a contract for sale of goods to be delivered in reasonable instalments as required by the buyer.<sup>13</sup>

**§ 5054. Delivery to carrier for buyer—Risk of deterioration.**<sup>14</sup>—The carrier is but a bailee for the shipper, where a

<sup>10</sup> Unless he substantially performs or tenders full performance, where several articles are sold under an indivisible contract, the seller can not recover the price of any part thereof: *Petersburg Fire Brick & Co. v. American Clay Machinery Co.*, 89 Ohio 365, 106 N. E. 33, L. R. A. 1915B, 536n; *Singer v. Santa Paula Commercial Co.*, 140 Ga. 411, 78 S. E. 1094. But the buyer may waive his rights by acceptance and be liable for those received: *Weinberg v. Gash*, 94 Misc. 303, 158 N. Y. S. 179. The buyer is not rendered liable for rejected portion by acceptance of lumber of standard portion, notifying seller of rejection of portion below quality: *Stearns Salt & Co. v. Dennis Lumber Co.*, 188 Mich. 700, 154 N. W. 91. Contra, see *Elzea v. Brown*, 59 Pa. Super. Ct. 403.

<sup>11</sup> *Robinson Clay Products Co. v. Thatcher*, 150 N. Y. S. 658.

<sup>12</sup> A buyer is under no obligation to accept a greater quantity of goods than he agreed to purchase: *Galland v. Kass*, 152 N. Y. S. 1074; *Famechon v. Devore*, 184 Mo. App. 577, 170 S. W. 694; *Weinmann v. Fellman*, 162 N. Y. S. 131. The buyer was justified in refusing acceptance, either under the common law or under the rule of substantial compliance, where an order for steel bars was filled with bars exceeding specified length, making additional weight and additional cost: *Polson Logging Co. v. Neumeyer*, 229 Fed. 705, 144 C. C. A. 115. A buyer of marble for use in a building is liable for all received at the contract-price, where he receives and

appropriates additional marble to another use: *Fleming v. Law*, 28 Cal. App. 110, 151 Pac. 385.

<sup>13</sup> *Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21, 150 C. C. A. 223.

<sup>14</sup> The contract is complied with by delivery to any one of the several common carriers in the city, whether the cars are on a regularly used spur or side track, or on the main track, or at the depot of the carrier, at the point of shipment, where goods are sold "f. o. b. cars" at the place of shipment: *Farmers' Cotton Oil Co. v. T. H. Brooke & Co.*, 14 Ga. App. 778, 82 S. E. 372; *Bloom v. Edward Miller & Co.*, 118 Ark. 601, 176 S. W. 673; *Martyn v. Western Pac. R. Co.*, 21 Cal. App. 589, 132 Pac. 602; *Cannon v. Turner-Hudnut Co.*, 185 Ill. App. 9; *Keeling-Easter Co. v. R. B. Dunning & Co.*, 113 Maine 34, 92 Atl. 929; *Sethness Co. v. Home Ade Bottling Co.*, 111 Miss. 151, 71 So. 308; *Schanz v. Bramwell*, 143 N. Y. S. 1057; *Rose v. Woldert Grocery Co.* (Okla.), 154 Pac. 531; *Richard Cocke & Co. v. Big Muddy Coal & Co.* (Tex. Civ. App.), 155 S. W. 1019; *Burton v. Nacogdoches Crate & Co.* (Tex. Civ. App.), 161 S. W. 25; *Outcalt Advertising Co. v. Thornton* (Tex. Civ. App.), 164 S. W. 436. A buyer may refuse to treat a delivery to an express company as a delivery to himself, where under the contract of carriage he could recover only one-half of their value if destroyed or lost, under Sales of Goods Act, § 127, subd. 2, which requires the seller to make a reasonable contract with the

shipper of goods makes himself the consignee in the bill of lading.<sup>15</sup> Where a seller shipped goods contrary to instructions there was no delivery, the contract calling for shipment as directed by the buyer.<sup>16</sup>

**§ 5055. Acceptance—Buyer not deemed to accept without opportunity to inspect.**<sup>17</sup>—Though a contract for a scale pro-

carrier: *Miller v. Harvey*, 83 Misc. 59, 144 N. Y. S. 624. Where delivery is not made within a reasonable time, delivery of goods to a carrier does not constitute delivery to the consignee, the order being canceled before such delivery: *Agnil Light Co. v. National Stamping Electric Works*, 178 Ill. App. 473. Where a contract requires a delivery to the buyer it is not fulfilled until such delivery is actually made, and a showing of delivery to express company as the seller's agent is not a showing of delivery: *Hauptman v. Miller*, 94 Misc. 266, 157 N. Y. S. 1104. While the rule is that delivery of freight to a common carrier is delivery to the consignee, this may be varied by an agreement: *McCook v. Halliburton-Myers Co.*, 14 Ga. App. 381, 80 S. E. 863. It was held that where plaintiff, an egg dealer, delivered goods to a transfer railroad company, delivery was made according to contract in view of local conditions and previous manner of delivery: *Hoffman Bros. Produce Co. v. I. V. Horn Co.*, 158 N. Y. S. 401.

<sup>15</sup> *Brown v. Max Malter Co.*, 184 Ill. App. 621; *Rosenbaum v. Davis & Co.*, 111 Miss. 278, 71 So. 388; *Planters' Oil Co. v. Lightsey*, 98 S. Car. 3, 81 S. E. 1102.

<sup>16</sup> *Watson v. Patrick* (Tex. Civ. App.), 174 S. W. 632.

<sup>17</sup> Where goods were shipped to a buyer from a distant point, and he had no opportunity to inspect them, he could take possession for the purpose of inspection without acquiring title: *G. I. Frazier Co. v. Owensboro Stave & Co.*, 162 Ky. 301, 172 S. W. 652. A buyer has the implied right of inspection of goods which were not present when the contract was made: *George Gifford Co. v. Willman*, 187 Mo. App. 29, 173 S. W. 53. On sale by sample or on repre-

sentation as to quality which does not amount to express warranty, the buyer has a reasonable opportunity for inspection, and, if not according to sample or representation, may reject it, or return it and recover consideration, but after reasonable opportunity for inspection he can not ordinarily complain, and will be assumed to have accepted it as a compliance with the contract: *Robinson v. Huffstetler*, 165 N. Car. 459, 81 S. E. 753; *Veitch v. Illinois Cent. R. Co.*, 14 Ala. App. 146, 68 So. 575; *Virginia Kid Co. v. New Castle Leather Co.*, 4 Del. 511, 89 Atl. 367; *Model Mill Co. v. Carolina & C. R. Co.*, 136 Tenn. 211, 188 S. W. 936; *Lange v. Interstate Sales Co.* (Tex. Civ. App.), 166 S. W. 900; *Robert McLane Co. v. Swernemann* (Tex. Civ. App.), 189 S. W. 282. The buyer's option to have the phosphate analyzed to determine whether the requisite proportions were present must have been exercised within a reasonable time, where a contract evidenced by a broker's note, for the sale of crushed tankage, did not automatically apply the test and measurement of ammonia and phosphate before fixing the final purchase-price: *International Agricultural Corporation v. Stadler*, 212 Fed. 378, 129 C. C. A. 54; *Barrett Mfg. Co. v. D'Ambrosio*, 90 Conn. 192, 96 Atl. 930; *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915B, 1131n, Ann. Cas. 1916A, 948n. The purchaser is not required to pay for the portion used, where seller of certain brand of flour ships another brand to baker, representing it to be of same grade, and baker uses only enough to find that it is of inferior grade: *Shreveport Mill & C. Co. v. Stoehr*, 139 La. 719, 71 So. 961. After a reasonable time for inspection, it is the duty of the purchasers to either accept or re-

vided "no scale placed on trial," where the scale proved defective on being tested, the buyer could refuse to accept it.<sup>18</sup>

**§ 5059. Acceptance—When buyer is deemed to have accepted.**<sup>19</sup>—A purchaser of goods under a contract to pay the

ject the goods, and, if rejected, it is his duty to promptly notify the sellers: *Koolbergen v. Yates*, 53 Pa. Super. Ct. 406; *Emery Thompson Mach. &c. Co. v. Graves*, 91 Conn. 71, 98 Atl. 331; *Johnston v. Lanter*, 98 Kans. 62, 157 Pac. 266.

<sup>18</sup> *Toledo Computing Scale Co v. Fredericksen*, 95 Nebr. 689, 146 N. W. 957.

<sup>19</sup> Where the buyer does any act in relation to the goods inconsistent with ownership in the seller, he is deemed to have accepted: *M. Hommel Wine Co. v. Netter*, 197 Ill. App. 382; *J. L. Owens Co. v. Whitcomb*, 165 Wis. 92, 160 N. W. 161. See also *White v. Schneitzer*, 221 N. Y. 461, 117 N. E. 941. Use by buyer amounts to an acceptance: *Aegerter v. Ronspies*, 97 Nebr. 656, 150 N. W. 1019; *Burrell v. Southern Cal. Canning Co.* (Cal. App.), 169 Pac. 405. It amounted to an acceptance of the goods, where the buyer of a lot of furniture received goods not ordered, and took them to his store and sold them: *Cuschner v. Pittsburgh-Hickson Co.*, 91 Wash. 371, 157 Pac. 879; *Schindler v. Sperling*, 155 N. Y. S. 348. The defendant, by making inspection through his agent and taking away a wagon load, will be held to have accepted them so that he can not afterward repudiate and hold the goods for sale on plaintiff's account in an action for the price of a car load of grapes: *Walker v. Barnett*, 174 Ill. App. 472. Retention of a musical instrument for several months, and using it, held to denote an acceptance, within Sales Act, § 48: *Wurlitzer Mfg. Co. v. United Realty &c. Co.*, 87 N. J. L. 656, 94 Atl. 630. Where the operation was merely for the purpose of testing and to determine whether the machine could be operated, there was no acceptance, within a provision of a contract of sale providing that operation of certain machinery should constitute an

acceptance: *Sherman v. Ayers*, 20 Cal. App. 733, 130 Pac. 163. Defendant's action, in taking off parts of an automobile to be used as exhibits at the trial without the consent of plaintiff, held not to show acceptance: *United Motor &c. Co. v. Callander*, 30 Cal. App. 41, 157 Pac. 561. There is no acceptance when the seller misrepresents and thus induces the buyer to take possession: *Barrett Mfg. Co. v. D'Ambrosio*, 90 Conn. 192, 96 Atl. 930. It did not amount to an acceptance by paying the draft covering the price in order to secure the bill of lading for the shipment from a bank so that he might inspect the goods: *Mueller v. Simon* (Tex. Civ. App.), 183 S. W. 63. Though it was more than he had ordered, where a buyer does not, within a reasonable time, either return the goods or notify the seller that he will not accept them because of an excess in the quantity, he impliedly accepts the full quantity: *Linger v. Wilson*, 73 W. Va. 669, 80 S. E. 1108. There was no acceptance, however, where goods in excess of those ordered were by mistake and without authority placed on the buyer's shelves, and thereafter, on discovery of the excess, promptly returned: *Savoy Shirt Co. v. Callaway Clothing Co.*, 69 Fla. 11, 67 So. 230. Use of a small quantity of lumber by purchaser, by mistake, where he had refused to accept, held not necessarily an acceptance of the lumber: *Continental Lumber &c. Co. v. Miller* (Tex. Civ. App.), 161 S. W. 927. That the buyer mortgaged the realty during installation and, pending suit to foreclose the seller's lien, sold the property to another did not constitute an acceptance of the plant, and plaintiff could only recover for such materials thereof as were incorporated in the new plant, where a refrigerator plant was not satisfactory and was changed: *United Iron Works v. Hosea*, 81 Wash. 234, 142 Pac. 673.

market-price can not return them simply because he has not agreed that prices stated in the seller's invoices were market-prices, but is obliged to accept and pay the market-price.<sup>20</sup>

<sup>20</sup> Owensboro Wheel Co. v. Trammell, 172 Ky. 564, 189 S. W. 702.

## CHAPTER CLIX

### RIGHTS OF UNPAID SELLER AGAINST THE GOODS

#### § 5065. Rights and remedies of unpaid seller—Generally.<sup>1</sup>

—The buyer can not recover damages for the failure of the seller to ship additional goods pursuant to the contract, where the buyer has failed to make payments when due.<sup>2</sup>

§ 5070. No lien where goods are in public place or already in possession of buyer.<sup>3</sup>—But where either the title or possession of goods sold is retained until payment is made, and the seller surrenders possession on promise of immediate payment, and payment is not made, he may repossess the goods or sue in conversion if the buyer refuses to return the goods.<sup>4</sup>

#### § 5071. Waiver of lien.<sup>5</sup>

<sup>1</sup> If the buyer has himself breached his agreement by refusing to pay for the goods on demand a seller is not bound to deliver: *Wolfe City Milling Co. v. Ward* (Tex. Civ. App.), 185 S. W. 663; *George Leuders & Co. v. Fahlberg Saccharine Works*, 150 N. Y. S. 635. The title of the seller is good, even as against a bona fide purchaser from the buyer, where turpentine sold for cash was delivered, but the buyer failed to pay the price: *Ocean S. S. Co. v. Southern States Naval Stores Co.*, 145 Ga. 798, 89 S. E. 838.

<sup>2</sup> *Armuchee Pants Mfg. Co. v. A. D. Juilliard & Co.*, 14 Ga. App. 141, 80 S. E. 525. But see *Burgie v. Hicks*, 203 Fed. 340.

<sup>3</sup> *Park v. South Bend Chilled Plow Co.* (Tex. Civ. App.), 199 S. W. 843. Property purchased on credit by an insolvent buyer is acquired fraudulently and may be reclaimed by the vendor if the purchaser has no reasonable expectation that he will be able to pay: *In re Sycamore Grain & Milling Co.*, 221 Fed. 468; *Mann v. Pusrin*, 158 N. Y. S. 906. See also *Jones v. H. M. Hobbie Grocery Co.*, 246 Fed. 431. The seller was held to have a right to recover the property

sold, on the buyer's default, so long as any of the purchase-money notes remained in his hands unpaid: *Orenstein-Arthur Koppel Co. v. Martin*, 77 W. Va. 793, 88 S. E. 1064.

<sup>4</sup> *E. L. Welch Co. v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828. See also *Jones v. Bank* (Ark.), 199 S. W. 103; *Swain v. Schild* (Ind. App.), 117 N. E. 933.

<sup>5</sup> The seller, by making a written contract of conditional sale limiting the security reserved to a specified sum, thereby waives a right to a lien for any further or other sum: *Pickford v. Borland*, 76 Wash. 339, 136 Pac. 128. It was held that the seller had waived the right of stoppage in transitu under Personal Property Law, § 139, by transferring negotiable warehouse receipt to buyer: *Rummell v. Blanchard*, 216 N. Y. 348, 110 N. E. 765, Ann. Cas. 1917D, 109n; *Rummell v. Blanchard*, 167 App. Div. 654, 153 N. Y. S. 159. It was held that the vendor's lien had been lost because of loss of identity of cane roller shells, which had been fastened to a mill shaft by hydraulic pressure and thoroughly connected with other parts of the machinery: *Hibernia Bank & Co. v. C. F. Knoll Plant-*

§ 5072. **Right of stoppage in transitu—General rule.**<sup>6</sup>—The right of stoppage is lost where goods are delivered into the actual possession of the buyer, or one standing in his shoes.<sup>7</sup>

§ 5075. **When transit is ended.**<sup>8</sup>

§ 5079. **Resale by seller.**<sup>9</sup>

ing &c. Co., 133 La. 242, 62 So. 663. The seller of lumber for cash, less 2 per cent., within ten days, or sixty days' acceptance, who declined to permit the buyer to refuse acceptance, and insisted on payment for about a year, could not thereafter claim the right to retake the lumber, which had been resold by the buyer: *Maley-Thompson &c. Co. v. Thomas Forman Co.*, 179 Mich. 548, 146 N. W. 95. The seller, by commencing an action for the unpaid purchase-price and attaching animals sold affirmed the sale and admitted that title had passed: *Miles v. Haney*, 190 Mo. App. 220, 176 S. W. 429; *Schroeder v. Hotel Commercial Co.*, 84 Wash. 685, 147 Pac. 417. But where the seller negotiated one of the purchase-money notes which he was afterward required to take up, it was held not a waiver of his right on the buyer's default to reclaim the property sold: *Orenstein-Arthur Koppel Co. v. Martin*, 77 W. Va. 793, 88 S. E. 1064.

<sup>6</sup>One selling goods on credit has the right of stoppage in transitu and may retake the goods after the goods are delivered to the carrier, warehouseman, etc., for delivery to the buyer, upon discovering the buyer's insolvency: *Monaghan Mills v. Gilreath Mfg. Co.*, 96 S. Car. 195, 80 S. E. 194; *Coleman v. New York &c. R. Co.*, 215 Mass. 45, 102 N. E. 92. If the purchaser or consignee is solvent, a seller has no right of stoppage in transitu: *Carder v. Atchison &c. R. Co.*, 170 Mo. App. 698, 153 S. W. 517. It is held that the insolvency of a buyer is a sufficient justification for seller's refusal to ship goods or of his stopping shipments in transitu: *Schwall v. Higginsville Milling Co.*, 195 Mo. App. 89, 190 S. W. 959.

<sup>7</sup>*E. L. Welch v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828.

<sup>8</sup>There was such a constructive delivery to the purchaser as to bar the

seller's right of stoppage in transitu, which continues until delivery, where goods consigned to the purchaser, on arrival, were delivered in accordance with the order of the purchaser: *St. Louis &c. R. Co. v. McDavitt* (Tex. Civ. App.), 165 S. W. 5. The right of stoppage in transitu endures so long as the goods remain in the possession of the carrier as such, and until actual or constructive delivery to the consignee; a "constructive delivery" arises when the carrier has recognized the title of the consignee and has agreed to hold the goods as his agent under a new contract: *Coleman v. New York &c. R. Co.*, 215 Mass. 45, 102 N. E. 92. The placing of goods sold on credit in a warehouse is not a delivery, unless they are subject to the buyer's order and control; and there can be no delivery to the buyer on mere order for delivery, unless it is actually delivered and demand for the goods made under it: *Monaghan Mills v. Gilreath Mfg. Co.*, 96 S. Car. 195, 80 S. E. 194.

<sup>9</sup>Where the buyer rescinded the contract of sale, the seller could resell within a reasonable time for the best price he could obtain: *Weishut v. Layton*, 5 Del. 364, 93 Atl. 1057; *Greenhut Cloak Co. v. Oreck*, 130 Minn. 304, 153 N. W. 613. The seller, after notice, may, without breaching the contract on his part, in good faith resell the goods as the agent of the buyer, where the possession or control of goods is with the seller and the buyer refuses to accept them without just cause: *Johnson v. Carden*, 187 Ala. 142, 65 So. 813; *Robson v. N. J. Weil & Co.*, 142 Ga. 429, 83 S. E. 207. The factors properly resold the lambs to minimize the damages sustained by defendant's conduct whether the contract was valid or not, where factors sold lambs to defendant, who repudiated the contract as not being in compliance with the

§ 5080. **Manner of resale.**<sup>10</sup>—The seller is bound, whether he sells as agent of the buyer or as seller whose vendee had refused to complete the sale, to make the sale fairly and for the best price reasonably obtainable.<sup>11</sup>

statute of frauds: *Smith v. Bloom*, 159 Iowa 592, 141 N. W. 32. Where a buyer refused to receive the goods, a resale could be made for the purpose of ascertaining the damages: *Gwin v. Hopkinsville Milling Co.*, 190 Ala. 346, 67 So. 382. The question of what is reasonable notice is for the jury under Civ. Code 1910, § 4141: *Robson v. N. J. Weil & Co.*, 142 Ga. 429, 83 S. E. 207. Except where the goods are of a perishable nature, where a seller makes resale of the property for the buyer's benefit, he must give notice of intention to sell: *Pillsbury Flour Mills Co. v. Walsh*, 60 Ind. App. 76, 110 N. E. 96. In Maryland it is held that a seller need only give the buyer notice of intention to resell, but need not give notice as to the time and place of sale: *Woodward v. Dudley A. Tyng & Co.*, 123 Md. 98, 91 Atl. 166; *Felty v. Southern Flour & Co.*, 140 Ga. 332, 78 S. E. 1074; *United Roofing Co. v. Albany Mill Supply Co.*, 18 Ga. App. 184, 89 S. E. 177; *Stanley v. Sumrell*

(Tex. Civ. App.), 163 S. W. 697. But, where neither title nor possession had passed to the buyer, notice of resale of lambs sold under an executory contract of sale was not required to be given to the buyer: *Leeper v. Schroeder*, 24 Colo. App. 164, 132 Pac. 701; *Anderson v. Schroeder*, 24 Colo. App. 183, 132 Pac. 707.

<sup>10</sup> On the buyer's refusal to complete the purchase, the seller has a right to resell, but this right must be exercised in good faith and at such times, by such methods, and under such circumstances as are most likely to produce the fair value of the property: *Woodward v. Dudley A. Tyng & Co.*, 123 Md. 98, 91 Atl. 166. The seller is only bound to exercise good faith and is not bound to sell at the market at the place it was contracted to be delivered, even though it might have sold for a greater sum at that place: *Sleepy Eye Milling Co. v. Hartman*, 184 Ill. App. 308.

<sup>11</sup> *Stanley v. Sumrell* (Tex. Civ. App.), 163 S. W. 697.



## CHAPTER CLX

### ACTIONS FOR BREACH OF CONTRACTS OF SALE—REMEDIES OF SELLER ON THE CONTRACT

§ 5090. **Generally—Affirming or rescinding—Election of remedies.**<sup>1</sup>—It is held that an action for the damages sustained is the proper remedy for breach of contract to buy goods at a future date.<sup>2</sup> The seller may sue on the contract and is not required to sue on the quantum meruit, where the buyer elected

<sup>1</sup> Where a buyer wholly repudiates a contract, the seller may rescind and sue for damages arising from the complete breach: *Wester v. Casein Co. of America*, 206 N. Y. 506, 100 N. E. 488, L. R. A. 1914B, 377n, Ann. Cas. 1914B, 377. Where the buyer repudiates the contract the seller may elect to accept repudiation as an anticipatory breach by rescinding the agreement: *Wetkopsky v. New Haven Gaslight Co.*, 90 Conn. 286, 96 Atl. 950; *T. C. Bottom Produce Co. v. Olsen*, 188 Mo. App. 181, 175 S. W. 126; *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 164 App. Div. 477, 150 N. Y. S. 17. See also *Hart-Parr Co. v. Finley*, 31 N. Dak. 130, 153 N. W. 137, Ann. Cas. 1917F, 706, and note citing and reviewing the recent cases on the subject of anticipatory breach. The seller could consider them as the property of the buyer, and sue for the price, or could foreclose his vendor's lien, and sue the seller for the difference, or could treat the property as his own, and sue for damages, where the buyer of a carload of melons refused to accept delivery: *Leventhal v. Hollamon* (Tex. Civ. App.), 165 S. W. 6; *Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 Fed. 913, 144 C. C. A. 195; *Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279; *Martyn v. Western Pac. R. Co.*, 21 Cal. App. 589, 132 Pac. 602; *Bond v. Bourk*, 54 Colo. 51, 129 Pac. 223, 43 L. R. A. (N. S.),

97n, Ann. Cas. 1914C, 581n; *Leeper v. Schroeder*, 24 Colo. App. 164, 132 Pac. 701; *Anderson v. Schroeder*, 24 Colo. App. 183, 132 Pac. 707; *Home Pattern Co. v. W. W. Mertz Co.*, 88 Conn. 22, 90 Atl. 33; *Robson v. Hale*, 139 Ga. 753, 78 S. E. 177; *United Roofing Co. v. Albany Mill Supply Co.*, 18 Ga. App. 184, 89 S. E. 177; *Monon Lumber Co. v. American Case & Co.*, 184 Ind. 11, 110 N. E. 196; *Dudley A. Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243; *Yeiter v. Campau*, 174 Mich. 94, 140 N. W. 479; *Hydrex Silent Exhaust Works v. Seager Engine Works*, 189 Mich. 431, 155 N. W. 432; *Storm v. Rosenthal*, 156 App. Div. 544, 141 N. Y. S. 339; *Daniels v. Morris*, 65 Ore. 289, 130 Pac. 397, 132 Pac. 958; *Texas Seed & Co. v. Chicago Set & Co.* (Tex. Civ. App.), 187 S. W. 747. But see *Bridges v. McFarland*, 143 Ga. 581, 85 S. E. 856; *Outcault Advertising Co. v. Wilson*, 186 Mo. App. 492, 172 S. W. 394; *J. B. Bradford Piano Co. v. Hacker*, 162 Wis. 335, 156 N. W. 140. The seller must elect his remedy, and where he has retaken possession he can not thereafter sell under the mortgage and recover the balance of the purchase-price under a contract containing the ordinary provisions of both a conditional sale and a chattel mortgage: *Rice v. Hampton*, 106 S. Car. 237, 91 S. E. 5.

<sup>2</sup> *Blish Milling Co. v. Detherage*, 155 Ky. 319, 159 S. W. 816.

to keep an engine, notwithstanding breaches of guaranty made conditions precedent to liability.<sup>3</sup>

§ 5091. **Seller's action for price where title has passed.**<sup>4</sup>—It is held that repudiation of the contract will be justified by refusal without cause by the buyer to take and pay for any installment of goods to be delivered and paid for in instalments under an entire contract of sale.<sup>5</sup>

§ 5092. **Recovery of price where title has not passed.**<sup>6</sup>

§ 5094. **Action for nonacceptance.**<sup>7</sup>—Where a seller sues

<sup>3</sup> Crescent Milling Co. v. H. N. Strait Mfg. Co., 227 Fed. 804, 142 C. C. A. 328.

<sup>4</sup> Recovery may be had where credit was extended though the contract for the sale of goods provided that cash should accompany the order. Bowman v. Atlantic Ice & C. Corp., 19 Ga. App. 115, 91 S. E. 215. The seller could tender the remaining books and then sue for the price where the buyer of a complete set of books refused to make payments therefor because of the nondelivery of a part thereof: Rodgers v. Wise, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009n.

<sup>5</sup> California Sugar & C. Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671.

<sup>6</sup> Retaking the property by the vendor does not relieve the vendee from his obligation to pay the balance of the price where a conditional sales contract reserves title in the vendor, with right in case of default to retake the chattel, sell it, and apply the proceeds to the debt, with express agreement by vendee to pay balance of purchase-price then remaining: International Harvester Co. v. Bauer, 82 Ore. 686, 162 Pac. 856. It is held that the seller might hold the property for the buyer and sue for the purchase-price and reasonable expenses of caring for the property where the buyer failed to perform: Haueter v. Marty, 156 Wis. 208, 145 N. W. 775. Upon tender of delivery and refusal the seller may sue for the price, though a contract for the sale of a chattel, such as a soda fountain, provided that title should not pass until the fountain was set up and accepted:

Bond v. Bourk, 54 Colo. 51, 129 Pac. 223, 43 L. R. A. (N. S.) 97n, Ann. Cas. 1914C, 581n. The seller electing to keep the contract alive can not tender the goods at the time for delivery and upon their rejection recover the purchase-price therefor, where on an executory contract of sale of standard goods with a market value, the title not passing, the buyer countermands the order before the seller did anything in pursuance of the contract: Consolidated Ribbon & Co. v. Crane Co., 183 Ill. App. 392. A recovery on the quantum meruit was proper, where the parties did not agree on the terms of the sale, but the buyer admitted that he received and used the goods, and both introduced evidence as to the reasonable market value and quantity delivered: Richard Cocke & Co. v. New Era Gravel & C. Co. (Tex. Civ. App.), 168 S. W. 988. A seller of furniture under title retention contract might, after seizure and sale leaving a balance, seek both enforcement of the debt and the mortgage where, after buyer's default, he took a note and mortgage on the property guaranteed by defendant and expressly agreeing that after maturity he might seize and sell the property: Dillworth v. Holmes Furniture & C. Co. (Ala. App.), 73 So. 288. But a conditional vendor can not sue for the full purchase-price when he unconditionally repossesses himself of the property, although this is done at the request of vendee: I. X. L. Stores Co. v. Moon (Utah), 162 Pac. 622.

<sup>7</sup> If the buyer refuses to accept the goods, the vendor may adopt any one

for damages for buyer's refusal to accept, it is necessary for him to show his readiness, willingness and ability to perform.<sup>8</sup>

**§ 5095. Measure of damages in action for nonacceptance.**<sup>9</sup>—It was held in a recent case that the buyer is not liable for the expenses of the seller in sending an agent to see about the grain, or in reselling it there to another, or in sending of a telegram to its agent, where the buyer failed to accept and pay for grain on arrival.<sup>10</sup>

of three remedies: first, the vendor may store goods for vendee and sue for contract-price; second, keep goods and recover excess of contract-price over market-price, or, third, sell at vendee's risk and recover difference between contract and sale prices: *Ry-lance v. James Walker Co.*, 129 Md. 475, 99 Atl. 597. Breach of contract is a proper remedy when the buyer refuses to accept: *Bullard v. Eames*, 219 Mass. 49, 106 N. E. 584. But it was held in a recent case that the seller's failure to superintend the installation as required by his contract could not preclude him from recovering the price where the buyer, without excuse, refused to permit the seller to install the machinery sold: *National Supply Co. v. United Kansas Portland Cement Co.*, 91 Kans. 509, 138 Pac. 599. See also *Model Mill Co. v. Carolina &c. R. Co.*, 136 Tenn. 211, 188 S. W. 936. The seller may treat the contract as rescinded and sue for damages sustained up to the time of the repudiation of the contract where goods are sold for future delivery and prior to the time for delivery the buyer notifies the seller that he will not perform: *American Mfg. Co. v. Champion Mfg. Co.*, 73 Ga. App. 551, 79 S. E. 485; *Rodgers v. Wise*, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009n. A buyer waives a tender of performance by notifying the seller that he will not pay for them: *Von Platen &c. Co. v. Chicago Veneered Door Co.*, 190 Ill. App. 23; *Passow v. Harris*, 29 Cal. App. 559, 156 Pac. 997. Where the contract of sale is severable an action may be brought on the default of any of the severable parts

thereof: *Maney Milling Co. v. Baker-Wignall & Co.*, 186 Ill. App. 390; *Churchill Grain &c. Co. v. Newton*, 88 Conn. 130, 89 Atl. 1121; *Crosby v. De Bord* (Tex. Civ. App.), 155 S. W. 647.

<sup>8</sup> *Weishut v. Layton*, 5 Del. 364, 93 Atl. 1057.

<sup>9</sup> The vendor's damages, for such logs as were not rendered valueless by the breach was the difference between the contract-price and the market-price at the time and place of breach, where contracted elm logs were refused: *Barney v. Jolly Hoop Co.*, 172 Ky. 99, 188 S. W. 1094; *Pier-son-Lathrop Grain Co. v. Britton*, 195 Mo. App. 26, 189 S. W. 584; *Hughes v. Eastern R. & Lumber Co.*, 93 Wash. 558, 161 Pac. 343. The measure of damages for the purchaser's breach of contract is the seller's net profit had the contract been completed: *Simpson v. Emmons* (Mo.) 99 Atl. 658. Plaintiff could not recover both unearned profits and money expended in preparing to mine the coal in an action for breach of a contract to buy coal to be mined: *Jones v. Lanier* (Ala.), 73 So. 535. The measure of damage held difference between cost of manufacturing and price agreed upon, less freight plaintiff had agreed to deduct, where defendant refused to perform its contract to purchase silo material which had not been manufactured: *Holland-Cook Mfg. Co. v. Consolidated Wagon &c. Co.* (Utah), 161 Pac. 922; *Westinghouse Elec. &c. Co. v. Samson Iron Works*, 234 Fed. 16, 148 C. C. A. 32.

<sup>10</sup> *Southern States Co. v. Long* (Ala. App.), 73 So. 148.

## CHAPTER CLXI

### REMEDIES OF THE BUYER ON THE CONTRACT

§ 5105. Where property has passed—Action for conversion or nondelivery.<sup>1</sup>—It is held that a breach of contract is the proper remedy and not a suit on the warranty where the seller fails to deliver the particular variety of goods specified but delivers another variety.<sup>2</sup>

§ 5106. Where title has not passed—Action for failing to deliver.<sup>3</sup>

§ 5107. Measure of damages.<sup>4</sup>—In a recent case it was held that damage to meats for want of ice was contemplated

<sup>1</sup> The buyer may sue for the conversion where a sale of chattels has been completed and the seller fails to make delivery: *Johnson v. Miller* (Tex. Civ. App.), 163 S. W. 592. An action may be either brought on the contract for its violation or for the conversion, but the buyer is confined to one or the other forms of action where the seller of cattle has refused to deliver: *Johnson v. Miller* (Tex. Civ. App.), 163 S. W. 592; *Walker Grain Co. v. Denison Mill &c. Co.* (Tex. Civ. App.), 178 S. W. 555. Where the seller breached his contract by refusing to deliver a part of the goods purchased, the buyer might continue with the contract and recover damages for failure to deliver: *Talcott v. Slater Bros. Cloak &c. Co.*, 171 App. Div. 395, 157 N. Y. S. 499.

<sup>2</sup> *Handy v. Roberts* (Tex. Civ. App.) 165 S. W. 37.

<sup>3</sup> The buyer's remedy for the seller's breach is an action for damages where by the terms of the contract the property in the thing agreed to be sold has not passed to the buyer: *Hamil v. Flowers*, 184 Ala. 301, 63 So. 994; *Baker v. Shaw*, 78 Wash. 233, 138 Pac. 888.

<sup>4</sup> As far as money can do it, in case of breach of a contract of sale, the party injured should be made whole;

the damages recoverable being the actual loss sustained provided it is such as would follow from the breach, and which, under the circumstances, might be presumed to have been contemplated by the parties: *McFadden v. Shanley*, 16 Ariz. 91, 141 Pac. 732; *United States Fidelity &c. Co. v. Travelers' Ins. Mach. Co.*, 167 Ky. 382 180 S. W. 815; *Usrey Lumber Co. v. Huie-Hodge Lumber Co.*, 135 La. 511, 65 So. 627; *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737n; *W. H. Coyle Consol. Cos. v. Swift & Co.*, 42 Okla. 613, 141 Pac. 1114. See also *J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co.* (Ind. App.), 118 N. E. 360. The sellers are liable for such damages as are the natural consequences of a breach of their contract, where they agree to furnish an article for a specified purpose: *Jones &c. Steel Co. v. Wood*, 249 Pa. 423, 94 Atl. 1067. Loss of profits by breach of a seller's contract may be recovered if in reasonable contemplation of the parties and the evidence affords data from which the amount of profits lost could be reasonably ascertained: *Davidson Hardw. Co. v. Delker Buggy Co.*, 167 N. Car. 423, 83 S. E. 557. But where the seller had no notice of the profits, expected

by the parties as a probable consequence of a breach of a contract to furnish ice for a meat market.<sup>5</sup> It is not the duty of the seller to purchase elsewhere, so as to minimize the loss, where he was justified in believing that the seller would yet deliver, when the seller cancels the contract.<sup>6</sup>

**§ 5108. Measure of damages—Difference between contract-price and market-value.**<sup>7</sup>—But the buyer can not be de-

profits lost by the seller's breach in delaying shipments can not be recovered: *Connellee v. Chas. C. Thompson Co.* (Tex. Civ. App.), 171 S. W. 1076; *Weber Implement Co. v. Acme Harvesting Mach. Co.*, 268 Mo. 363, 187 S. W. 874.

<sup>5</sup> *Mason v. Cedar Lake Ice Co.*, 123 Minn. 401, 143 N. W. 1125; *Yamaoka v. Kloeber*, 71 Wash. 598, 129 Pac. 387.

<sup>6</sup> *Reid v. Somerset Canning Co.*, 182 Ill. App. 112. Compare *Hart-Parr Co. v. Finley*, 31 N. Dak. 130, 153 N. W. 137, Ann. Cas. 1917F, 706.

<sup>7</sup> The measure of damages is usually the difference between the contract-price and the market-price, at the time and place, with interest, where a vendor fails to deliver personal property: *Richardson Const. Co. v. Whiting Lumber Co.*, 116 Va. 490, 82 S. E. 87; *Armstrong v. Walters*, 223 Fed. 451; *George F. Craig & Co. v. Pierson Lumber Co.*, 179 Ala. 535, 60 So. 838; *Heard v. Heard*, 181 Ala. 230, 61 So. 343; *Willingham v. Whitley*, 189 Ala. 52, 66 So. 681; *Ward v. Cotton Seed Products Co.*, 193 Ala. 101, 69 So. 514; *McFadden v. Shanley*, 16 Ariz. 91, 141 Pac. 732; *Wiegel v. Road Improvement Dist. No. 1*, 126 Ark. 31, 189 S. W. 178; *J. J. Moore & Co. v. J. S. Guerin & Co.*, 165 Cal. 534, 132 Pac. 1038; *Log Mountain Coal Co. v. White Oak Coal Co.*, 163 Ky. 842, 174 S. W. 721; *Paris Flouring Co. v. Imperial Cotto Milling Co.*, 181 Ill. App. 215; *Citizens' Bank v. Adam Schillo Lumber Co.*, 188 Ill. App. 535; *Keeling-Easter Co. v. R. B. Dunning & Co.*, 113 Maine 34, 92 Atl. 929; *Chandler Grain & Co. v. Shea*, 213 Mass. 398, 100 N. E. 663; *Ozzola v. Musolino*, 225 Mass. 512, 114 N. E. 733; *Galinski v. Thomas*, 178 Mich. 589, 146 N. W. 191; *Rockford Mal-leable Iron Works v. Tilden*, 188

Mich. 80, 154 N. W. 35; *Sauer v. McClintic-Marshall Const. Co.*, 189 Mich. 577, 155 N. W. 586; *Heller v. Ferguson*, 189 Mo. App. 484, 176 S. W. 1126; *Consumers' Glue Co. v. Samuel Bing-ham's Son Mfg. Co.*, 193 Mo. App. 90, 181 S. W. 1086; *Pritchett v. Jen-kins*, 52 Mont. 81, 155 Pac. 974; *International Paper Co. v. Rockefeller*, 161 App. Div. 180, 146 N. Y. S. 371; *Langstroth v. J. C. Turner Cypress Lumber Co.*, 162 App. Div. 818, 148 N. Y. S. 224; *Fowler v. Gress Mfg. Co.*, 94 Misc. 650, 158 N. Y. S. 524; *Mandel v. Steinhardt*, 143 N. Y. S. 1098; *Seldin v. Golden*, 161 N. Y. S. 261; *B. P. Ducas Co. v. Bayer Co.*, 163 N. Y. S. 32; *American Lumber Co. v. Quiett Mfg. Co.*, 162 N. Car. 395, 78 S. E. 284; *American Lumber Co. v. Drexel Furniture Co.*, 167 N. Car. 565, 83 S. E. 801; *Winborne & Co. v. Fulton Mills*, 171 N. Car. 62, 87 S. E. 953; *Gardner v. Postal Tele-graph-Cable Co.*, 171 N. Car. 405, 88 S. E. 630, L. R. A. 1916E, 484; *Waters-Pierce Oil Co. v. Progressive Gin Co.* (Okla.), 159 Pac. 349; *Medlin v. Adams Grain & Co.*, 100 S. Car. 359, 84 S. E. 867; *Richard Cocke & Co. v. Big Muddy Coal & Co.* (Tex. Civ. App.), 155 S. W. 1019; *Standard Milling Co. v. Imperial Rice Co.* (Tex. Civ. App.), 160 S. W. 637; *Brewer v. Neatherly* (Tex. Civ. App.), 162 S. W. 1185; *Walker Grain Co. v. Denison Mill & Co.* (Tex. Civ. App.), 178 S. W. 555; *Loewi v. Long*, 76 Wash. 480, 136 Pac. 673; *Oriental Trading Co. v. Houser*, 87 Wash. 184, 151 Pac. 242; *Wilson v. Wiggin*, 77 W. Va. 1, 87 S. E. 92. The buyer might recover damages measured by the difference between the contract-price and the market-price f. o. b. mine, on seller's breach of a contract for the sale and delivery of coal f. o. b. shipper's mine: *Sullivan*

prived of all damages merely because no regular market-price existed at time of breach.<sup>8</sup> Under the Uniform Sales Act<sup>9</sup> the measure of damages for failure to deliver, when there is no market, and therefore no market-value, is the loss directly and naturally occasioned the buyer.

v. Boswell, 122 Md. 539, 89 Atl. 940. See also *Kinney v. Ehrensperger* (Ala. App.), 77 So. 439. The measure of damages for breach of contract to deliver lumber at a certain place at a certain time is the difference between the market-price and the contract-price at the place of delivery, and if there is no market at that place, then at the nearest market with freight therefrom, with compensation for time, trouble, and expense involved in procuring the lumber: *North Shore Lumber Co. v. South Side Lumber Co.*, 176 Ill. App. 96. It was held that plaintiffs could recover difference between contract-price and market-price, and, if unable to purchase in market a sufficient amount of timber, the profits they would have made on this remainder, and any other proximate damages in an action for failure to deliver contracted timber for plaintiff's sawmill: *Arthur Delapierre Co. v. Chickasaw Lumber Co.*, 111 Miss. 607, 71 So. 872. The market-value could be determined by considering their market-value in a city where there was a market, less the cost of removal, in an action for refusal to deliver paving blocks sold, where there was no market in the town where they were quarried: *LaFrance v. Desautels*, 225 Mass. 324, 114 N. E. 312; *Allen v. Nothern*, 121 Ark. 150, 180 S. W. 465. If no substantial damages are shown, on a seller's breach of contract to deliver, the buyer is entitled to recover nominal damages: *Berbarry v. Tombacher*, 162 N. Car. 497, 77 S. E. 412. And plaintiff was only entitled to recover nominal damages on proof that the market-value of wheat at that time was only 78 cents, in an action for breach of a contract to deliver wheat at threshing time for 80 cents per bushel: *Troendle v. Steger*, 159 Ky. 182, 166 S. W. 779. Compensation will be lim-

ited to such damages as could not have been avoided, where plaintiff might have mitigated the damages from defendant's breach of sale by purchasing elsewhere: *Wilson v. Scarboro*, 169 N. Car. 654, 86 S. E. 611; *Fought v. Joseph Schlitz Brewing Co.*, 193 Ill. App. 572. The buyer may recover the excess paid over the contract-price where in case of breach of contract of sale the market was rising, and the seller refused to deliver, and the buyer immediately upon breach purchased the goods in the open market: *San Angelo Cotton Oil Co. v. Houston County Oil Mill &c. Co.* (Tex. Civ. App.), 185 S. W. 887. One can, in an action for breach of contract for failing to furnish the ice, recover the profits he would have realized by its resale, where he purchased ice for the season for the purpose of reselling it in an established retail business, to the seller's knowledge: *Crystal Springs Ice Co. v. Holliday*, 106 Miss. 714, 64 So. 658. Where it was not possible or practicable to buy ice on the market to lessen the damages, the measure of damages for breach of contract to sell ice for resale at retail by the buyer is the loss of profits, under proof of proper facts as to the certainty of loss of profits: *Wilt v. Hammond*, 179 Mo. App. 406, 165 S. W. 362; *Irwin v. Kelly*, 176 Ill. App. 178; *Baker v. Shaw*, 78 Wash. 233, 138 Pac. 888. The defendant is not entitled to reduce the damages on the theory that each bushel of beans would contain a certain amount of waste and would therefore reduce the amount of the recovery, in an action for breach of a contract for sale of kidney beans: *Wellman v. O'Connor-Martin Co.*, 178 Mich. 682, 146 N. W. 289.

<sup>8</sup> *B. P. Ducas Co. v. Bayer Co.*, 163 N. Y. S. 32.

<sup>9</sup> *Birdsong & Co. v. Marty*, 163 Wis. 516, 158 N. W. 289.

§ 5110. **Buyer's remedies for breach of warranty.**<sup>10</sup>—It has been held that in case of a conditional sale, an action for

<sup>10</sup> A breach of warranty was held ground for rescission where defendant sold plaintiff an automobile under an implied warranty that it was fit for a particular service: *International Harvester Co. v. Porter*, 160 Ky. 509, 169 S. W. 993; *McCoy v. Prince*, 11 Ala. App. 388, 66 So. 950; *Brought v. Redewill Music Co.*, 17 Ariz. 393, 153 Pac. 285; *C. B. Ensign & Co. v. Coffelt*, 119 Ark. 1, 177 S. W. 735; *Pepper v. Vedova*, 26 Cal. App. 406, 147 Pac. 105; *Lane v. Mc-Lay*, 91 Conn. 185, 99 Atl. 498; *Hakes v. Aaron*, 182 Ill. App. 100; *Four Traction Auto Co. v. Hurni*, 170 Iowa 476, 153 N. W. 102; *Hostettler v. Bartholomew*, 95 Kans. 217, 147 Pac. 1134; *Stevens Tank &c. Co. v. Berlin Mills Co.*, 112 Maine 336, 92 Atl. 180; *Smith v. Means*, 170 Mo. App. 158, 155 S. W. 454; *Miller v. Zander*, 85 Misc. 499, 147 N. Y. S. 479; *Bracken v. Fidelity Trust Co.*, 42 Okla. 118, 141 Pac. 6; *L. R. A. 1915B, 1216n*; *Koehler v. Dennison*, 72 Ore. 362, 143 Pac. 649; *Mueller v. Simon* (Tex. Civ. App.), 183 S. W. 63; *Unadilla Silo Co. v. Hull*, 90 Vt. 134, 96 Atl. 535. The courts in some of the states held that an executed sale can not be rescinded for breach of a warranty in the absence of fraud or an agreement to rescind: *Eagle Glass &c. Co. v. Second Hand Pipe &c. Co.*, 74 W. Va. 228, 81 S. E. 976; *Baer Grocer Co. v. Barber Milling Co.*, 223 Fed. 969, 139 C. C. A. 449; *Rimmele v. Huebner*, 190 Mich. 247, 157 N. W. 10; *Brown v. Warwick*, 80 Misc. 241, 141 N. Y. S. 919. See also *Ulrich v. Galveston &c. Piano Co.* (Tex. Civ. App.), 199 S. W. 310. The buyer, upon discovery of a breach, and so long as the contract is executory, may rescind and recover any consideration given, or he may elect to accept the property and recover damages for the breach of the warranty where personal property is sold upon an express warranty as to quality: *Robinson v. Huffstetler*, 165 N. Car. 459, 81 S. E. 753; *Richard Cocke &c. Co. v. Big Muddy Coal &c. Co.* (Tex. Civ. App.), 155 S. W. 1019. Where the facts

justify it, the buyer may adopt either of two remedies; first, rescind the contract of sale, return the goods, and sue for the price paid, or, second, he may affirm the contract and sue for breach of warranty: *Eason Drug Co. v. Montgomery Showcase Co.*, 186 Ala. 454, 65 So. 345; *McCoy v. Prince*, 11 Ala. App. 388, 66 So. 950; *Thompson v. O. A. Crenshaw Grain Co.*, 113 Ark. 169, 167 S. W. 699; *Woodford Distilling Co. v. Remington Typewriter Co.*, 174 Ill. App. 244; *J. I. Case Threshing Mach. Co. v. Badger*, 56 Ind. App. 399, 105 N. E. 576; *Paxton-Eckman Chemical Co. v. Mundell*, 62 Ind. App. 45, 112 N. E. 546; *Bright Nat. Bank v. Hanson* (Ind. App.), 113 N. E. 434; *American Fruit Product Co. v. Davenport Vinegar &c. Works*, 172 Iowa 683, 154 N. W. 1031; *Lyman v. Wederski*, 95 Kans. 438, 148 Pac. 642; *Cooper v. Ragsdale*, 96 Kans. 772, 153 Pac. 516; *Piersall v. Huber Mfg. Co.*, 159 Ky. 338, 167 S. W. 144; *Barnard v. Napier*, 167 Ky. 824, 181 S. W. 624; *Glover Mach. Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516; *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *Mobile Auto Co. v. R. W. Sturges & Co.*, 107 Miss. 848, 66 So. 205; *Rosenbaum v. Davis &c. Co.*, 111 Miss. 278, 71 So. 388; *Shannon v. Abell*, 169 Mo. App. 598, 155 S. W. 62; *Excelsior Stove Mfg. Co. v. Million*, 174 Mo. App. 718, 161 S. W. 298; *Morbrose Inv. Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189; *J. W. Jenkins' Sons Music Co. v. Kindle* (Mo. App.), 180 S. W. 557; *El Paso Milling Co. v. Davis* (Mo. App.), 183 S. W. 361; *Doornbos v. Thomas*, 50 Mont. 370, 147 Pac. 277; *Smith v. Hedges*, 89 Misc. 183, 152 N. Y. S. 95; *McElraevy &c. Co. v. St. Joseph's Home*, 143 N. Y. S. 235; *Tomlinson & Co. v. Morgan*, 166 N. Car. 557, 82 S. E. 953; *Winn v. Finch*, 171 N. Car. 272, 88 S. E. 332; *Voris v. Gage*, 46 Okla. 748, 149 Pac. 150; *Spaulding v. Howard*, 51 Okla. 502, 152 Pac. 106; *Elzea v. Brown*, 59 Pa. Super. Ct. 403; *Williamson Heater Co. v. Paxville School Dist.* No. 19, 102 S. Car.

breach of warranty can not be maintained, in the absence of a statute giving such right, until the price is paid and the title passed.<sup>11</sup>

§ 5111. Agreement for specific remedy.<sup>12</sup>

§ 5112. Measure of damages for breach of warranty.<sup>13</sup>—It is held that the buyer may recover damages for breach of war-

295, 87 S. E. 69; *Hubbs v. Marshall* (Tex. Civ. App.), 175 S. W. 716; *Kelsey v. J. W. Ringrose Net Co.*, 152 Wis. 499, 140 N. W. 66. Where goods do not comply with contract requirements the buyer may retain them and sue for the breach of the warranty: *Monarch Metal & C. Co. v. Hanick*, 172 Mo. App. 680, 155 S. W. 858; *Western Union Tel. Co. v. Jackson Lumher Co.*, 187 Ala. 629, 65 So. 962; *McCoy v. Prince*, 11 Ala. App. 388, 66 So. 950; *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 Pac. 367; *Dietrich v. Badders*, 4 Del. 499, 90 Atl. 47; *McIlvrid v. Murphy*, 190 Ill. App. 515; *Dravo Doyle Co. v. Sulzberger & Co.*, 197 Ill. App. 547; *Edwards Mfg. Co. v. Stoops*, 54 Ind. App. 361, 102 N. E. 980; *Barnard v. Napier*, 167 Ky. 824, 181 S. W. 624; *Greer v. Whalen*, 125 Md. 273, 93 Atl. 521; *Gascoigne v. Cary Brick Co.*, 217 Mass. 302, 104 N. E. 734, Ann. Cas. 1917C, 450n; *Monarch Metal & C. Co. v. Hanick*, 172 Mo. App. 680, 155 S. W. 858; *Excelsior Stove Mfg. Co. v. Million*, 174 Mo. App. 718, 161 S. W. 298; *Interboro Brewing Co. v. Independent Consumers' Ice Co.*, 83 Misc. 119, 144 N. Y. S. 820; *Murray Co. v. Palmer* (Okla.), 154 Pac. 1137; *Williamson Heater Co. v. Paxville School Dist.* No. 19, 102 S. Car. 295, 87 S. E. 69; *Ft. Worth Grain & C. Co. v. Walker Grain Co.* (Tex. Civ. App.), 168 S. W. 470; *Bolt v. State Savings Bank* (Tex. Civ. App.), 179 S. W. 1119; *Ney v. Wrenn*, 117 Va. 85, 84 S. E. 1; *Unadilla Silo Co. v. Hull*, 90 Vt. 134, 96 Atl. 535.

<sup>11</sup> *Moneyweight Scale Co. v. David*, 180 Mich. 8, 146 N. W. 391; *G. B. Shearer Co. v. Kakoulis*, 144 N. Y. S. 1077. See also *Skoog v. Mayer Bros. Co.*, 122 Minn. 209, 142 N. W. 193.

<sup>12</sup> It generally confers a cumulative remedy, where a warranty merely

confers on the buyer the right to return the property and make a settlement on specified terms, but it is exclusive of other forms of remedy if stipulation for the return is mandatory: *Crouch v. Fahl* (Ind. App.), 113 N. E. 1009; *Hope v. Peck* (Okla.), 132 Pac. 344; *Updegrove v. Gould Balance Valve Co.* (Okla.), 156 Pac. 684. It was held that a contract of sale of a stallion, giving privilege of returning him in a certain time and receiving another if not as guaranteed, furnished the only remedy for his failure to come up to guaranty: *Holland Banking Co. v. Haynes*, 125 Ark. 10, 187 S. W. 632; *Crouch v. Leake*, 108 Ark. 322, 157 S. W. 390, 50 L. R. A. (N. S.) 774n; *Harrison v. Walker*, 124 Ark. 555, 188 S. W. 17; *J. I. Case Threshing Mach. Co. v. Badger*, 56 Ind. App. 399, 105 N. E. 576; *American Nat. Bank v. Allen*, 195 Mo. App. 98, 190 S. W. 947. The privilege of returning being merely an option, that the seller of a stallion permitted the buyer to return it, if not as warranted, would not prevent the buyer from suing for breach of the warranty that the horse was a 50 per cent. foal-getter: *Loisseau v. Gates*, 31 S. Dak. 227, 140 N. W. 258, Ann. Cas. 1915D, 1157n; *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 Pac. 367; *Leitner v. Thayer*, 24 Wyo. 378, 159 Pac. 1084.

<sup>13</sup> The buyer's measure of damages is the difference between the value of the goods as warranted and the value of the goods actually received where goods sold were not as warranted: *Thompson v. O. A. Crenshaw Grain Co.*, 113 Ark. 169, 167 S. W. 699; *Western Cabinet & C. Mfg. Co. v. Davis*, 121 Ark. 370, 181 S. W. 273; *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 Pac. 367; *Loper v. Lingo* (Del. Super.), 97 Atl. 585; *Overall v. Chicago Motor Car*



ranty, though it resold the goods for the price it paid without

Co., 183 Ill. App. 276; Stark Music Printing &c. Co. v. Witmark, 189 Ill. App. 293; Dravo Doyle Co. v. Sulzberger & Sons Co., 197 Ill. App. 547; Sanderson v. Trump Mfg. Co., 180 Ind. 197, 102 N. E. 2; Natchez Drug Co. v. Ratekin Seed House, 165 Iowa 641, 146 N. W. 865; Norris v. O'Connor, 166 Iowa 303, 147 N. W. 752; Barnard v. Napier, 167 Ky. 824, 181 S. W. 624; Hauss v. Surran, 168 Ky. 686, 182 S. W. 927; White Automobile Co. v. Dorsey, 119 Md. 251, 86 Atl. 617; Patterson v. Gore, 177 Mich. 591, 143 N. W. 643; J. A. Fay &c. Co. v. Cummer Mfg. Co., 190 Mich. 281, 157 N. W. 1; Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193; Wilson v. Danderand, 124 Minn. 120, 144 N. W. 460; Shannon v. Abell, 169 Mo. App. 598, 155 S. W. 62; Eversole v. Hanna, 184 Mo. App. 445, 171 S. W. 25; Oxegeator Co. v. Johnson, 99 Nebr. 641, 157 N. W. 339; Powell v. New England Cotton Yarn Co., 154 App. Div. 875, 139 N. Y. S. 569; Miller v. Zander, 85 Misc. 499, 147 N. Y. S. 479; Detroit Steel Products Co. v. Bernheimer &c. Brewing Co., 151 N. Y. S. 876; Hampton Guano Co. v. Hill Live Stock Co., 168 N. Car. 442, 84 S. E. 774, L. R. A. 1915D, 875n; Winn v. Finch, 171 N. Car. 272, 88 S. E. 332; Burgess v. Felix, 42 Okla. 193, 140 Pac. 1180; Kansas City Hay Press Co. v. Williams, 51 Okla. 6, 151 Pac. 570; Murray Co. v. Palmer (Okla.), 154 Pac. 1137; Liggett v. Ritter, 54 Pa. Super. Ct. 405; Reynolds v. Ramsey, 56 Pa. Super. Ct. 97; Loisseau v. Gates, 31 S. Dak. 227, 140 N. W. 258, Ann. Cas. 1915D, 1157n; Ft. Worth Grain &c. Co. v. Walker Grain Co. (Tex. Civ. App.), 168 S. W. 470; Mueller v. Simon (Tex. Civ. App.), 183 S. W. 63; Jacot v. Grossmann Seed &c. Co., 115 Va. 90, 78 S. E. 646; Burnley v. Shinn, 80 Wash. 240, 141 Pac. 326, Ann. Cas. 1916B, 96n; Eagle Glass &c. Co. v. Second Hand Pipe &c. Co., 74 W. Va. 228, 81 S. E. 976; Wilson v. Wiggin, 77 W. Va. 1, 87 S. E. 92. Where there is a breach of warranty of machinery sold, the measure of damages is difference between contract-price and actual value, with

such special damages as were in the contemplation of the parties: Underwood v. Coburn Motor Car Co., 166 N. Car. 458, 82 S. E. 855. The buyer can recover the purchase-money and freight paid for transportation and reasonable compensation for care and keep of the stallion on rescission of contract for sale of stallion for breach of warranty: Hostetler v. Bartholomew, 95 Kans. 217, 147 Pac. 1134. The buyer could recover the expense of treating mules affected with glanders and for maintaining them in quarantine, under an implied warranty that mules bought were free from contagious diseases: Sandlin v. Wilder, 142 Ga. 131, 82 S. E. 440. Plaintiff's measure of damages in an action for breach of warranty of material sold is the loss directly and naturally resulting: Jorgensen v. Gessell Pressed Brick Co., 45 Utah 31, 141 Pac. 460, Ann. Cas. 1917C, 309n. Where there is a breach of warranty as to the variety of seeds sold to one who resells to the grower with the same warranty, the measure of damages is the difference in market-value between the crop produced and the crop which would have been produced if the seed had been of the variety warranted: Buckbee v. P. Hohenadel, Jr., Co., 224 Fed. 14, 139 C. C. A. 478. It is held the difference between the value of the crop of the kind that was produced during the first season in which they bore and, the crop which would have ordinarily been produced if the plants had been of the variety represented, together with the cost of resetting and recultivating and the cost of the new plants is the measure of damages for a breach of warranty as to the variety of strawberry plants sold: Smeltzer v. Tippin, 109 Ark. 275, 160 S. W. 221; Grafton-Stamps Drug Co. v. Williams, 105 Miss. 296, 62 So. 273; Keeler v. Green, 51 Mont. 42, 149 Pac. 286; Ford v. Farmers' Exch., 136 Tenn. 287, 189 S. W. 368. It is held that the measure of damages for breach of warranty in selling fruit trees is the difference between the value of the farm at the date when

warranty.<sup>14</sup> If there is an entire failure of value, the price paid may be recovered.<sup>15</sup>

§ 5113. **Measure of damages for breach of warranty of quality.**<sup>16</sup>—It has been held that a buyer is entitled to recover the difference between the contract-price and the market-value

the breach was discovered and its value as it would have been had the trees been as warranted: *Lunt v. Brown Bros. Co.*, 157 N. Y. S. 150. The difference between their market-price at the time they should have been gathered and the price when they were harvested, on account of defects in the engine, was proper for consideration on the question of damages where the seller of a traction engine guaranteed to develop 20 horsepower was told that the buyer wanted it for use in raising and harvesting potatoes: *Southern Gas & Engine Co. v. Adams* (Tex. Civ. App.), 169 S. W. 1143. It is held that expense of keeping a stallion bought is a proper item of damage where the warranty under which he was sold was broken: *Cooper v. Ragsdale*, 96 Kans. 772, 153 Pac. 516; *Glover Mach. Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516; *Sterns v. Hudson*, 113 Maine 154, 93 Atl. 58. For breach of warranty as to grade of fertilizer, purchaser is only entitled to diminution of crop value: *Stuart v. Burlington County Farmers' Exchange*, 89 N. J. L. 12, 97 Atl. 775. It was held that the measure of damages for breach of warranty that metal shingles were fit for use on a particular building was the cost of the shingle roof, including the cost of the shingles and expense of putting them on, less their value after their removal, to which should be added the expense incurred in attempting to repair and improve the roof to conform to the warranty: *Edwards Mfg. Co. v. Stoops*, 54 Ind. App. 361, 102 N. E. 980.

<sup>14</sup> *K-W Ignition Co. v. Greenville Metal Products Co.* (Ind. App.), 114 N. E. 989. An Alabama case holds that the buyer may recover for breach of warranty though he has resold them for more than he paid: *Stewart v. Riley*, 189 Ala. 519, 66 So.

488. But see *Western Implement Co. v. Blodgett*, 24 Cal. App. 19, 140 Pac. 38.

<sup>15</sup> *Springer v. Puckett*, 25 Colo. App. 547, 139 Pac. 1115; *Walls v. Tinsley*, 187 Mo. App. 462, 173 S. W. 19.

<sup>16</sup> Where shingles were bought to be delivered direct to a patron of the purchaser, and were delivered, but were not of quality warranted, the purchaser could recover expenses connected with a final adjustment of the sale under Sales Act, § 69: *Coast Central Milling Co. v. Russell Lumber Co.*, 88 Conn. 109, 89 Atl. 898. The difference between the value of the car in its defective condition at the time of sale and its value if it had been as represented is the measure of damages for a breach of warranty as to the quality and condition of an automobile: *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361; *Elliott Supply Co. v. Johnson*, 34 N. Dak. 632, 159 N. W. 2. And it is held that the buyer's measure of damages is that which might be fairly considered arising out of the ordinary course of things from the breach of the contract itself, which is the difference in value between the crop actually raised and the crop that might have been raised if there had been compliance with the contract where a seller failed to furnish fertilizer which complied with the requirements of the brand ordered: *Philbrick v. Kendall*, 111 Maine 198, 88 Atl. 540. It is held that defective quality could not wholly defeat the seller's claim for the price, where the goods had been resold by the buyer, but the buyer in such case could offset only his actual damages from the breach, where there was a breach of warranty: *Jewell Belting Co. v. Hamilton Rubber Mfg. Co.*, 257 Ill. 238, 100 N. E. 920.

together with any part of the price paid where he has rejected goods of defective quality.<sup>17</sup>

§ 5114. **Rescission by buyer—Placing seller in statu quo.**<sup>18</sup>—But the purchaser will be permitted a reasonable time to test the chattels and to rescind if not meeting the warranty. What is a reasonable time will depend on the circumstances in each case.<sup>19</sup>

<sup>17</sup> First Church of Christ v. Southern Seating &c. Cabinet Co., 76 Wash. 367, 136 Pac. 127.

<sup>18</sup> A vendee can not rescind the contract of sale where he has sold a part of the goods and is thus unable to restore them to the vendor: Illinois Glass Co. v. Ozell Co., 197 Ill. App. 626. A party can not affirm a contract in part and rescind in part; if he rescinds at all, he must do so in toto: Stark Music Printing &c. Co. v. Witmark, 189 Ill. App. 293; S. B. & B. W. Fleisher v. Abbott, 222 Fed. 211, 137 C. C. A. 525; Levy v. John C. Dettra & Co., 91 Misc. 41, 154 N. Y. S. 176. A purchaser of a gasoline lighting machine, who seeks to avoid the contract for the failure of the machine to meet certain representations, was bound to act promptly upon the discovery of facts authorizing the rescission under Rev. Codes, § 5065: Hillman v. Luzon Café Co., 49 Mont. 180, 142 Pa. 641; Ripley v. Jackson Zinc &c. Co., 221 Fed. 209, 136 C. C. A. 619; Crescent Milling Co. v. H. N. Strait Mfg. Co., 227 Fed. 804, 142 C. C. A. 328; McCoy v. Prince, 11 Ala. App. 388, 66 So. 950; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 159 Pac. 163; M. Hommel Wine Co. v. Netter, 197 Ill. App. 382; J. B. Millet Co. v. Andrews, 175 Mich. 350, 141 N. W. 578; Linderman Mach. Co. v. Shaw-Walker Co., 187 Mich. 28, 153 N. W. 34; Marth v. Wiskerchen, 186 Mo. App. 515, 172 S. W. 410; Sterling Silver Mfg. Co. v. Worrel (Mo. App.), 154 S. W. 866; Miller v. Zander, 85 Misc. 499, 147 N. Y. S. 479; Salomon v. Olkin, 91 Misc. 17, 154 N. Y. S. 204; Reichenthal v. Glockner, 158 N. Y. S. 699; Alamo Auto Sales Co. v. Herms (Tex. Civ. App.), 184 S. W. 740. After a machine had been greatly damaged through the

fault of the buyer, he can not rescind the purchase of an automobile for breach of warranty: Burnley v. Shinn, 80 Wash. 240, 141 Pac. 326, Ann. Cas. 1916B, 96n. Merely expressing a willingness to rescind or a proposal to return the property will not amount to a rescission. The rescission must be positive: Collins v. Skillings, 224 Mass. 275, 112 N. E. 938. The discovery of a secret defect in yarn after a number of deliveries had been made, not ascertainable by ordinary inspection or tests, held to entitle the purchaser to rescind and refuse to accept further deliveries: Roxford Knitting Co. v. Hamilton Mfg. Co., 205 Fed. 842, 124 C. C. A. 44.

<sup>19</sup> United Motor San Francisco Co. v. Callander, 30 Cal. App. 41, 157 Pac. 561; Dietrich v. Badders, 4 Del. 499, 90 Atl. 47; Hakes v. Aaron, 182 Ill. App. 100; Pictorial Review Co. v. Fitz-Gibbon, 163 Iowa 644, 145 N. W. 315; Lake v. Western Silo Co., 177 Iowa 735, 158 N. W. 673; Fred S. Todd Shoe Co. v. Pierce Shoe Co. (Iowa), 160 N. W. 827; International Harvester Co. v. Bean, 159 Ky. 842, 169 S. W. 549; Meek Coal Co. v. George D. Whitcomb Co., 164 Ky. 833, 176 S. W. 354; Bayer v. Winton Motor Car Co., 194 Mich. 222, 160 N. W. 642; Minot Grocery Co. v. Flathead Produce Co., 30 N. Dak. 533, 153 N. W. 284; Couch v. O'Brien (Okla.), 136 Pac. 1088; Koehler v. Dennison, 72 Ore. 362, 143 Pac. 649; Purcell v. International Harvester Co., 37 S. Dak. 517, 159 N. W. 47; Higson v. Hughes, 72 Wash. 362, 130 Pac. 478; Kelsey v. J. W. Ringrose Net Co., 152 Wis. 499, 140 N. W. 66. Where the delay is clearly unreasonable, what is a reasonable time to offer to rescind and restore, or to offer to restore, merchandise, on failure of

§ 5115. **Buyer's damages on rescission—Recovery of purchase-price paid.**<sup>20</sup>

§ 5116. **Interest and special damages.**<sup>21</sup>

§ 5117. **Special damages.**<sup>22</sup>—It is held that it is the purchaser's duty to make reasonable exertions to minimize damages,

warranty, though ordinarily for the jury, may be determined by the court: *Barber Medicine Co. v. Bradley*, 48 Okla. 82, 150 Pac. 127. And a buyer was not required to call for a repayment and a return of the notes before the expiration of 90 days, where a contract of sale stipulated that, if the buyer was dissatisfied at the expiration of 90 days, the seller would repay the cash and return the notes given in payment: *Watson v. Rice* (Tex. Civ. App.), 166 S. W. 106; *Manchester Sawmills Co. v. A. L. Arundel Co.*, 197 Ala. 505, 73 So. 24. And the rule for prompt rescission does not apply where the seller requests the buyer to continue to try the chattel: *Peterson v. Barbero*, 180 Mo. App. 365, 167 S. W. 1180; *Crouch v. Fahl* (Ind. App.), 113 N. E. 1009; *J. G. Cherry Co. v. Larson*, 124 Minn. 251, 144 N. W. 949.

<sup>20</sup> There was an implied promise on the part of the seller to repay the buyer on demand, where carrier failed to deliver fruit in time and the buyer refused it, having paid the seller, and the carrier returned fruit to the seller and the difference between price and value of the fruit, on return: *Manning v. Chesky*, 90 Conn. 647, 98 Atl. 357. There was a rescission and the buyer could recover the amount paid, if buyer of second-hand automobile had right to return it if it was not put in running order by seller, and seller accepted car: *Lane v. McLay*, 91 Conn. 185, 99 Atl. 498. The vendee can recover only the amount paid for the goods less allowance for damages thereto, under Personal Property Law, § 65, providing that the vendee shall have 30 days to redeem if, on default, vendor retakes the goods, but that unless the vendor then sells at public auction the vendee may recover the

amount paid, on the vendor's failure to sell at auction: *Rindone v. Hamlin's, Inc.*, 161 N. Y. S. 858.

<sup>21</sup> The buyer, by retaining the goods without tendering the market-price, was liable for interest from date of delivery where the contract of sale of goods provided buyer should pay market-prices, and the seller invoiced them at higher prices: *Owensboro Wheel Co. v. Trammell*, 172 Ky. 564, 189 S. W. 702.

<sup>22</sup> In a suit by the seller for the price, if the enlargement of tunnel and equipment of track for use of locomotive purchased of plaintiff were valueless for any other purpose, the engine proving unsatisfactory, such damages may be recovered on counterclaim, but, if such alterations were of some permanent value, this should be considered: *Glover Mach. Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516. Loss suffered by a mining company in its output of coal by defendant's failure to furnish suitable locomotive, such loss, being within contemplation of the parties, could be recovered on counterclaim in suit by plaintiff for the purchase-price: *Glover Mach. Works v. Cooke-Jellico Coal Co.*, 173 Ky. 675, 191 S. W. 516. The purchaser is entitled to recover only such damages as proximately result from failure to correct defects within a reasonable time, and after due notice, under a contract for sale of machinery, by which the seller agreed to correct defects within 30 days: *Westinghouse Elec. & Co. v. Glencoe Cotton Mills*, 106 S. Car. 133, 90 S. E. 526. Damages recoverable for the failure of a heating system to maintain the temperature warranted are not only the cost of increasing the effectiveness of such system, but, if necessary to make it comply with the warranty, the cost even of such radical changes

and that such as might have been averted are not proximate and can not be recovered where the seller agreed to correct defects of machinery.<sup>23</sup>

as amount to a change in the system      <sup>23</sup> Westinghouse Elec. &c. Co. v.  
itself: Barnes v. Thompson, 38 S. Glencoe Cotton Mills Co., 106 S. Car.  
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